

TITLE PAGE

Valuing Domestic Contributions: A Search for a Solution for Family Law

Submitted by Fae Sinead Garland to the University of Exeter

as a thesis for the degree of

Doctor of Philosophy in Law

In January 2012

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ABSTRACT

Currently, a great schism exists in the way that the law of financial provision treats cohabiting and married couples on relationship breakdown. Given that research consistently demonstrates that women are predominantly responsible for carrying out homemaking activities regardless of employment status, at the heart of this divide is the way that the law attributes value to this traditionally female role. In the married context, on divorce, breadwinning and homemaking contributions have equal value, yet in the cohabitation context only financial contributions are recognised, with homemaking having no value attributed to it. This polarised approach has received extensive criticism from the courts, the legal profession and the academic community, both for overvaluing domestic contributions in the married context and for ignoring or at best undervaluing them in the cohabitation context. Yet, despite the agreement over the inadequacies in this area, there is a lack of consensus over the direction that reform should take, and so far attempts have been slow and have often come to nothing, especially in the cohabitation context. Furthermore, feminist opinion is divided about whether financial recognition of domestic contributions in family law poses a threat to the financial autonomy of women, encouraging patriarchal financial dependence; or whether such developments redress a glaring inequality inherent in gendered roles freely chosen within the family.

Consequently, this project uses the two very differing feminist positions of Ruth Deech and Martha Fineman who embody this divide as the lens through which to explore this dichotomous tension underlying the law in this area. To test out these two feminist stances, this project uses a range of doctrinal, feminist and empirical methodology, namely interviews with legal practitioners, to compare the approaches in New Zealand, Scotland and Queensland, Australia alongside England and Wales, where each jurisdiction differentially reflects a point on a spectrum between Deech and Fineman's contrasting positions. This project also uses focus groups with members of the public in England and Wales to ascertain the affected communities' views on these models of financial provision. Drawing on these results, this thesis shall consider how the law of financial provision in England and Wales should divide assets on relationship breakdown in the marriage, civil partnership and the same- and different-sex cohabiting context. Should it promote financial autonomy or should it offer greater protection to those who lead gendered lives in the private sphere?

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ACKNOWLEDGEMENTS

I owe a huge debt to those who provided a wealth of encouragement and support throughout this journey.

First and foremost; I would like to extend my deepest gratitude to Professor Anne Barlow for being an outstanding supervisor. Without her patience, hard work and immense knowledge in this area, this work would not have been possible. A special thank you also goes to my second supervisor Professor Liz Trinder whose constructive suggestions, advice and empirical expertise has been very much appreciated in the shaping of this thesis.

My family have provided constant support during these past few years and I am forever grateful for all that they have done for me to make this possible. I would especially like to thank my parents whose love and encouragement has been unwavering even when I have been at my most stressed.

I would also like to thank all those who kindly gave up their time to take part in this project. The insight that they have provided has been instrumental to the conclusions that I have reached.

My appreciation extends to my fellow PGRs in the School of Law for their friendship and the supportive environment that they created where I have received invaluable advice, endless cheer and some great memories. I am particularly grateful to Kit for keeping me sane and for being a wonderful friend.

Furthermore, my gratitude goes to all those at the University of Exeter who have made this project possible.

These thanks extend to all my friends outside of Exeter who have supported me throughout this thesis and to everyone else who has helped me reach the end of this process. I am eternally grateful.

And finally, a heartfelt thank you to Nick.

CHAPTER 1: INTRODUCTION¹

1.1 Introduction

...the English statute [the Matrimonial Causes Act 1973], in its fundamental provisions...is in...need of modernisation in the light of social and other changes as well as in the light of experience.

There is a limitation on the resources of even the judges of the House of Lords to conduct wide-ranging comparative studies as a prelude to establishing a new principle, or perhaps to abandoning an existing principle in what is essentially a social policy field...

Charman v Charman (No. 4) [2007] 1 FLR 1246 [121 – 122] (Postscript, per Sir Mark Potter)

Financial provision on relationship breakdown in England and Wales is in need of reform. The calls for change come from a vast range of bodies including the courts,² legal practitioners,³ independent public bodies⁴ and academic communities.⁵ This criticism extends to both the married context (and where the same provisions have been extended to civil partners) as well as the unmarried cohabiting context.

Currently, the law categorises contributions in relationships as financial and non-financial (or domestic), which gives rise to many issues on partnership breakdown: financial contributions are much more straightforward to quantify than the non-financial ones. Consequently, a central focus for criticisms in this area has been gender, given that this area raises questions concerning the public regulation of the private sphere, and research has consistently demonstrated that women are most typically responsible for contributions associated within this sphere. Even when both partners are in employment, the division of paid and unpaid work carried out within households remains gendered, with women rather than men making the most of the unpaid domestic contributions of caring for children, household chores and the organisation and running of the family home.⁶ Consequently, the fundamental question concerns how much financial recognition should be given to domestic contributions when

¹ This thesis reviews the Law as it is up until the 16th April 2012. Any subsequent changes have not been included in the main text although, where relevant, important changes after this date have been mentioned in footnotes.

² *Charman v Charman (No. 4) [2007] 1 FLR 1246*

³ For example Resolution. See Resolution 'Campaigns' <<http://www.resolution.org.uk/campaigns/>> accessed 4 December 2011

⁴ E.g. The Money and Property Committee (Family Justice Council) *Annual Report 2006-2007* Chapter 5, Paragraph 5.4 <<http://www.judiciary.gov.uk/NR/rdonlyres/E6732066-A7F2-485C-A5C3-738DA0588909/0/fjcreport200607.pdf>> accessed 1 December 2011

⁵ See the below sections 1.3.1, 1.3.2 and 1.3.3 to see the calls for reform from the academic communities in the married, cohabiting and same-sex context.

⁶ R Crompton and C Lyonette, 'Who does the Housework? The Division of Labour within the Home' in A Park, J Curtice, K Thomson, M Philips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage Publications 2008) 52; R Breen and L Cooke, 'The Persistence of the Gendered Division of Domestic Labour' (2005) 21(1) *European Sociological Review* 43

relationships break down. How far should the law value those contributions made within the private sphere?

In England and Wales, domestic contributions are treated in fundamentally different ways in different relationship contexts. In the marriage context, *White v White* (2000)⁷ introduced a principle of fairness establishing a principle of non-discrimination so that breadwinner and homemaker contributions are valued equally when deciding how to divide assets on divorce. Yet, despite a sharp increase in the numbers of those cohabiting in England and Wales since the 1970s while the number of those marrying has declined,⁸ no such principle applies in the cohabitation context. Rather, Property Law applies and domestic contributions are ignored.⁹ For Eekelaar,¹⁰ differential treatment between cohabitants and married couples seems to implicitly presuppose a difference in behaviour. The principle of fairness on divorce provides for and even encourages¹¹ a gendered homemaker/breadwinner split in relationship roles. Yet, in the cohabitation context, the Law's abstention which provides little or no support for cohabiting couples infers a social norm which assumes financial independence and thus implies that gender equality already prevails.¹²

These different approaches have been criticised heavily. In the married context, some commentators such as Deech¹³ suggest that domestic contributions are overvalued in the divorce context, leaving marriage exposed to gold-diggers. The Law's presumption that there will be a homemaker/breadwinner divide ignores the increase in the number of women in the labour force.¹⁴ Deech's fundamental criticism of this approach is that it will encourage women to continue to adopt the homemaker role.¹⁵ Consequently, as Barlow suggests, this non-discrimination principle may have been a reform more suitable for the 1970s.¹⁶ Similarly, Sir Mark Potter in his postscript in *Charman v Charman*¹⁷ questioned whether the huge settlements that are possible on divorce were 'desirable', and suggested that the Matrimonial Causes Act 1973 is 'in need of modernisation in the light of social and other changes.' This

⁷ *White v White* [2000] UKHL 54, [2001] 1 AC 596 [24] (Lord Nicholls)

⁸ E Beaujouan and M Bhrolchain, 'Cohabitation and Marriage in Britain Since the 1970s' 145(3) *Population Trends* (ONS 2011) 19-20; J Haskey, 'Cohabitation in Great Britain: Past, Present and Future Trends and Attitudes' (2001) 103 *Population Trends* 4, 11-12

⁹ For example, see the discussion in A Lawson, 'The Things We Do for Love: Detrimental Reliance in the Family Home' (1996) 16

Legal Studies 218; J Miles, 'Property Law v. Family Law: Resolving the Problems of Property Law' (2003) 23 *Legal Studies* 624

¹⁰ J Eekelaar, 'Uncovering Social Obligations: Family Law and the Responsible System' in M MacLean (eds), *Making Law for Families* (Hart 2000) 16

¹¹ Some argue that in effect it makes it financially better for the woman to be the homemaker. See, for example, N Francis, 'If it's Broken – Fix It' (2006) 36 *Family Law* 104, 107

¹² J Eekelaar, 'Uncovering Social Obligations: Family Law and the Responsible System' in M MacLean (eds), *Making Law for Families* (Hart 2000) 16

¹³ R Deech, 'The Principles Against Maintenance' (1977) 7 *Family Law* 229

¹⁴ See below at section 1.2

¹⁵ R Deech, 'The Principles Against Maintenance' (1977) 7 *Family Law* 229

¹⁶ A Barlow, 'Configuration(s) of Unpaid Caregiving within Current Legal Discourse in and around the Family' (2007) 58(3) *Northern Ireland Legal Quarterly* 251, 260

¹⁷ *Charman v Charman* (No. 4) [2007] 1 FLR 1246

modernisation is especially necessary given that the predominant origins of assets in big money cases has shifted from inheritance to a 'new financial era dominated by hedge-funds, private equity funds, derivative traders and sophisticated off-shore structures mean[ing] that very large fortunes were being made very quickly.'¹⁸ Thus, there is a call for a comprehensive review of the law and the Family Justice Council in 2007 requested the Law Commission to consider reform in this area.¹⁹ The Law Commission has also recently recognised the need to re-examine this area of Family Law and has expanded the scope of its current project from 'Marital Property Agreements'²⁰ to 'Matrimonial Property, Needs and Agreements'.²¹ Initially, the Law Commission (post *Radmacher v Granatino*²² which gave greater weight to pre-nuptial agreements) was considering a scheme for binding pre-nuptial agreements. However, the Law Commission recognised that the questions being raised in relation to these agreements could only be fully answered through a greater consideration of what 'needs' means in ancillary relief.²³ Now, the project is also considering the definition of matrimonial and non-matrimonial property and how far 'one party should be required to meet the other's needs after the relationship has ended.'²⁴ Thus, the Law Commission's focus is now centred on the heart of the approach in the divorce context.

In complete contrast, the Law is also criticised for ignoring, or at best undervaluing, domestic contributions in the cohabitation context,²⁵ given that research shows the division of paid and unpaid work undertaken for the household reflects that of married couples.²⁶ Consequently, the fear is that in fact the current law discriminates against the traditionally female homemaker ignoring 'home-making and parental contributions'.²⁷ Yet progress is slow; attempts at reform from the Law Commission and also Lord Lester's Cohabitation Bill 2009

¹⁸ Sir Mark Potter concluded was the result of the removal of exchange control restrictions in 1979. *Charman v Charman* (No. 4) [2007] 1 FLR 1246 [116] (Sir Mark Potter).

¹⁹ The Money and Property Sub-Committee of the Family Justice Council agreed to approach the Law Commission with the request that the reform of s 25 be included in its future work programme. The Money and Property Committee (Family Justice Council) *Annual Report 2006-2007* Chapter 5, Paragraph 5.4 <<http://www.judiciary.gov.uk/NR/rdonlyres/E6732066-A7F2-485C-A5C3-738DA0588909/0/fjcreport200607.pdf>> accessed 1 December 2011

²⁰ Law Commission, *Matrimonial Property Agreement* (Law Com CP No 198 2011)

²¹ Law Commission, *Press Release Clarifying the Law on Financial Provision for Couples when Relationships End* (The Law Commission, 6 February 2012) <http://lawcommission.justice.gov.uk/news/Press_notice_financial_provision.htm> accessed 5 May 2012

²² *Radmacher v Granatino* [2010] UKSC 42

²³ E Cooke, 'Pre-nups and beyond: what is the Law Commission up to Now?' (2012) 42(3) *Family Law* 323, 323

²⁴ Law Commission, *Press Release Clarifying the Law on Financial Provision for Couples when Relationships End* (The Law Commission, 6 February 2012) <http://lawcommission.justice.gov.uk/news/Press_notice_financial_provision.htm> accessed 5 May 2012>

²⁵ A Barlow, 'Configuration(s) of Unpaid Caregiving within Current Legal Discourse in and around the Family' (2007) 58(3) *Northern Ireland Legal Quarterly* 251, 260

²⁶ A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in 21st Century Britain* (Hart 2005) 91 - 93

²⁷ R Bailey-Harris, 'Law and the Unmarried Couple – Oppression or Liberation?' (1996) 8 *Child and Family Law Quarterly* 137, 139

have come to nothing and the government has made it clear that cohabitation reform is not on their current agenda.²⁸

Consequently, Family Law in the 21st Century and the area of financial provision on relationship breakdown can be seen to be in crisis. Therefore, there is a great need for reform in both the married and cohabiting contexts, with particular attention needed on how the law should value domestic contributions. As Glennon argues:

*...there is a clear need to combine the debates on married and unmarried couples as they raise mutual questions concerning obligations within domestic relationships of varying duration and circumstance and, as such, they should be considered as integrated policy issues.*²⁹

Yet, there lacks a consensus over the shape that subsequent reform should take and feminist opinion is itself divided about whether the developments in the married context are a threat to the financial autonomy of women,³⁰ encouraging patriarchal financial dependence; or whether such developments have redressed a glaring inequality inherent in gendered roles freely chosen within the family.³¹ Thus, at the heart of this debate is the public/private dichotomy which can be seen to reflect the delicate balance between autonomy and protection; should the law remain out of the private sphere, ignoring domestic contributions and thereby promoting the financial autonomy of women through the public sphere? Or should there be greater public regulation in the private sphere valuing domestic contributions within relationships and thereby affording greater protection for women who assume the homemaker role?³²

Given the context set out above, it seems that future reform requires consideration of the appropriateness of greater recognition of non-financial domestic contributions in the cohabitation context; a clearer understanding of how domestic contributions are being valued on divorce, and guidance on whether this should or should not extend to the same-sex context. The aim of this project is therefore to examine how the law might in future better address the valuation of domestic contributions, in order to consider these calls for reform and to provide further evidence for policy makers in this area when addressing reform.

²⁸ Jonathan Djanogly, Parliamentary Under-Secretary of State, Ministry of Justice, Written Ministerial Statement, 6 September 2011

²⁹ L Glennon, 'Obligations between Adult Partners: Moving from Form to Function?' (2008) 22 *International Journal of Law Policy and the Family* 22, 44

³⁰ R Deech, 'The Principles Against Maintenance' (1977) 7 *Family Law* 229

³¹ A Diduck, 'Fairness and Justice for All? The House of Lords in *White v White* [2000] 2 FLR 981' (2001) 9(2) *Feminist Legal Studies* 174, 180 - 182; R Bailey-Harris, 'The Paradoxes of Principle and Pragmatism: Ancillary Relief in England and Wales' (2005) 19 *International Journal of Law, Policy and the Family* 229, 231

³² This debate is explored in more detail in Chapter 2

To consider how the law should develop in the modern context, this thesis takes a feminist approach as this is undoubtedly a women's issue. While doing so, this thesis will use the public/private divide identified in feminist legal theory as a starting point to determine how far the law should regulate the private sphere. To see if a compromise can be reached between the approaches which divide feminists on this issue; this thesis uses (heuristically) the polarised feminist perspectives of Ruth Deech and Martha Fineman. These two commentators embody the dichotomy in this feminist debate and therefore they shall be used as lenses through which the subject matter of this thesis shall be analysed. For Deech, the law should promote autonomy, stay out of the private sphere and give no value to domestic contributions; to attach a value to the traditional 'female role' would retard the emancipation of women. Furthermore, in the cohabitation context, Deech argues that the law should recognise that cohabitants have chosen to avoid legal regulation by not marrying and therefore we should allow 'a corner of freedom where couples may escape Family Law with all its difficulties.'³³ In direct contrast with Deech, Fineman argues that the law should protect those within the private sphere and in particular, protect the Mother/Child care-dyad and other forms of care-giving relationships by protecting those who are economically dependent as a result of being a carer. For her, the care-giving relationship, and therefore domestic contributions, should be central to the legal framework and this should be irrespective of the relationship status.³⁴ This thesis aims to examine these theoretical positions in practice to see whether a balance can be achieved between the two and to propose a suitable line for reform.

To test out these stances, this project compares the approaches in New Zealand, Scotland and Australia alongside England and Wales, which differentially reflect the positions between Deech and Fineman's positions. These jurisdictions each have legislation that requires the courts to take account of domestic contributions and each has different formulations of approach, resolving these issues in distinctive ways. New Zealand most closely resembles Deech's approach, emphasising autonomy and clean break; Scotland also embraces Deech's approach but to a lesser degree, recognising economic disadvantages; Australia's welfare based system is much closer to Fineman's position; and finally England and Wales, which is inherently needs-based in terms of its bottom line, embraces Fineman to the greatest degree.³⁵ Consequently, this thesis shall use Deech and Fineman's positions as heuristic devices to evaluate these different jurisdictional approaches and also to provide insight into

³³ R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 43

³⁴ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995)

³⁵ See Chapter 2 for greater expansion.

reform considerations through the comparative doctrinal analysis, as called for by Sir Mark Potter in *Charman v Charman* above.³⁶

In addition, empirical methods are used to provide a holistic examination of these perspectives in practice. This project uses structured interviews with lawyers practising in the four jurisdictions to ascertain their perspectives on the effectiveness of their respective schemes. Additionally, the empirical stage of this project asks the essential question of how well each approach might serve families in England and Wales by carrying out focus groups with purposively selected members of the public in this jurisdiction to see how these different formulations of domestic contributions might be received by the affected community. Accordingly, this holistic examination provides a three-dimensional depiction of how the law in each jurisdiction works in practice, allowing the attitudes, thoughts and perceptions of the lawyers to build a thorough picture of how these different jurisdictions, embodying different feminist positions, operate in reality.³⁷ Furthermore, the doctrinal and empirical methodology gives these feminist positions a practical framework of effect and will provide an opportunity to consider how the law of financial provision on relationship breakdown in England and Wales could and should be valuing domestic contributions in the 21st Century.

The rest of this chapter outlines the demographic changes of the family in England and Wales and considers how well the current law of financial provision fits these changes for married and cohabiting couples. The next chapter shall set out the methodology used in this project and Chapters 3 to 6 shall in turn focus on the findings from each individual jurisdiction (Chapter 3, New Zealand; Chapter 4, Scotland; Chapter 5, Australia; and Chapter 6, England and Wales). Chapter 7 outlines the findings from the focus groups which test the general public's reactions (in England and Wales) to these different approaches. Finally, Chapter 8 presents the conclusions from this study.

1.2 The Changing Family in England and Wales?

As McRae suggests,³⁸ while there has been considerable change in the structure of families, there is also a great level of continuity that still exists in British households. The change that McRae refers to is evident: in the last half of the twentieth century the normative family, its traditions and practices have undergone a dramatic transformation. Scott refers to this as

³⁶ *Charman v Charman* (No. 4) [2007] 1 FLR 1246 [121 – 122] (Postscript, per Sir Mark Potter)

³⁷ M Israel and I Hay, 'Good Ethical Practice in Empirical Research on Law' (UK Centre For Legal Education), Flinders University, Adelaide, Australia, <www.ukcle.ac.uk/resources/israel_and_hay.html>. accessed 21 November 2009

³⁸ S McRae, *Changing Britain: Families and Households in the 1990s* (Oxford University Press 1999) 26 - 28

being a 'second demographic revolution'.³⁹ Once 'family' was defined by form, a marriage-centric notion based on relationship status and characterised by the patriarchal structure of male breadwinner and the female homemaker.⁴⁰ Thus, the roles adopted within the family were institutionalised through marriage and were gendered with women largely separated from the public sphere and confined to the private sphere.

However, this institutional and form-based view of the family has shifted from relationship form to function (looking at what families do instead of what form they take⁴¹). Marriage is no longer the primary family arrangement; marriage rates have decreased in England and Wales and are at an all-time low⁴² while divorce rates have almost doubled since 1971.⁴³ Meanwhile, there has been an increase in different types of non-traditional families such as lone parenthood, cohabitation and same-sex couples. The Office of National Statistics estimated in 2007 that there were around 4.5 million cohabiting couples in the UK (73% of whom have never married before).⁴⁴ They predicted that this would continue to rise particularly for adults over 30 years of age⁴⁵ and Haskey (2001) predicted that one in four couples living together by 2031 would be cohabiting.⁴⁶ Furthermore, there are over three million one-parent families and 1.8 million cohabiting couples with dependent children.⁴⁷ While these new-style families have become permanent fixtures of the social fabric, evidence suggests that other relationship structures are emerging such as those 'living apart together'.⁴⁸

Opinions towards family have also changed; attitudes on sex before marriage are less traditional⁴⁹ and only 18% of respondents in 2006 viewed homosexuality to be wrong compared to 24% in 1996.⁵⁰ Heterosexual cohabitation outside marriage is receiving increased social recognition⁵¹ not just at a national level, but in the western world more generally.⁵²

³⁹ J Scott, 'Family and Gender Roles: How Attitudes are Changing' *International Conference on Family Relations* (GeNet. Working Paper No.21 University of Valencia, Spain 2006) 3

⁴⁰ N Smelser, 'The Victorian Family' in P Laslett (ed) *Families in Britain* (Routledge and Kegan Paul 1982)

⁴¹ J Eekelaar and M Maclean, 'Marriage and the Moral Bases of Personal Relationships' (2004) 31 (4) *Journal of Law and Society* 510, 537 - 8

⁴² E Beaujouan and M Bholchain, 'Cohabitation and Marriage in Britain Since the 1970s' 145(3) *Population Trends* (ONS 2011) 19 - 20

⁴³ E McLaren, 'Divorce in England and Wales, 2010' *Statistical Bulletin* (ONS 08 December 2011) 1

⁴⁴ B Wilson, 'Estimating the Cohabitation Population' *Population Trends* (ONS 2009) 21, 21

⁴⁵ B Wilson, 'Estimating the Cohabitation Population' *Population Trends* (ONS 2009) 21, 136

⁴⁶ J Haskey, 'Cohabitation in Great Britain: Past, Present and Future Trends and Attitudes' (2001) 103 *Population Trends* 4, 11 - 12

⁴⁷ J Jeffries, 'Families and Households 2001 - 2010' (2011) *Statistics Bulletin* (ONS 2011) 1

⁴⁸ Duncan and Phillips in 2006 found nine per cent of respondents to the nationally representative British Social Attitudes survey classified themselves in such intimate but non-co-residential relationships. S Duncan and M Phillips, 'New Families? Tradition and Change in Modern Relationships' in A Park, J Curtice, K Thomson, M Phillips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage 2008) 14 - 16

⁴⁹ S Duncan and M Phillips, 'New Families? Tradition and Change in Modern Relationships' in A Park, J Curtice, K Thomson, M Phillips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage 2008) 4

⁵⁰ S Duncan and M Phillips 'New Families? Tradition and Change in Modern Relationships' in A Park, J Curtice, K Thomson, M Phillips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage 2008) 18

⁵¹ A Barlow and G James, 'Regulating Marriage and Cohabitation in 21st Century Britain' (2004) 67(2) *Modern Law Review* 143

⁵² K Kiernan, 'The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe' 15 *International Journal of Law, Policy and the Family* 1

Furthermore, evidence is showing that people believe cohabitation and marriage to be socially similar.⁵³

This move away from the 'imposed normative order' of marriage⁵⁴ seems to be attributable to a decrease in religious adherence and collectivism, and instead, a 'new important place of the individual in society and by extension, in families'⁵⁵ has developed. Individualism emphasises a growth in values such as independence or autonomy and, in the family context, a way of self-defining intimate relations. Consequently, Giddens argues that people now enter 'pure relationships' for their own sake lasting for 'as long as it is thought by both parties to deliver enough satisfactions for each individual to stay within it.'⁵⁶ Furthermore, for Giddens, romantic love has been replaced with an 'active and contingent love'⁵⁷ which 'develops only to the degree to which intimacy does.'⁵⁸ For some, this expansion allows for greater autonomy and negotiation between family members moving away from the patriarchal subordinating structure that the traditional family imposed,⁵⁹ as these new family forms are based on negotiation and fluidity.⁶⁰ For others, however, this development away from the traditional family is viewed in a negative light as dysfunctional, unstable and therefore seen to be a rise in the 'broken family'.⁶¹ Baroness Young described it as the 'self-first disease which is debasing our society'.⁶² The fundamental question is whether or not new emerging family forms should be normalised by adopting a new form of regulation, or whether we should try and force a traditional model onto them.⁶³

Crucial to this question is the recognition that gender roles within society have changed radically in many ways. A greater number of women are in the labour market, with 65.4% of women employed either full-time or part-time⁶⁴ and now 13.52 million women are in employment in comparison to 15.54 million men, the smallest gap in employment yet.⁶⁵ Perceptions have also changed, and Duncan and Phillips indicated that there has been a reduction in those who agree that a 'man's job is breadwinning, a woman's job is

⁵³ J Lewis, *The End of Marriage?: Individualism and Intimate Relations* (Edward Elgar Publishing 2001) Chapter 6, 123; S Duncan, and M Phillips, 'New Families? Tradition and Change in Modern Relationships' in A Park, J Curtice, K Thomson, M Phillips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage 2008), 5 - 8

⁵⁴ C Smart and B Neale, *Family Fragments* (Blackwell 1999) 8

⁵⁵ A Diduck, *Law's Families* (Lexis Nexis 2003) 2

⁵⁶ A Giddens, *The Transformation of Intimacy: Sexuality, Love & Eroticism in Modern Societies* (Polity Press 1995) 58

⁵⁷ A Giddens, *The Transformation of Intimacy: Sexuality, Love & Eroticism in Modern Societies* (Polity Press 1995) 5

⁵⁸ A Giddens, *The Transformation of Intimacy: Sexuality, Love & Eroticism in Modern Societies* (Polity Press 1995) 62

⁵⁹ J Lewis, *The End of Marriage?: Individualism and Intimate Relations* (Edward Elgar Publishing 2001) 21 – 22; V Elizabeth, 'Cohabitation, Marriage and the unruly consequence of Difference' (2000) 14 (1) *Gender Studies* 87, 88

⁶⁰ A Diduck, *Law's Families* (Lexis Nexis 2003) 25 - 26

⁶¹ Rt Hon Ian Duncan Smith, *Breakdown Britain 2008* (Conservatives in Social Justice Policy Group 2007) 1

⁶² J Lewis, *The End of Marriage?: Individualism and Intimate Relations* (Edward Elgar 2001) 11

⁶³ C Smart, *The Ties that Bind* (Routledge 1984)

⁶⁴ R Clegg and N Palmer, 'Labour Market Statistics, November 2011' *Statistical Bulletin* (ONS November 2011) 4

⁶⁵ R Clegg and N Palmer, 'Labour Market Statistics, November 2011' *Statistical Bulletin* (ONS November 2011) 4

homemaking/care-giving' from 29% in 1989 to 16% in 2006.⁶⁶ Similarly, only 35% agreed that 'a pre-school child is likely to suffer if his or her mother works' compared with 47.5% in 1989. For Giddens, women are the most extensive example of individualisation, and he argues that women have been successful in their claims for autonomy, equality and sexual emancipation,⁶⁷ and have also become more financially independent.

Nevertheless, as McRae infers,⁶⁸ there is still a great level of continuity in place. While the traditional family has lost its form, 'families of choice' (family arrangements alternative to the traditional family such as cohabitation and same-sex relationship) 'seek values commonly associated with the traditional ideal of the family – a sense of involvement, security and continuity.'⁶⁹ Further similarities can be seen in the ever present imbalance between the genders and their interaction within the public/private sphere. Women are predominantly earning much less, with a gender pay gap of 10.2% in 2010,⁷⁰ and their median weekly earnings average is around 17% lower than men's.⁷¹ Furthermore, women are more likely to be part-time workers, and this has been attributed to child-care influencing the employment patterns of mothers.⁷² However, despite predictions that women's increased participation in the workforce would be matched by an increase in the number of hours spent on domestic labour by men,⁷³ this has not yet materialised. Consequently, women still make the majority of unpaid domestic contributions.⁷⁴ In fact, it seems that although attitudes may be more accommodating for women who work, it is still perceived that it is women's natural role to complete household tasks, and Scott contends that changes in attitudes to family behaviour and values are therefore not so revolutionary.⁷⁵ Moreover, where women are in control of financial expenditures, they are more likely than men to spend their income on family and

⁶⁶ R Crompton and C Lyonette, 'Who does the Housework? The Division of Labour within the Home' in A Park, J Curtice, K Thomson, M Philips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage Publications 2008) 52, 54

⁶⁷ A Giddens, *The Transformation of Intimacy: Sexuality, Love & Eroticism in Modern Societies* (Polity Press 1995) 6

⁶⁸ S McRae, *Changing Britain: Families and Households in the 1990s* (Oxford University Press 1999) 26 - 28

⁶⁹ S McRae, *Changing Britain: Families and Households in the 1990s* (Oxford University Press 1999) 25

⁷⁰ Annual Survey on Hours and Earnings (Based on SOC 2010)' (2012) *Statistical Bulletin* (ONS 2012) 1

⁷¹ Men were recorded as earning £538 on average per week compared with £440 for women. M Williams '2011 Annual Survey on Hours and Earnings (Based on SOC 2010)' (2012) *Statistical Bulletin* (ONS 2012) 1

⁷² 5.84 million women are in part-time work compared to 1.96 million men. R Clegg and N Palmer, 'Labour Market Statistics, November 2011' *Statistical Bulletin* (ONS November 2011) 4

⁷³ J Gershuny, M Godwin, and S Jones, 'The Domestic Labour Revolution: A process of Lagged Adaptation?' in M Andersen, F Bechhofer and J Gershuny (eds), *The Social And Political Economy Of The Household* (Oxford University Press 1994) 151, 151 - 152

⁷⁴ E.g. caring for children, household chores and the organisation and running of the family home. R Crompton and C Lyonette, 'Who does the Housework? The Division of Labour within the Home' in A Park, J Curtice, K Thomson, M Philips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage Publications 2008) 52, 75; R Breen and L Cooke, 'The Persistence of the Gendered Division of Domestic Labour' (2005) 21(1) *European Sociological Review* 43, 53; J Scott, 'Family and Gender Roles: How Attitudes are Changing' *International Conference on Family Relations* (GeNet. Working Paper No.21 University of Valencia, Spain 2006)

⁷⁵ J Scott, 'Family and Gender Roles: How Attitudes are Changing' *International Conference on Family Relations* (GeNet. Working Paper No.21 University of Valencia, Spain 2006) 16

children,⁷⁶ and financial practices may be gendered in both the married and cohabiting contexts.⁷⁷ Research is also indicating that it may be the birth of children which triggers a more traditional division of labour in modern relationships.⁷⁸

Thus it seems that while women are gaining greater financial independence and employment opportunities, this is limited by their responsibilities in the domestic sphere, and often women are carrying out a dual burden of breadwinning and homemaking. This chapter shall now turn to the law surrounding married, cohabiting and same-sex couples to determine how the law of financial provision on relationship breakdown is responding to this (arguably smaller than first thought) social change in gender roles to establish whether the law is in fact fit for purpose.

1.3 The Legal Family in England and Wales

1.3.1 Marriage

For many years, law only recognised the married family. Ancillary relief in England and Wales currently operates a system based on separate property following the Married Women's Property Act 1882, the first legislation which enabled married women to own property in their own right during marriage.⁷⁹ Before this, property had been subject to the doctrine of unity and upon marriage a wife's property automatically belonged to her husband. After the 1882 Act, however, upon divorce each party left the marriage with their separate property. This shift in approach reflected the then prevailing enlightenment foundation of autonomy, the economically rational man and formal equality.⁸⁰ Thus, the onus was on property and so domestic contributions were ignored. Yet, due to the unequal economic status of men and women and a social shift from renting to buying family homes,⁸¹ the separate property approach led to some harsh decisions⁸² in which attempts to use the law of trusts to soften the impact of divorce ultimately failed. Only maintenance was payable, and assets could not be

⁷⁶ J Pahl, 'Family Finances, Individualisation, Spending Patterns and Access to Credit' (2000) 37 *Journal of Socio-Economics* 577, 584-585; S Sonnenberg, 'Household Financial Organisation and Discursive Practice: Managing Money and Identity' (2008) 37 *Journal of Socio-Economics* 533, 547

⁷⁷ C Vogler, M Brockmann and R Wiggins, 'Managing Money in New Heterosexual Forms' (2008) 37 *Journal of Socio-Economics* 552, 561 - 565

⁷⁸ T Greenstein, 'Husbands' Participation in Domestic Labor: Interactive Effect of Wives' and Husbands' Gender Ideologies' (1996) 58 *Journal of Marriage and the Family* 585, 592; K Pyke and S Coltrane, (1996) 'Entitlement, Obligation and Gratitude in Family Work' (1996) 17(1) *Journal of Family Issues* 60; K Dwenda, B Gjerdingen and A Center, 'First-time Parents' Postpartum Changes in Employment, Childcare, and Housework Responsibilities' (2005) 34(1) *Social Science Research* 103

⁷⁹ A Barlow, 'Cohabiting Relationships, Money and Property: The Legal Backdrop' (2008) 37(2) *Journal of Socio-Economics* 502, 504 - 505

⁸⁰ A Diduck, *Law's Families* (Lexis Nexis 2003) 144

⁸¹ S Cretney, *Family Law in the Twentieth century: A History* (Oxford University Press 2003) 118; A Diduck, *Law's Families* (Lexis Nexis 2003) 141

⁸² *Gissing v Gissing* [1971] AC 886; Here the wife was not entitled to any capital after a 25 year marriage that ended on her husband's affair.

⁸² *Rimmer v Rimmer* [1953] 1 QB 63, 68 where the value of the house price rose from £460 in 1935 to £2,117 in 1952 and was in the husband's sole name and could not be redistributed.

reallocated. This subsequently brought about a series of structural changes within divorce law⁸³ and ancillary relief.

Thus, the Matrimonial Property and Proceeding Act 1970 (consolidated in Part II of the Matrimonial Causes Act 1973 [hereafter MCA]) provided the courts with power to redistribute assets on divorce and gave them greater discretion to consider a broad list of factors under s25(2).⁸⁴ In 1984, the Matrimonial and Family Proceedings Act amendments made children the first consideration and also introduced the principle of 'clean break'. These two factors could have been combined to give the primary carer of children a greater share of the capital assets on divorce at the expense of spousal maintenance. Instead, the courts developed the more certain one-third rule starting point⁸⁵ which essentially became translated as the basis for needs-based awards for the homemaker on relationship breakdown. These later became the party's reasonable requirements as calculated by the *Duxbury* formula⁸⁶ where any capital surplus left after meeting these requirements was returned to the breadwinner. This placed a glass-ceiling⁸⁷ on the awards that domestic contributors (typically women) could achieve on relationship breakdown and can be seen as a welfare-based approach. In its favour was the fact that awards on divorce were relatively certain.

However, in *White v White* (2000),⁸⁸ there was a fundamental shift in the court's approach away from 'welfare' towards 'entitlement'⁸⁹ in a bid to end what in practice was essentially gender discrimination. *White* was a case that concerned a modern-day couple where both parties worked on a farm inherited by Mr White and also both carried out child-caring and domestic contributions. This decision radically overhauled the discretionary approach of the courts, introducing a principle of fairness measured by a yardstick of equality. This, the courts suggested, meant that equal division should be the starting point thus removing discrimination between the breadwinner and homemaker. *Lambert v Lambert*⁹⁰ (which concerned a couple that had a more traditional homemaker/breadwinner divide of relationship roles) later emphasised breadwinning was not to be seen as intrinsically more valuable than homemaking. Consequently, *White* introduced what was seen by some as a quasi-deferred community-of-property system, entitling each spouse to an equal share of assets on divorce unless a

⁸³ The Divorce Act 1969 shifted a fault-based approach to essentially a no-fault based approach – irrevocable breakdown plus five grounds followed by the Matrimonial Property and Proceeding Act 1970

⁸⁴ Listed in Appendix S

⁸⁵ *Watchel v Watchel* [1973] Fam 72

⁸⁶ *Duxbury v Duxbury* [1987] 1 FLR 7

⁸⁷ C Butler, 'Newline: Miller and McFarlane' (2006) 36 *Family Law* 512, 516

⁸⁸ *White v White* [2000] UKHL 54, [2001] 1 AC 596 [24] (Lord Nicholls)

⁸⁹ See J Eekelaar, 'Back to Basics and Forward into the Unknown' (2001) 31 *Family Law* 30. For more detail on this shift, see further *Burrow v Burrow* [1999] 1 FLR 508 (Cazalet J); *SRJ v DWJ* [1999] 2 FLR 176 (Hale J)

⁹⁰ *Lambert v Lambert* [2002] 3 FCR 673

departure from the yardstick of equality could be justified.⁹¹ The aim, it was said, was to achieve 'fairness' between parties.

Miller v Miller; McFarlane v McFarlane (2006)⁹² later clarified that 'fairness' consisted of three strands: needs, compensation and sharing. Needs are to be generously interpreted to reflect the standard of living, and compensation is intended to redress any relationship-generated disadvantage irrespective of relationship duration.⁹³ *McFarlane*, which was held to be a paradigm case for when compensation is to apply, concerned a 19-year-long marriage with three children and assets worth £3 million. Both spouses had been in equally lucrative careers, with Mrs McFarlane having given up her career to raise their children. On divorce, Mr McFarlane was earning £1 million a year and the courts recognised that if the assets were split equally, then his wealth would quickly exceed Mrs McFarlane's since she had given up her career. Consequently, the courts granted Mrs McFarlane £250,000 per annum in order to compensate her for her sacrifice. Essentially, through 'compensation', the law is reinforcing a holistic approach to non-discrimination between breadwinner and homemaker, which looks to achieve substantive rather than formal equality. The law is not only recognising the extent of the homemaker's contribution, but it is also recognising the full economic impact that care-giving can have, particularly for women post-divorce.⁹⁴ This holistic approach therefore removes the 'glass-ceiling' for women that had existed in the previous needs-based approach towards financial awards⁹⁵ and can be seen to address a glaring inequality inherent in gendered roles freely chosen within the family by giving greater recognition to the domestic contributions in the marriage context.⁹⁶

However, particularly in large money cases, there have been huge criticisms of this approach, alleging that the courts are far too generous and the awards granted are overvaluing domestic contributions. In *Miller* (a case which involved a two-year marriage without children), Mrs Miller had worked in a public relations firm on a salary of £85,000 per annum. Upon marriage, she gave up her job and home to become the homemaker. Mr Miller was a multi-millionaire, who had worked as a chief investment officer for a company in which he also owned substantial shares. The court found that the needs and economic disadvantage arising from the marriage were very small but that Mrs Miller was used to a high standard of living and a

⁹¹ S Cretney, 'Community of Property Introduced by Judicial Decision', (2003) 119 *Law Quarterly Review* 349, 349; A Barlow, 'Community of Property- the Logical Response to Miller and McFarlane?' (2007) 39 *Bracton Law Journal* 19, 22 - 23

⁹² *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618

⁹³ Although that may affect quantification of awards

⁹⁴ S Jenkins, 'Marital splits and income changes over the longer term' in M Brynin and J Ermisch (eds), *Changing Relationships* (Routledge 2009) 19 - 20

⁹⁵ C Butler, 'Newslines: Miller and McFarlane' (2006) *Family Law* (36) 512, 516

⁹⁶ A Diduck, 'Fairness and Justice for All? The House of Lords in *White v White* [2000] 2 FLR 981' (2001) 9(2) *Feminist Legal Studies* 174, 180 - 182; R Bailey-Harris, 'The Paradoxes of Principle and Pragmatism: Ancillary Relief in England and Wales' (2005) 19 *International Journal of Law, Policy and the Family* 229, 231

large amount of the wealth had been acquired during the marriage. She was accordingly awarded £5 million of her husband's total £32 million assets although it is unclear how this sum was calculated. This included a combined share of the couple's two homes and a proportion of the vast increase in value that Mr Miller's property had accrued over the course of the marriage. While £5 million was not an equal share of Mr Miller's assets, it certainly was far more than her needs or reasonable requirements, and it seems to be a vast sum for only two years of marriage. This is not an isolated case either and these big awards have been demonstrated in cases like *Mills v Mills-McCartney*,⁹⁷ where the wife received £16.5 million after a four-year marriage with one child as a result of generously interpreted needs. The post-*White* approach evidently enables large awards to be made in the wife's favour.

Nevertheless, there is perhaps some ability for the courts to also evaluate contributions through 'stellar' or special contributions. In *Charman v Charman*⁹⁸ (a 28 year marriage with two children) the courts, while strengthening the principle of equal sharing, suggested that special contributions could be either financial or non-financial, although the latter are extraordinarily difficult to value. Here the courts suggested that in these cases a percentage of 33-45% should be awarded to the other spouse. Consequently, the courts granted Mrs Charman (homemaker) 36% of the £131 million assets built up over the course of the marriage on account of Mr Charman's special contributions. However, the courts were unclear and lacked clarity over their reasoning.⁹⁹

Yet, some commentators contend that the courts in *White* and *Miller/McFarlane*, in order 'to prevent discrimination coming in through the front door may have allowed it in through the back.'¹⁰⁰ For some feminists, 'protection [is] the polite way to refer to subordination'.¹⁰¹ By providing maintenance and valuing domestic and financial contributions equally, the law essentially encourages a patriarchal financial dependence. It demeans women, presenting them as weak and vulnerable and in need of protection.¹⁰² For Diduck, valuing domestic contributions as equal, rather than focusing on needs, has attributed too high a value to previously undervalued work.¹⁰³ Thus, to many commentators, it seems that the law has swung too far in the opposite direction, through over-valuing domestic contributions,

⁹⁷ *McCartney v McCartney* [2008] EWHC 401

⁹⁸ *Charman v Charman* [2007] EWCA 503 Civ.

⁹⁹ J Miles, 'Charman v Charman (No. 4): Making Sense Of Needs, Compensation And Equal Sharing After Miller/McFarlane' (2008) 20(3) *Child and Family Law Quarterly* 378, 385 - 386

¹⁰⁰ C Butler, 'Newline: Miller and McFarlane' (2006) 36 *Family Law* 512, 516

¹⁰¹ C Pateman, *The Disorder of Women* (Polity Press 2003) 185

¹⁰² R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1141 - 1143

¹⁰³ A Diduck, 'Fairness and Justice for All? The House of Lords in *White v White* [2000] 2 FLR 981' (2001) 9(2) *Feminist Legal Studies* 174, 180 - 182

reinforcing stereotypes and encouraging gold-digging.¹⁰⁴ Although this 'gold-digging' fear is confined to a small number of big asset cases, it now potentially means that a wife is capable of attaining an equal share in the capital with the potential for periodical payments not confined to need, but to the estimated compensatory value for the career lost. As a result, this potentially may give over-sized awards to 'undeserving' wives.¹⁰⁵ Furthermore, given the increased engagement women have with the labour market and the decline of homemaker/breadwinner relationship models as they are replaced by dual earner couples or part-time/fulltime models, perhaps as Barlow suggests, the provisions of *White* would have been better suited to the 70s.¹⁰⁶

This concern about over-generous evaluations of domestic contributions is particularly relevant given the inability of parties to protect their assets with any certainty through pre-nuptial agreements. The courts traditionally have been reluctant to enforce pre-nuptial agreements on the grounds of public policy.¹⁰⁷ However, since 1997 in *S v S*¹⁰⁸ the courts began to see pre-nuptial agreements in much more favourable lights.¹⁰⁹ Most recently in *Radmacher v Granatino*¹¹⁰ the Supreme Court held that respect should be given to the parties' autonomy and if the contract was not unfair (measured by needs and compensation) it should carry great weight when the court is considering how to divide assets on relationship breakdown. Pre-nuptial agreements, therefore, may have some weight, but they cannot with any certainty protect a party's assets. The Law Commission¹¹¹ is currently exploring the approach that should be taken for pre-nuptial agreements and a Bill is anticipated in 2012 which may change this approach.

Furthermore, conceptual difficulties have been identified in the three strands of fairness. According to Glennon, these three strands divide into two inherently different theoretical approaches when valuing contributions and dividing the assets.¹¹² Needs and compensation are value-based calculations or functional awards on the share that is apportioned and the equal sharing is status-based owing to the relationship itself. Alternatively according to Cooke, equal-sharing is partnership based whereas needs and compensation represent an award both

¹⁰⁴ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1141 - 1142

¹⁰⁵ N Francis, 'If it's Broken – Fix It' (2006) 36 *Family Law* 104, 107

¹⁰⁶ A Barlow, 'Configuration(s) of Unpaid Caregiving within Current Legal Discourse in and around the Family', (2007) 58(3)

Northern Ireland Legal Quarterly 251, 260

¹⁰⁷ *Hyman v Hyman* [1925] AC 601

¹⁰⁸ *S v S* [1997] 2 FLR 100

¹⁰⁹ See Chapter 6, also *M v M* [2002] 1 FLR 654, *K v K* [2003] 2 FLR 120; See the postscript in *Charman v Charman* [2007] EWCA 503 Civ [121-122] (Sir Mark Potter)

¹¹⁰ *Radmacher v Granatino* [2010] UKSC 4

¹¹¹ Law Commission, *Marital Property Agreements* (Law Com CP No 198, 2011) Para 1.11

¹¹² L Glennon, 'Obligations between Adult Partners: Moving from Form to Function?' (2008) 22 *International Journal of Law Policy and the Family* 22, 32 - 33

satisfy different perceptions of fairness.¹¹³ There is concern that these two conflicting theoretical bases of ancillary relief will produce equally conflicting and uncertain results. The incompatible theoretical approaches of these strands of fairness is certainly exemplified in the narrow application of compensation due to concern that it may lead to double counting when used alongside needs.¹¹⁴

Thus fundamental concerns have been voiced about the way that the courts value domestic contributions in the married context. These include the criticisms that it prevents the emancipation of women from the private sphere; that it is uncertain and unclear; that there are not enough opportunities for spouses to protect their financial autonomy given that equal sharing can extend to all matrimonial assets; that special contributions are rarely applied; and that the impact of pre-nuptial agreements (while having greater impact post-*Radmacher*)¹¹⁵ on future asset division is uncertain. Consequently, there have been calls for reform from the courts, from the academic community and also from legislative bodies, although there has been little consensus over the shape that this should take.

Due to the high levels of uncertainty in this jurisdiction, some commentators have critiqued the current approach under s25. Bailey-Harris has criticised the law as lacking ‘predictability in practice or policy coherence’ and thus argues for greater clarity over the interpretation of s25 factors and their piecemeal application¹¹⁶ and Bird went as far as suggesting guidelines for the courts when interpreting s25.¹¹⁷ Others have suggested that reform should move away entirely from such a discretionary approach, and instead we could consider a statutory-based reform similar to a community-of-property regime.¹¹⁸

While some have argued for greater certainty surrounding the role of needs, others have suggested that reform should move away from a needs-focused approach altogether. The Centre for Social Justice has called for a strict equal division of assets in both big and small-asset cases rather than the needs-based approach that currently governs smaller asset cases.¹¹⁹ In contrast, Bailey-Harris has called for greater recognition of marriage as a

¹¹³ E Cooke, ‘Miller/McFarlane: Law in Search of Discrimination’ (2007) 19(1) *Child and Family Law Quarterly* 98, 99 - 100

¹¹⁴ J Miles, ‘Charman v Charman (No. 4): Making Sense Of Needs, Compensation And Equal Sharing After Miller/McFarlane’ (2008) 20(3) *Child and Family Law Quarterly* 378, 389 - 393

¹¹⁵ *Radmacher v Granatino* [2010] UKSC 4

¹¹⁶ R Bailey-Harris, ‘The Paradoxes of Principle and Pragmatism: Ancillary Relief in England and Wales’ (2005) 19 *International Journal of Law, Policy and the Family* 229, 237

¹¹⁷ R Bird, ‘The Reform of Section 25’ (2002) 32 *Family Law* 428, 429 - 430

¹¹⁸ E Cooke, A Barlow, T Akoto and T Callus, ‘Community of Property: A Regime for England and Wales?’ (The Nuffield Foundation 2006) 40 - 41; E Cooke, ‘Miller/ McFarlane: Law in Search of Discrimination’ (2007) 19(1) *Child and Family Law Quarterly* 98, 106; A Barlow ‘What does Community of Property have To Offer English law?’ in A Bottomley and S Wong (eds), *Changing Contours of Domestic Life, Family and Law* (Hart, 2009) 27, 40 - 46

¹¹⁹ D Hodson, ‘Report from the Family Law Review of the Centre for Social Justice: ‘Every Family Matters’ (2009) 39 *Family Law* 864, 866

partnership of equals, and a discussion of what is meant by equality of outcome;¹²⁰ and Miles has argued that greater certainty would be achieved by abandoning need in favour of using equality and compensation¹²¹ as the core principles which may help to simplify the complicated nature of exercising compensation, sharing and need, and avoid the trap of double counting domestic contributions.¹²² Moreover, there has been considerable debate surrounding the appropriateness of maintenance, and Deech argues strongly the case against maintenance believing that it perpetuates dependency and prevents women's emancipation from the private sphere.¹²³

However despite the contention that there needs to be a more restrictive approach to the care-giver, many argue that this is not possible until greater social equality has been achieved. Commentators such as O'Donovan,¹²⁴ Diduck and Orton argue¹²⁵ that only once women have equality in the public sphere – and as Glennon would add, a better valuation of domestic work in society in general – can maintenance and women's dependence on men be significantly reduced.¹²⁶

Thus ancillary relief in England and Wales is criticised for its level of complexity, its lack of certainty and its overgenerous valuation of domestic contributions. Yet, commentators are divided over how this should be reformed and it is evident that future guidance is necessary on the approach that should be taken. Accordingly, this thesis draws on the differing approaches in New Zealand, Queensland, Australia and Scotland in the married context¹²⁷ and considers from Deech's and Fineman's perspectives how domestic contributions are currently and should be approached in the future.

1.3.2 Different-Sex Cohabitation

As section 1.2 above discussed, since the 1970s there has been a dramatic growth in the number of cohabiting couples. In comparison, there has been relatively little legal change although the law has gradually recognised a 'cohabitation rule' in an ad hoc, haphazard fashion¹²⁸ which treats cohabitants as husband and wife to limit their benefit entitlements.

¹²⁰ R Bailey-Harris, 'The Paradoxes of Principle and Pragmatism: Ancillary Relief in England and Wales' (2005) 19 *International Journal of Law, Policy and the Family* 229, 231 - 233

¹²¹ J Miles, 'Principle or Pragmatism in Ancillary relief: the Virtues of Flirting with Academic Theories and Other Jurisdictions' (2005) 19 *International Journal of Law, Policy and the Family* 242, 255 - 256

¹²² J Miles, 'Charman v Charman (No. 4): Making Sense Of Needs, Compensation And Equal Sharing After Miller/McFarlane' (2008) 20(3) *Child and Family Law Quarterly* 378, 393 - 394

¹²³ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1142

¹²⁴ K O'Donovan, 'The Principles of Maintenance: An Alternative View' (1978) 8 *Family Law* 180

¹²⁵ A Diduck and H Orton, 'Equality and Support for Spouses' (1994) 57 *Modern Law Review* 681, 686

¹²⁶ L Glennon, 'The Limitations of Equality Discourses on the Contours of Intimate Obligations' in J Wallbank, S Choudhary and J Herring (eds) *Rights, Gender and Family Law* (Routledge 2010)

¹²⁷ Outlined in Chapter 2

¹²⁸ R Probert, 'Family Law – A Modern Concept?' (2004) 34 *Family Law* 901

Furthermore, there has been some recognition of cohabiting couples as a family such as in Rent Act succession cases like *Dysons Holdings v Fox*¹²⁹ and the Domestic Violence and Matrimonial Proceedings Act 1976 was effectively the first active legislative step the law took to protect cohabiting couples.¹³⁰

Yet, on relationship breakdown, apart from Schedule 1 of the Children Act 1989 (which provides financial provision for the benefit of the children regardless of marital status),¹³¹ there is no specific Family Law remedy for financial provision on relationship breakdown and therefore domestic contributions are treated completely differently to the married context. Perhaps most indicative of this difference in the law's attitude is the absence of any consideration of these; cohabitants, both same and opposite-sex, are not recognised as a family in their own right and consequently have no access to a Family Law remedy. Instead they must rely on Property and Trust Law to establish any legal entitlement to any asset including (usually the most contentious object) the family home. This in turn means that while domestic and financial contributions of married couples are given equal weighting, here domestic contributions are often overlooked and ignored.¹³²

Trust Law predominantly looks towards direct financial contributions as a means of determining an interest through a constructive trust or a resulting trust. Since *Stack v Dowden*,¹³³ the constructive trust has been identified as the most appropriate mechanism in cohabitation cases. This requires a common intent between the parties for the property to be beneficially shared and that the cohabitant searching for a share has detrimentally relied on this common intent. Both common intent and detrimental reliance can be either express or implied. Express common intent requires that an actual conversation takes place¹³⁴ and express detrimental reliance is where money is spent on the property with the belief that they shared an interest in that property.¹³⁵ Implied common intent on the other hand can arise from the parties' behaviour if they have made a direct financial contribution such as paying the mortgage¹³⁶ and detrimental reliance can be inferred¹³⁶ where the party has embarked on exceptional behaviour such as improvements to the family home¹³⁷ which the court does not think would have occurred unless the claimant believed that they had an interest in the

¹²⁹ *Dysons Holdings v Fox* [1976] QB 503

¹³⁰ S Cretney, *Family Law in the Twentieth Century: A History* (Oxford University Press 2003) 520

¹³¹ See Appendix T

¹³² J Miles, 'Property Law v Family Law: Resolving the Problems of Family Property' (2003) 23 *Legal Studies* 624, 639 - 341

¹³³ *Stack v Dowden* (2007) UKHL 17

¹³⁴ *Lloyds Bank v Rosset* (1991) AC 107

¹³⁵ *Layton v Martin* (1986) 2 FLR 227, 237

¹³⁶ *Le Foe v Le Foe and Another* (2002) 1 FCR 107 indicated that direct mortgage payments could suffice.

¹³⁷ E.g. a woman using a sledgehammer *Eves v Eves* (1975) 1 WLR 1338

property. Nevertheless, the courts have not recognised indirect financial contributions or domestic contributions.

*Stack v Dowden*¹³⁸ did offer some relief to this approach and indicated that the courts are now able to impute intentions; to look at 'what the parties must, in the light of their conduct, be taken to have intended'¹³⁹ that is to say, the courts can read into what the couple *would* have intended, yet the Law Lords were keen to emphasise that 'fairness is not the appropriate yardstick'.¹⁴⁰ *Jones v Kernott*¹⁴¹ confirmed the use of imputation in joint names cases although this, the court stated, was only in reference to the quantification of shares. While Lady Hale and Lord Walker did not specifically refer to fairness, they stated at [47]:

*'...if [the court] cannot deduce exactly what shares were intended, it may have no alternative but to ask **what their intentions as reasonable and just people would have been had they thought about it at the time.**'*¹⁴²

Reading the intentions as reasonable and just offers the opportunity for fairness to creep into trust cases, although this is limited in its application and fairness is completely different from the fairness that operates in the matrimonial context. Furthermore, it appears limited only to the quantification of shares. Thus domestic contributions in the cohabitation context remain unrecognised¹⁴³ in an area that is complex and confusing¹⁴⁴ with a 'witches' brew' of remedies which are unpredictable for the economically weaker cohabitant.¹⁴⁵ However, the position of sole owners has not been changed by these recent developments and unless a trust has been expressly declared or written,¹⁴⁶ remains focused on financial contributions for the establishment of a constructive trust.

It is evident that there is a stark division in the value placed on domestic contributions for married and cohabiting couples on relationship breakdown. Yet, the division of paid and unpaid work undertaken by cohabiting couples for the household recurrently reflects that of married couples.¹⁴⁷ These similarities with married couples also appear to extend to the type of responsibilities and moral obligations that cohabitants feel towards the wider family.¹⁴⁸

¹³⁸ *Stack v Dowden* [2007] UKHL 17

¹³⁹ *Stack v Dowden* [2007] UKHL 17 [61] (Lady Hale)

¹⁴⁰ *Stack v Dowden* [2007] UKHL 17 [144] (Lord Neuberger)

¹⁴¹ *Jones v Kernott* [2011] UKSC 53

¹⁴² Emphasis added by this author

¹⁴³ A Lawson, 'The Things We Do for Love: Detrimental Reliance in the Family Home' (1996) 16 *Legal Studies* 218, 226 - 229; J

Miles, 'Property Law v Family Law: Resolving the Problems of Family Property' (2003) 23 *Legal Studies* 624, 639 - 341

¹⁴⁴ R Probert, 'Cohabitation in Twentieth Century England and Wales: Law and Policy' (2004) 26 *Law and Policy* 13, 31 - 32

¹⁴⁵ R Bailey-Harris and J Wilson 'Jones v Kernott – Another helping of the witches' brew?' (*Family Law Week* 2011)

<<http://www.familylawweek.co.uk/site.aspx?i=ed89478>> accessed 3 January 2012

¹⁴⁶ Law of Property Act 1925 s53(1)(b)

¹⁴⁷ See, for example, A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in 21st Century Britain* (Hart 2005)

¹⁴⁸ J Eekelaar and M Maclean, 'Marriage and the Moral Bases of Personal Relationships' (2004) 31 (4) *Journal of Law and Society* 510, 536 - 537

Moreover, there has been a large growth of research recently which indicates that differences in the organisation of relationship responsibilities may not stem from relationship status, but from more subtle socio-economic factors. Research into the financial arrangements of couples has shown that when age and relationship length are taken into account, married and cohabiting couples organise their financial affairs similarly.¹⁴⁹ Furthermore, research into the division of housework, such as by Crompton and Lyonette,¹⁵⁰ also demonstrates that influential factors such as age, employment status,¹⁵¹ working hours¹⁵² and the presence of children¹⁵³ appear to affect the division of paid and unpaid labour rather than relationship status.¹⁵⁴

However, there is a split over whether this area should be reformed. For commentators such as Deech and Bottomley,¹⁵⁵ disregarding domestic contributions promotes financial independence and autonomy. It refrains from interfering with the private sphere and gives the parties the freedom to determine how to order their own property, allowing them to try alternative forms of relationships rather than 'to have one form imposed on them especially one that treats women as perpetual dependents.'¹⁵⁶ Instead, as traditionally gendered roles are not attached with any value, cohabitation is a way that gendered practices can be avoided and a greater position for negotiation is available, providing a space 'to define gender and personal identity in more liberating and non-traditional ways.'¹⁵⁷ This places women in a better bargaining position.¹⁵⁸ Consequently, the approach towards cohabitation avoids patriarchal dependence as it presumes and therefore encourages financial equality between the parties. Furthermore, women are encouraged to engage with the labour market because there is no recognition of domestic contributions and therefore there is no room to entice women into the domestic sphere. Therefore, for Montgomery¹⁵⁹ and Eekelaar,¹⁶⁰ the principles applied

¹⁴⁹ C Vogler, M Brockmann and R Wiggins, 'Managing Money in New Heterosexual Forms' (2008) 37 *Journal of Socio-Economics* 552, 561 - 565; K Ashby and C Burgoyne, 'Separate Financial Entities? Beyond Categories of Money Management' (2008) 37(2) *Journal of Socio-Economics* 458

¹⁵⁰ R Crompton and C Lyonette, 'Who does the Housework? The Division of Labour within the Home' in A Park, J Curtice, K Thomson, M Philips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage Publications 2008) 52, 74 - 75

¹⁵¹ R Crompton and C Lyonette, 'Who does the Housework? The Division of Labour within the Home' in A Park, J Curtice, K Thomson, M Philips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage Publications 2008) 52, 74 - 75

¹⁵² T Greenstein, 'Husbands' Participation in Domestic Labor: Interactive Effect of Wives' and Husbands' Gender Ideologies' (1996) 58 *Journal of Marriage and Family* 585, 592; K Pyke and S Coltrane, (1996) 'Entitlement, Obligation and Gratitude in Family Work' (1996) 17(1) *Journal of Family Issues* 60

¹⁵³ K Dwenda, B Gjerdingen and A Center, 'First-time Parents' Postpartum Changes in Employment, Childcare, and Housework Responsibilities' (2005) 34(1) *Social Science Research* 103

¹⁵⁴ R Crompton and C Lyonette, 'Who does the Housework? The Division of Labour within the Home' in A Park, J Curtice, K Thomson, M Philips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage Publications 2008) 52, 74 - 75

¹⁵⁵ R Deech, 'Cohabitation' (2010) 40 *Family Law* 39; A Bottomley 'From Mrs Burns to Mrs Oxley: Do Co-Habiting Women (Still) Need Marriage Law?' (2006) 14 *Feminist Legal Studies* 181, 206

¹⁵⁶ R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 43

¹⁵⁷ R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 42

¹⁵⁸ A Cherlin, 'Towards a New Home Socio-Economics of Union Formation' in L Waite and C Bachrach (eds), *The Ties That Bind: Perspectives On Marriage And Cohabitation* (Aldine de Gruyter 2000) 126, 131

¹⁵⁹ J Montgomery, 'A Question of Intention?' [1987] *Conveyancer* 16

¹⁶⁰ J Eekelaar, 'A Woman's Place - A Conflict between Law and Social Values' [1987] 93 *Conveyancer* 101

'are those which the parties have accepted themselves'¹⁶¹ and there is a strong emphasis placed on the choice of cohabitants not only to order their own affairs (Deech contends that cohabitants 'are well aware of the situation they have placed themselves in'),¹⁶² but also to choose not to enter marriage where these sorts of contributions would have far more sway.

However, there are strong arguments that the Trust Law approach fails to protect the vulnerable, and the case of *Burns v Burns*¹⁶³ is frequently cited to demonstrate the gross unfairness that exists in the cohabitation context. This case concerned a 19-year-long cohabitation relationship where Mrs Burns assumed the homemaker role raising their three children who at the time of the trial were adults and had all left home. She had even changed her surname to match her partner's, redecorated the house, bought various chattels and paid for a substantial amount of the bills with a part-time job that she had in the later years of the relationship. Yet, at the end of the relationship Mrs Burns had no real earning potential as the result of her homemaking role. In the absence of any direct financial payments which Lord Justice Fox emphasised should be referable back to the purchase price or the mortgage on the property, Mrs Burns was left without a share in the home and without a remedy elsewhere so she was in effect left with nothing. Essentially, child-bearing and its effect on Mrs Burns' socio-economic status is of no value to the courts when establishing a beneficial interest. Consequently a major concern is that this amounts to discrimination against the homemaker or 'primary carer'¹⁶⁴ as the current approach in Trust Law omits 'home-making and parental contributions',¹⁶⁵ a role predominantly held by the female partner.¹⁶⁶ As Baird argues 'it is women, usually, who are left high and dry after cohabitation.'¹⁶⁷ Further commentators such as Barlow, Lind and Wong also identify this approach as being discriminatory against women due to the habitual gendered nature of domestic contributions in relationships,¹⁶⁸ and for Fineman a lack of recognition of care-giving relationships ignores the gendered lives that women lead and how their lives are really characterised by dependency.¹⁶⁹ Trust Law fails to protect the vulnerable by ignoring the voices of those within the private family sphere. While ignoring domestic contributions may encourage financial independence, it in fact does not recognise those women who have freely chosen (with their partner's agreement or

¹⁶¹ J Montgomery, 'A Question of Intention?' [1987] *Conveyancer* 16, 16

¹⁶² R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 43

¹⁶³ *Burns v Burn* (1984) Ch. 317

¹⁶⁴ Law Commission, *Cohabitation: The Financial Consequences Of Relationship Breakdown* (Law Com No 176, 2006) para 4.22

¹⁶⁵ R Bailey-Harris, 'Law and the Unmarried Couple – Oppression or Liberation?' (1996) 8 *Child and Family Law Quarterly* 137, 139

¹⁶⁶ National Statistics (2009) 'Labour market' *Social Trends* 39 (ONS 2009) 7

¹⁶⁷ Vera Baird, 13 June 2006, HC Deb vol. 447, col. 637

¹⁶⁸ See S Wong, 'Constructive Trusts Over The Family Home: Lessons To Be Learned From Other Commonwealth Jurisdictions?' (1998) 18 *Legal Studies* 369; A Barlow and C Lind, 'A Matter of Trust: The Allocation of Rights in the Family Home' (1999) 19 *Legal Studies* 468, 487 - 488

¹⁶⁹ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 26

encouragement) a gendered homemaker role in the domestic sphere and therefore this consistently undermines the homemaker.¹⁷⁰

Furthermore, it seems that cohabiting couples are not necessarily characterised by equal financial autonomy. While some have argued that the *Burns* scenario is no longer a reality,¹⁷¹ Douglas et al.'s¹⁷² work indicated that in fact the *Burns* scenario still exists and again it is the female partner who tends to be disadvantaged by the lack of recognition of domestic contributions in Trust Law. Additionally, there are concerns that the ability to be autonomous and to achieve financial dependence may not be possible for all cohabitants and research indicates, that while cohabitants tend to have a more egalitarian division of roles than married couples, this may be attributable as aforementioned to other factors, other than relationship status, that affect the division of paid and unpaid labour.¹⁷³ In addition, although some believe that respect should be given to the cohabitant's autonomous choice not to marry and therefore there should be no Family Law intervention aside from the enforcement of cohabitation contracts,¹⁷⁴ yet Probert,¹⁷⁵ while examining the French *PaCS*,¹⁷⁶ which employs a contract to constitute the relationship and define rights, found that these were not often used and the contractual element could lead to unequal bargaining positions.

However, while there is consensus that reform is needed, there is a lack of clarity firstly over what principles should govern any reform and secondly whether a cohabitation regime should be different or similar to marriage. For some commentators such as Barlow et al, family regulation should be based on function rather than form.¹⁷⁷ Some of those who have embraced this function over form approach have argued that the law should redistribute property in the same way that it does in marriage by extending Part II MCA,¹⁷⁸ although others

¹⁷⁰ R Bailey-Harris, 'Law and the Unmarried Couple – Oppression or Liberation?' (1996) 8 *Child and Family Law Quarterly* 137, 137 - 138; J Miles, 'Property Law v Family Law: Resolving the Problems of Family Property' (2003) 23 *Legal Studies* 624, 639 - 341

¹⁷¹ R Probert, 'Trusts and the Modern Woman – Establishing an Interest in the Family Home' (2001) 13(3) *Child and Family Law Quarterly* 275, 283 - 286

¹⁷² G Douglas, J Pearce and H Woodward *A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown* (Funded by ESRC, Cardiff Law School 2007) 138

¹⁷³ K Dwenda, B Gjerdingen and A Center, 'First-time Parents' Postpartum Changes in Employment, Childcare, and Housework Responsibilities' (2005) 34(1) *Social Science Research* 103; T Greenstein, 'Husbands' Participation in Domestic Labor: Interactive Effect of Wives' and Husbands' Gender Ideologies' (1996) 58 *Journal of Marriage and Family* 585, 592; K Pyke and S Coltrane, (1996) 'Entitlement, Obligation and Gratitude in Family Work' (1996) 17(1) *Journal of Family Issues* 60

¹⁷⁴ See R Deech, 'The Case against the Legal Recognition of Cohabitation' (1980) 29 *International and Comparative Law* 480, 495 - 496; M Garrison, 'Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation' (2005) 52 *California Law Review* 815

¹⁷⁵ R Probert, 'From Lack of Status to Contract: Assessing the French Pacte Civil de Solidarite' (2001) 23(3) *Journal of Social Welfare and Family Law* 257, 259 - 261

¹⁷⁶ Pacte Civil de Solidarite', the French regime for cohabiting couples which is an opt-in scheme to these *PaCS*

¹⁷⁷ A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in 21st Century Britain* (Hart 2005)

¹⁷⁸ R Bailey-Harris, 'Law and the Unmarried Couple – Oppression or Liberation?' (1996) 8 *Child and Family Law Quarterly* 137, 139; S Wong 'Caring and Sharing: Interdependency as a Basis for Property Redistribution' in A Bottomley and S Wong (eds) *Changing Contours of Domestic Life, Family and Law* (Hart 2009)

think that this should be subject to a two-year qualification period.¹⁷⁹ Similarly, some commentators think that a cohabitation regime should have the same approach to marriage, as the marital approach is essentially remedial¹⁸⁰ and in 2010 Lord Lester put forward a cohabitation Bill (which subsequently was unsuccessful) which proposed very similar provisions to the married context although with some differences.¹⁸¹ An approach like this would be based on entitlement however Probert worries that a similar scheme to Part II MCA may move too far away from a financial focus in the cohabitation context.¹⁸² Furthermore, there are concerns that an approach identical to marriage will undermine the institution itself¹⁸³ although Kiernan, Barlow and Merlo¹⁸⁴ analysed marriage rates in Europe and Australia and suggested that there is little relationship between these rates and the introduction of legislation which treats cohabitants as spouses.

For those who think that cohabitants should be treated differently, there is also a lack of coherence over the approach that should be taken.¹⁸⁵ For some, like Deech, the approach is simple; cohabitants should have no Family Law remedy at all.¹⁸⁶ Yet, many commentators argue that there should be some provisions made available to cohabiting relationships. Eekelaar¹⁸⁷ has suggested that the law should focus on the reasonable expectations of the parties, what the parties would deem that they ought to have, and Douglas et al.¹⁸⁸ suggested that the approach should be based on unjust enrichment, 'the idea that one party 'gets something for nothing'¹⁸⁹ or enjoys a windfall at the expense of another.'¹⁹⁰ The Law Commission has also suggested a scheme which attempts to redress imbalances and compensate losses through a statutory scheme of economic advantages and disadvantages.¹⁹¹

¹⁷⁹ A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in 21st Century Britain* (Hart 2005) and R Bailey-Harris 'Law and the Unmarried Couple – Oppression or Liberation?' (1996) 8 *Child and Family Law Quarterly* 137, 139

¹⁸⁰ R Bailey-Harris, 'Dividing the Assets on Breakdown of Relationships Outside Marriage: Challenges for Reformers' in R Bailey-Harris (eds), *Dividing the Assets on Family Breakdown* (Jordan 1998); and Mr Justice Munby, 'Families Old and New – the Family and Article 8' (2005) 17 *Child and Family Law Quarterly* 487, 496-7

¹⁸¹ These differences include provisions that state that the court must have regard for the length of the cohabiting relationship, the existence of any agreement or trusts and the physical or mental ability of the parties to gain employment. Furthermore the court also must consider the respective economic advantages and economic disadvantages of the parties.

¹⁸² R Probert, 'Family Law and Property Law: Competing Spheres in Regulation of the Family Home?' in A Hudson (eds), *New Perspectives on Family Law, Human Rights and the Home* (Cavendish 2003) 37

¹⁸³ See, for example P Morgan, 'Marriage-Lite: The Rise of Cohabitation and its Consequences' (*Institute for the Study of Civil Society* 2000); Family Law Review *Breakthrough Britain: Every Family Matters* (Centre for Social Justice 2009)

¹⁸⁴ K Kiernan, A Barlow and R Merlo, 'Cohabitation Law reform and its Impact on marriage: Evidence from Australia and Europe' [2007] *International Family Law* 71, 72 - 73

¹⁸⁵ See J Miles, 'Property Law v Family Law: Resolving the Problems of Family Property' (2003) 23 *Legal Studies* 624

¹⁸⁶ See R Deech, 'The Case against the Legal Recognition of Cohabitation' (1980) 29 *International and Comparative Law* 480, 497

¹⁸⁷ J Eekelaar, 'Non-Marital Property' in P Birks (eds), *Frontiers of Liability* (Oxford University Press 1994)

¹⁸⁸ G Douglas, J Pearce, and H Woodward, 'Cohabitants, Property and the Law: A Study of Injustice' (2009) 72 *Modern Law Review* 24

¹⁸⁹ G Douglas, J Pearce, and H Woodward, 'Cohabitants, Property and the Law: A Study of Injustice' (2009) 72 *Modern Law Review* 24, 31. This would also apply in big money cases in the matrimonial context.

¹⁹⁰ G Douglas, J Pearce, and H Woodward, 'Cohabitants, Property and the Law: A Study of Injustice' (2009) 72 *Modern Law Review* 24, 31

¹⁹¹ Law Commission, *Cohabitation: The Financial Consequences Of Relationship Breakdown* (Law Com No 176, 2006) para 4.22

However, at present the Government clearly has no intention to reform the current system¹⁹² and thus continues to promote autonomy. The law is overwhelmingly considered inappropriate in this area but while options for law reform are extensive, there is no unity over how, instead, cohabiting relationships should be treated on relationship breakdown. This project considers the approaches in New Zealand, Scotland and Australia who have all approached cohabiting couples in different ways to determine how domestic contributions should be recognised in cohabiting couples and whether any difference should lie between cohabitation and marriage.

1.3.3 Same-Sex Relationships

Same-sex and different-sex cohabiting couples are treated indistinguishably and while same-sex couples cannot marry (although this itself is currently under review),¹⁹³ they are able to enter into a civil partnership under the Civil Partnership Act 2004 (CPA). The CPA introduced almost identical legal consequences of marriage to same-sex couples who entered into a registered partnership, and Schedule 5 of the CPA sets out a framework for financial provision on the dissolution of civil partnerships which is to correspond to those provisions in the MCA. Thus, s21(2) of the schedule mirrors s25 of the MCA, setting out the factors which must be considered when making a financial order on dissolution. Initially, there was some uncertainty over whether the homemaker/breadwinner approach,¹⁹⁴ taken in the marriage context, would be duplicated for civil partnerships. However, the court recently confirmed in *Lawrence v Gallagher* (2012)¹⁹⁵ that the approach in the Civil Partnership context was to be no different from that in the marriage context.

The debates surrounding the introduction of the CPA stemmed from the manifest inequalities and injustices that same-sex couples faced without the option of entering a registered partnership equivalent to marriage. While the CPA has rectified this inequality,¹⁹⁶ no real consideration has been given to the financial and domestic realities of these relationships. Therefore, there lacks an understanding of whether, empirically, there could or should be differential treatment between marriage and civil partnerships on relationship breakdown. This is a particular concern since the presumptions that exist in the marriage context in ancillary relief seem to have been extended into the civil partnership context. How appropriate is this extension given that the assumptions in the married context appear to be based on

¹⁹² Jonathan Djanogly, Parliamentary Under-Secretary of State, Ministry of Justice, Written Ministerial Statement, 6 September 2011

¹⁹³ The government produced a consultation document which reviewed extending marriage to same-sex couples. Government Equalities Office *Equal Civil Marriage: A Consultation* (The Home Office, 15 March 2012)

¹⁹⁴ M Harper, M Downs, G Wilson and K Landells, *Civil Partnership – The New Law* (Jordan Publishing 2005) 70

¹⁹⁵ *Lawrence v Gallagher* [2012] EWCA Civ 394

¹⁹⁶ Although arguably some discrimination still persists while same-sex couples are unable to marry.

gendered beliefs about how different-sex couples organise their domestic affairs? Should the same presumptions which are based on a homemaker/breadwinner relationship model be applied in the same-sex context?

Little empirical research on the way that same-sex couples organise their financial and domestic affairs exists in the UK and therefore this thesis also draws from a small body of work undertaken abroad. Research demonstrates both here and abroad that lesbian and gay couples are generally more likely to have liberal egalitarian attitudes compared to heterosexual couples.¹⁹⁷ Dunne demonstrated that the 'absence of gender polarized norms informing approaches to parenting and divisions of labour allows lesbian partners greater flexibility in negotiating their arrangements'¹⁹⁸ and thus they are more likely to foster conceptions of equality. This questions whether financial provision based on gender relations in the family sphere will reflect the greater space for negotiation which exists within same-sex couples.

Furthermore, with a considerable proportion of studies tending to find that most same-sex relationships are in fact dual-earner families,¹⁹⁹ it seems, superficially, that the traditional homemaker/breadwinner divide has been rejected by same-sex couples and thus they each will have some level of economic independence. When it comes to housework, it seems that same-sex couples are likely to divide the tasks fairly equitably. Kurdek's studies in both 1993 and 2006²⁰⁰ compared the division of housework in cohabiting same-sex couples and heterosexual married couples without children and found that lesbian and gay couples tended to distribute household labour equally while married couples without children were least equal, with wives doing most of the housework. In his 2005 review, he determined that 'although members of gay and lesbian couples do not divide household labour in a perfectly equal manner, they are more likely than members of heterosexual couples to negotiate a balance between achieving a fair distribution of household labour and accommodating the different interests, skills, and work schedules of particular partners.'²⁰¹ Other research has

¹⁹⁷ S Solomon, E Rothblum and K Balsam, 'Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings' (2005) 52(9/10) *Sex Roles* 561, 578; G Dunne, *Lesbian Lifestyles: Women's Work and the Politics of Sexuality* (University of Toronto Press 1997) 258; M Schechory and R Ziv, (2007) 'Relationships between Gender Role Attitudes, Role Division and Perceptions of Equity Among Heterosexual, Gay and Lesbian Couples' (2007) 56 *Sex Roles* 10

¹⁹⁸ G Dunne, 'Pioneers behind our own Front Doors' (1997) 12 *Journal of Work, Employment and Society* 6, 33 - 34,

¹⁹⁹ A Impett and Peplau L, "'His" and "Her" Relationships? A Review of the Empirical Evidence"' in Vangelisti A and Perlman D (eds) *The Cambridge Handbook of Personal Relationships* (Cambridge University Press 2006)

²⁰⁰ L Kurdek, 'Predicting Marital Dissolution: A five Year Prospective Longitudinal Study of Newlywed Couples' (1993) 64 *Journal of Personality and Social Psychology* 221;

L Kurdek, 'Differences between Partners From Heterosexual, Gay And Lesbian Cohabiting Couples' (2006) *Journal of Marriage and the Family* 509

²⁰¹ L Kurdek, 'What do We Know about Gay and Lesbian Couples?' (2005) 14 *Current Directive of Psychological Science* 251, 252

reflected this more equitable division of labour particularly in lesbian couples.²⁰² Chan²⁰³ compared lesbian parents and heterosexual parents and discovered that although household tasks and family decision-making were relatively similar, generally lesbian biological and non-biological mothers shared child-care tasks more equally than heterosexual parents. In the UK, Dunne²⁰⁴ also found, in her study of 29 lesbian couples with children, that domestic responsibilities were fairly evenly shared, and that there was a mutual recognition of a woman's right to financial independence.

Although some studies have found that equal sharing may not be universal in same-sex relationships,²⁰⁵ the majority of studies in this area seem to produce evidence that a greater level of equality exists in the division of roles. Seemingly, sexual orientation is a key factor in affecting the equality of a couple's division of housework as it lacks the traditional gendered hierarchy.²⁰⁶ Thus, an interpretation of s21(2) factors based on the presumption of a homemaker/breadwinner divide would have little consideration for the impact that sexuality may have on the division of labour. In fact, this extends to financial organisation with Burns, Burgoyne et al. (2008) indicating that same-sex couples demonstrate a more individualistic and different approach than heterosexual couples in the way that they treated financial resources, and that there was a greater level of importance placed on financial autonomy and a lower level of financial interdependence compared to different-sex couples.²⁰⁷ Arguably a different approach is needed in models of financial provision in order to account for this greater level of financial independence and more egalitarian relationship dynamics.

Consequently, following the marital model of financial provision may not in its current application provide same-sex couples with rights and responsibilities that accurately reflect the roles that they play in each other's' lives. In fact, the absence of gender power imbalances and gender-based influences on the division of household roles makes it possible to predict that the courts will make a greater use of the yardstick of equality to achieve fair division of

²⁰² L Peplau and L Spalding, 'The Close Relationships Of Lesbians, Gay Men, and Bisexuals' in C Hendrick (eds), *Close Relationships: A Sourcebook* (Sage 2000); C Patterson, 'Family Relationships of Lesbians and Gay Men' (2000) 62(4) *Journal of Marriage and the Family* 1052; M Schechory, and R Ziv, 'Relationships between Gender Role Attitudes, Role Division and Perceptions of Equity among heterosexual, Gay and Lesbian Couples' (2007) 56 *Sex Roles* 10

²⁰³ R Chan and R Brooks, 'Division of Labor Among Lesbian and Heterosexual Parents: Associations With Children's Adjustment' (1998) 12(3) *Journal of Family Psychology* 402, 414 - 417

²⁰⁴ G Dunne, 'Opting into motherhood: Lesbians Blurring the Boundaries and transforming the meaning of Parenthood' (1997) 4(1) *Gender Studies* 11

²⁰⁵ C Carrington, *No Place Like Home: Relationships and Family Life among Lesbians and Gay Men* (Chicago University Press 1999) 273

²⁰⁶ S Solomon, E Rothblum and K Balsam, 'Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings' (2005) 52(9/10) *Sex Roles* 561, 578

²⁰⁷ M Burns, C Burgoyne, and V Clarke, 'Financial affairs? Money Management in Same Sex Relationships' (2008) 37 (2) *Journal of Socio-Economics* 481, 509 - 514

property. Yet splitting the assets equally may not, as Burgoyne²⁰⁸ voices her concern over the Civil Partnership Act's provisions, take into any account that maybe there seems to be a greater level of financial independence in these couples. Consequently, this project considers the suitability of other approaches in New Zealand, Scotland and Australia in the context of same-sex relationships.

1.4 Conclusion

It is evident from this chapter that the way in which domestic contributions are valued on relationship breakdown in England and Wales is in serious need of reform and both in the married/civil partner and unmarried context. However, the debate surrounding reform is contentious and there is little agreement on the shape that change should take and how much recognition the law should give to domestic contributions: should it encourage women to be financially autonomous by attributing no value to domestic contributions or should it recognise gendered roles freely chosen by women (and encouraged by their partners) and therein provide greater protection by attributing higher value to these contributions? Consequently, this thesis aims to provide essential insight into this debate by considering Deech and Fineman's polarised views which embody these two conflicting positions. To do this, this thesis explores how these divergent feminist positions would work in practice and whether a compromise between the two can be reached. The next chapter now sets out the empirical and feminist methodology that this thesis uses to do so.

²⁰⁸ M Burns, C Burgoyne, and V Clarke, 'Financial affairs? Money Management in Same Sex Relationships' (2008) 37 (2) *Journal of Socio-Economics* 481, 509

CHAPTER 2: METHODOLOGY

2.1 Research Aims

The last chapter identified the need for reform to the law of financial provision in England and Wales in both the married and cohabitation regimes. In particular, it is evident that detailed consideration of how the law should value domestic contributions is required. Therefore, the aim of this thesis is to examine how the law might in future better address the valuation of domestic contributions (particularly regarding cohabitants), to answer the calls for reform identified in chapter 1. To gain insight into these issues, this project explores the law of financial provision on relationship breakdown in England and Wales, New Zealand, Australia and Scotland where different approaches have emerged in different years. Thus the following research questions are posed:

Research Question 1: How successful is each jurisdiction in valuing domestic contributions? This will be considered by asking:

- (a) How domestic contributions are valued for:
 - (i) Married Couples
 - (ii) Cohabiting Couples
 - (iii) Same-Sex Couples
- (b) How satisfactory is this valuation when viewed from (divergent) feminist perspectives?
- (c) How satisfactory is this valuation considered to be within its own individual jurisdiction?

Research Question 2: What lessons can be learned in England and Wales from these other approaches:

- (a) Do they rectify current criticisms?
- (b) Would they be well received in England and Wales?

This is a socio-legal project, which moves beyond the sole use of traditional legal methodology and its focus on black-letter law. However, research question 1(a) involves a doctrinal analysis of the legal systems under examination, exploring legal sources like cases, statutes, legislative information, court rules, and the law of other countries.²⁰⁹ Banakar argues that this black-letter approach conveys the ideal state of the legal system, providing a degree of certainty, giving definite answers to practical questions.²¹⁰ That is to say, it searches for the laws of law,

²⁰⁹ M Cohen and K Olsen, *Legal Research in a Nutshell*, Social Science Reference Centre (SSRC) (Firestone 2000) 1

²¹⁰ R Banakar, *Merging Law and Sociology: Beyond the Dichotomies of Socio-Legal Research* (New York University Press 2003)

trying to present law as it is. Yet is this enough for Family Law or is more socio-legal context required?

For some, it is impossible to merge other disciplines with law in this attempt to provide context. As Foucault argues, a discipline's knowledge is created by its own self-validation, two separate fields cannot be combined; they will not add to each other's knowledge, only transforming the way that knowledge is sought.²¹¹ Thus, their conflicting paradigms and classifications cannot be merged easily, and in fact any integration of the differing types of data produced will not be compatible. Luhmann²¹² and Teubner²¹³ define the law as an autopoietic system. It is an intellectually closed system that has its own concepts and rationality and can only use its own elements to reproduce itself and therefore it remains closed to other systems of knowledge. This other knowledge is in fact impossible to measure or compare. This then has been interpreted to mean that sociological insights cannot be turned into legal concepts and legal definitions cannot be formed into sociological categories.²¹⁴ Consequently, it has been argued that it is unworkable to draw on concepts from other disciplines to use in one's own.

However, a narrow focus on legal sources carries limitations. Detaching the law from any form of context or regard of itself as a social phenomenon tends to over-simplify problems and lose sight of how law functions in reality.²¹⁵ Furthermore, ignoring context consequently presents a two-dimensional picture of the law in action, devoid of society's perspectives, attitudes and any consideration of the law's effect on people. Thus, ascertaining suitable reform options in Family Law or even identifying whether reform is needed is problematical. To ensure effective law reform '[one] need[s] to know how law or legal decision-making or legal enforcement really works outside the statute or text book.'²¹⁶ Selznick²¹⁷ and Nonet²¹⁸ argue that positive law is only a small part of the bigger picture; one cannot escape context nor separate positive law and moralities; it is important for us to understand it as a system of values. Therefore, it is necessary to draw on other tools and sources in other disciplines such as feminist theory or empirical research to provide a picture of law in action. This more holistic approach allows the researcher to effectively judge Family Law from inside the legal system as they are able to

²¹¹ M Foucault, *Power/Knowledge* (Random House 1980)

²¹² See e.g. N Luhmann, *Essays on Self-Reference* (Columbia University Press 1990) 11

²¹³ See e.g. G Teubner, (2006) 'The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors' 69(3) *Modern Law Review* 327, 334 -335

²¹⁴ M Freeman, *Lloyd's Introduction to Jurisprudence* (7th edn, Sweet and Maxwell 2001) 685

²¹⁵ M Minow, *Making all the Difference, Inclusion, Exclusion and American Law* (Cornell University Press 1990)

²¹⁶ H Genn, M Partington and S Wheeler *Law in the Real World: Improving Our Understanding of How Law Works* (The Nuffield Foundation 2006) 2

²¹⁷ P Selznick, 'Law in Context Revisited' (2003) 30 *Journal of Law and Society* 177

²¹⁸ P Nonet, 'What is Positive Law?' (1990) 100 *Yale Law Journal* 667

position Family Law²¹⁹ in its social context, which provides a deeper level of understanding of how this area of law works in practice. This is especially important for Family Law which really needs to be socially located in the context of the culture that it operates in. Moreover, Cotterrell argues that the only way to really make sense of legal concepts is by sociological interpretation;²²⁰ 'a question, which cannot be legitimately answered by reference to a statute or judgment, lies outside the doctrinal gaze.'²²¹ Therefore a solely doctrinal analysis (while pivotal in establishing differences between legal systems) would avoid answering the question of how effectively domestic contributions are and should be valued. Instead, a socio-legal approach is necessary to get to the heart of this question.

The use of feminist and empirical methods alongside the doctrinal approach therefore will provide a comprehensive analysis of the four jurisdictions. To provide an assessment of how the law can better value domestic contributions from a feminist perspective, this thesis uses the positions of two divergent feminist commentators as a heuristic device to critique how the different legislative frameworks in England and Wales, Scotland, New Zealand and Australia affect women. Then, the empirical phase will provide a three-dimensional depiction of how the law in each jurisdiction 'functions in reality' from the perspective of legal practitioners.²²² This will give each jurisdiction's background and context; an 'empirical understanding of the law in action helps us to understand society better.'²²³ The combining of feminist methodology alongside empirical methodology is, as Hunter identifies, valuable for 'address[ing] complexity rather than producing simplified and bounded responses to often oversimplified or ideologically driven policy questions.'²²⁴

This chapter shall now explore the three methods that this thesis uses to analyse the four jurisdictions' theoretical and practical issues. First a comparative doctrinal analysis addresses how contributions are valued. Second, a feminist critique considers how satisfactory these different methods of valuing contributions are. The third phase is an analysis of structured interviews with practitioners to consider how satisfactorily the scheme works in practice. This will be followed by focus groups with members of the public in England and Wales to consider how well received these differing approaches would be.

²¹⁹ M Freeman 'Towards a Critical Theory of Family Law' (1985) *Current Legal Problems* 153, 154–155; See also M Freeman (eds), *The State, the Law, and the Family: Critical Perspectives* (Sweet & Maxwell 1984); M Henaghan, 'The Normal Order of Family Law' (2008) 28(1) *Oxford Journal of Legal Studies* 165

²²⁰ R Cotterrell, 'Why Must Legal Ideas be Interpreted Sociologically' (1998) 25 *Journal of Law and Society* 171, 191

²²¹ A Bradney, 'Law as a Parasitic Discipline' (1998) 25 *Journal of Law and Society* 71, 76

²²² M Israel and I Hay, 'Good Ethical Practice in Empirical Research on Law' (UK Centre For Legal Education), Flinders University, Adelaide, Australia <www.ukcle.ac.uk/resources/israel_and_hay.html> accessed 21 November 2009

²²³ H Genn, M Partington and S Wheeler, *Law in the Real World: Improving Our Understanding of How Law Works* (The Nuffield Foundation 2006) 1

²²⁴ R Hunter, 'Would You Like Theory with that? Bridging the Divide between Policy-Oriented Empirical Legal Research, Critical Theory and Politics' (2008) 41 *Studies in Law, Politics and Society* 121, 144

2.2: Methodology

2.2.1 Doctrinal Analysis

A comparative doctrinal approach has been selected as it allows the comparison of differences and similarities between legal institutions and systems²²⁵ and presents a potential tool in domestic law reform by ‘borrowing’ ideas (here concerning how to approach domestic contributions) from other jurisdictions.²²⁶ Özücü argues that ‘borrowing’ and imitating is central to legal reform as the law has limited innovation to be found within itself.²²⁷

These four jurisdictions have each been selected because each has different formulations of how courts should take account of domestic contributions with different formulations of approach and each is different to England and Wales’ wholly discretionary approach. New Zealand’s deferred community-of-property system has an ‘entitlement’ system dividing assets equally,²²⁸ Scotland has a quasi-community-of-property system which also rebalances economic advantages/disadvantages and shares economic burdens;²²⁹ and Australia actively quantifies contributions made throughout the relationship.²³⁰ Furthermore, each jurisdiction treats cohabitants in different ways. Australia and New Zealand have both extended financial provision remedies available on divorce to all same/different-sex cohabitants, and Scotland has a similar but different approach from married couples, rebalancing economic advantages and disadvantages. In the process of the doctrinal comparison, consideration has been given to any influences such as religious laws, international laws and normative orders to gain as complete a picture as possible.

However, commentators have raised concerns²³¹ about the danger of merely comparing jurisdictions and how they differ. Twining²³² observes the difficulty in ranking or statistically comparing jurisdictions but consequently declares that some form of evaluation must take place. Specifically, a review is needed rather than a mere expansion of knowledge²³³ which should also consider factors such as cultural elements to provide an understanding of the

²²⁵ R Banakar and M Travers (eds) *Theory, Method and Socio-Legal Research* (Hart 2005) 240

²²⁶ E Özücü, ‘Law as Transposition’ (2002) 51(2) *International and Comparative Law Quarterly* 205

²²⁷ E Özücü, ‘Law as Transposition’ (2002) 51(2) *International and Comparative Law Quarterly* 205, 206

²²⁸ Under the Property (Relationships) Act 1976

²²⁹ Family Law (Scotland) Act 2006

²³⁰ Family Law Act Cth 1975 Australia

²³¹ See for example E Özücü, ‘Law as Transposition’ (2002) 51(2) *International and Comparative Law Quarterly* 205; G Frankenberg, ‘Critical Comparisons: Re-thinking Comparative Law’ (1995) 26(2) *Harvard International Law Journal* 411 and A Riles, ‘Comparative Law and Socio-Legal Studies’ in M Reimann and R Zimmerman (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 775

²³² W Twining, ‘Mapping Law’ (1999) 50(1) *Northern Ireland Law Quarterly* 12, 36 - 39

²³³ G Frankenberg, ‘Critical Comparisons: Re-thinking Comparative Law’ (1995) 26(2) *Harvard International Law Journal* 411, 441

dynamics of imposition and resistance.²³⁴ For Örüçü²³⁵ and Probert²³⁶ the danger lies in the presumption that legal systems can be copied or 'transplanted' into other jurisdictions, especially where the solutions have grown out of dissimilar legal systems. This danger is because fundamental differences may lie in structure, substance and culture of the jurisdictions which may prevent the scheme that is successful in one context from being equally successful in another. Örüçü calls for a 'transposition' of legal ideas where the legal concepts are in effect 'tuned' into these respective jurisdictions.²³⁷

Additionally, Cotterrell felt that to determine the success of 'legal transplantation' and to aid transposition, consideration must be given to the four communities of law²³⁸ including the 'affective community'. This community relates to family life which Cotterrell feels is 'especially relevant in considering organisational problems...for example in marriage and divorce, inheritance in families, and sexual and fiduciary relations.'²³⁹ Consequently, although all four jurisdictions share common law history, due attention must be given to subtle differences which lie in the different countries. Therefore, each chapter explores the comparative similarities and differences which arise in each jurisdiction examined within this thesis. Furthermore, the focus groups offer fundamentally important insight into how individuals will respond to these bigger societal changes affecting how law in this area should react in England and Wales.

2.2.2 Feminist Critique

As discussed, within feminism there are contrasting positions on how domestic contributions should be valued in law and these are used as lenses to analyse the subject matter within this thesis. This section therefore sets out the heuristic devices that shall be used to critique the jurisdictions in this study. To do so, this part shall first explain why feminist methodology is being used by justifying why this is a women's issue and what the feminist method of 'asking the woman question' entails. This section then explores the current gulf in feminist theory relating to the public/private divide, before explaining how the positions of Fineman and Deech embody this debate and subsequently how they are to be used as lenses throughout this thesis.

²³⁴ A Riles, 'Comparative Law and Socio-Legal Studies' (2006) in M Reimann and R Zimmerman (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 775

²³⁵ E Örüçü, 'Law as Transposition' (2002) 51(2) *International and Comparative Law Quarterly* 205,

²³⁶ R Probert, 'From Lack of Status to Contract: Assessing the French Pacte Civil de Solidarite' (2001) 23(3) *Journal of Social Welfare and Family Law* 257, 266 - 267

²³⁷ E Örüçü, 'Law as Transposition' (2002) 51(2) *International and Comparative Law Quarterly* 205, 222

²³⁸ R Cotterrell, 'Is There a Logic of Legal Transplants' in D Nelken and J Feest (eds), *Adapting Legal Cultures* (Hart 2001) 71, 82 - 84

²³⁹ R Cotterrell, 'Is There a Logic of Legal Transplants' in D Nelken and J Feest (eds), *Adapting Legal Cultures* (Hart 2001) 71, 83

2.2.2.1 Justifying Feminism: Is this a Woman's Issue?

The gulf between unmarried and married couples/civil partnerships and the financial awards made on relationship breakdown can, for the most part, be attributed to the way in which the law values domestic contributions. In the cohabitation context where Property Law applies, no recognition to the non-financial role is given,²⁴⁰ and conversely, in the married and civil partner context, *White*²⁴¹ established that financial and domestic contributions are to be given equal weighting. Thus, while financial contributions are a pivotal point in determining financial provision for both relationship types on breakdown, it seems that the law is in fact sending out very different messages about how domestic contributions should be recognised, if at all. As Eekelaar contends,²⁴² the law is therefore making different assumptions about the way that roles are divided according to relationship status, with marriage having a social bargain of a gendered homemaker/ breadwinner divide whereas in the cohabitation context there is the presumption that the relationship is more equal and less gendered.

Yet, women are responsible for the bulk of domestic tasks in both the marriage and cohabitation context²⁴³ and research has demonstrated that women complete 19 hours of housework a week compared to the men's average of 5.5 hours.²⁴⁴ Furthermore, while women are dominant in the execution of household tasks, they are less dominant in the labour market. This is despite the number of women in employment being just shy of men;²⁴⁵ for men still earn an average 10.2% more than the average woman²⁴⁶ and women are far more prevalent in lower-wage jobs and the part-time sector.²⁴⁷ Additionally, women are most likely to be out of employment because of their commitments within the family home.²⁴⁸

Additionally, the increase in women's participation in the labour force, and therefore in the number of hours women take up in employment, has not been met by a diminution in the number of hours women spend on domestic labour. Instead, women are carrying out dual roles of breadwinning and homemaking, whereas men still predominantly remain in the

²⁴⁰ See *Burns v Burns* (1984) Ch. 317 and *Stack v Dowden* [2007] UKHL 17, [2007] 1 FLR 1858

²⁴¹ *White v White* [2000] 2 FLR 981

²⁴² J Eekelaar, 'Uncovering Social Obligations: Family Law and the Responsible System' in M MacLean (eds), *Making Law for Families* (Hart 2000) 16

²⁴³ R Crompton and C Lyolette, 'Who does the Housework? The Division of Labour within the Home' in A Park, J Curtice, K Thomson, M Philips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage Publications 2008) 52, 74 - 75

²⁴⁴ X Ramos, 'Domestic Work Time and Gender Differentials in Great Britain 1992-1998' [2003] *International Journal of Manpower* 265

²⁴⁵ 13.6 million women to 16 million men. National Statistics (2009) 'Labour Market' *Social Trends* 39 (ONS 2009) Chapter 4, 47

²⁴⁶ National Statistics *Statistical Bulletin: 2010 Annual Survey of Hours and Earnings* (ONS 2010) 6

²⁴⁷ There are nearly five times as many part-time women as men. National Statistics (2009) 'Labour Market' *Social Trends* 39 (ONS 2009) Chapter 4, 47

²⁴⁸ National Statistics (2009) 'Labour market' *Social Trends* 39 (ONS 2009) Chapter 4, 59

breadwinner role.²⁴⁹ Moreover, child-care responsibilities often result in women selecting jobs that fit most conveniently around these duties. Consequently, women take up a higher amount of part-time roles²⁵⁰ than men as their ability to enter employment is heavily affected by their ability to arrange private childcare. This occurs regardless of relationship status.²⁵¹ Furthermore, childcare is consistently an area where the distinction between sex and gender is often blurred. Women's physical ability to bear children and the consequent legal structure that surrounds having children which is strongly linked to sex (such as maternity leave) in fact perpetuates the gendered social norms that identify women as care-givers. This all denotes that the approach taken towards recognising domestic contributions is a women's issue. Women, therefore, are construed as homemakers, and are typically more economically disadvantaged as a result of caregiving work and consistently end up poorer on relationship breakdown than their male counterparts.²⁵²

This contrasts with the Scandinavian welfare model,²⁵³ often described as 'women friendly',²⁵⁴ which has strong provision for childcare and therefore reduces the need for women to fit work around their home lives.²⁵⁵ As a result of these 'women friendly' policies, women take on more fulltime employment²⁵⁶ and thus Scandinavian domestic partnerships can realistically be more egalitarian.²⁵⁷ The Scandinavian system demonstrates that there is a correlation between women's economic activity and how the state regulates domestic activities and childcare. This strengthens the argument that the question of how to value domestic contributions is a women's issue; it is fundamentally women's lifestyles that will be most greatly affected.²⁵⁸

Accordingly, it seems that by valuing domestic contributions schizophrenically, where the married homemaker is eagerly compensated for her commitment to the family sphere

²⁴⁹ R Crompton and C Lyonette, 'Who Does the Housework? The Division of Labour within the Home' in A Park, J Curtice, K Thomson, M Philips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage 2008) 52, 74 - 75

²⁵⁰ There are nearly five times as many part-time women as men. National Statistics (2009) 'Labour Market' *Social Trends* 39 (ONS 2009) Chapter 4, 47

²⁵¹ R Crompton and C Lyonette, 'Who Does the Housework? The Division of Labour within the Home' in A Park, J Curtice, K Thomson, M Philips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage 2008) 52, 74 - 75

²⁵² S Jenkins, 'Marital Splits and Income Changes Over the Longer Term' in M Brynin and J Ermisch (eds), *Changing Relationships* (Routledge 2009)

²⁵³ This includes Denmark, Finland, Norway, and Iceland. Although these have differences, they have an overarching similar fundamental basis.

²⁵⁴ S Johansson and K Andersson, 'Diversity – A Challenge to the Scandinavian Care Regime?' (2008) 4(2) *Forum on Public Policy Online* 1 <www.forumonpublicpolicy.com> accessed 1 August 2009

²⁵⁵ S Johansson and K Andersson, 'Diversity – A Challenge to the Scandinavian Care Regime?' (2008) 4(2) *Forum on Public Policy Online* 1 <www.forumonpublicpolicy.com> accessed 1 August 2009

²⁵⁶ 'The percentage of women in paid work was particularly high in the Scandinavian states (Denmark, 73.2%; Sweden, 71.8%; and Finland 68.5%) and in the Netherlands (69.6%)'. Taken from M Latham, 'EU's Employment Rate Edges up to 65%' (22 July 2008) <<http://www.europeanvoice.com/article/2008/07/2127/eu-s-employment-rate-edges-up-to-65-/61807.aspx> European voice.com> accessed 12 October 2009

²⁵⁷ J Bonke, M Deding, M Lausten and LS Stratton, 'Intra-Household Specialization in Housework in the United States and Denmark' (2008) 89(4) *Social Science Quarterly* 1023, 1041

²⁵⁸ 'Finland, followed by Sweden, also had the distinction of having the narrowest gaps between male and female employment, 3.6 points in the case of Finland and 4.7 points in Sweden's'. Taken from M Latham, 'EU's Employment Rate Edges up to 65%' (22 July 2008) <<http://www.europeanvoice.com/article/2008/07/2127/eu-s-employment-rate-edges-up-to-65-/61807.aspx> European voice.com> accessed 12 October 2009

compared to the unmarried homemaker whose contributions are ignored, the Law is in fact dividing women into hierarchical groups, with married women placed largely at the top of the ladder. This consequently is generating concerns that, rather than recognising the actual worth of these contributions, the law is basing its financial provision on unfounded assumptions. These are arguably reinforcing gender stereotypes in both contexts. In the cohabitation context, as the law ignores domestic contributions and instead gives weight to financial contributions, the presumption is that cohabiting couples are more egalitarian, acting with financial rationality. This disadvantages cohabiting women as it fails to recognise the precarious economic position that often accompanies the gendered homemaking role. In comparison, in the married context, the law presumes that there is a more traditional division of relationship roles and therefore the law encourages a family structure based on the homemaker/breadwinner model. This places women in a vulnerable position by encouraging a financial dependency on their male partners, consequently discouraging women from the public sphere.²⁵⁹ The different ways of valuing domestic contributions send out confusing signals that do not appear to reflect empirical evidence. Yet, should the law promote financial autonomy and value domestic contributions less to try and encourage women to take a more active role in the public sphere and thus become more financially independent? Essentially should the law be working against socially constructed ideas of gender roles or should it be recognising this gendered disadvantage and accordingly protecting those who act within the private sphere? Furthermore, should the Law intervene at all in the cohabitation context and if so, should it be treated analogously with marriage?

This is an especially urgent question given that current family policy in England and Wales seems to be heading towards a more autonomous, self-regulating approach (often termed as a third-way egalitarian approach) of enabling self-provision.²⁶⁰ The courts have recently given pre-nuptial agreements much greater weight in ancillary relief proceedings²⁶¹ and both the Conservatives' *Every Family Matters*²⁶² and Labour's *Supporting Families*²⁶³ policy documents indicate definitive moves towards less state intervention and a greater element of expectation on the individual's responsibility to act as an independent economic actor. Therefore, it is vital at this juncture to determine whether this is in fact in the best interests of women. On the one hand, it is important to be mindful of concerns that feminist methods can tend to be ethno-

²⁵⁹ J Brophy and C Smart (eds), *Women in Law: Explorations in Law, Family and Sexuality*, (Routledge and Kegan Paul 1985)

²⁶⁰ Family Law Review *Breakthrough Britain: Every Family Matter* (Centre for Social Justice 2009) See Section 6, 6.1 and 6.2 of *Every Family Matters*. In particular, page 202 presents a desire to prevent homemakers through on-going support to be able to remain within the home post-separation. Furthermore, there is an emphasis on contract to regulate financial arrangements.

²⁶¹ *Radmacher v Granatino* [2010] UKSC 42

²⁶² Family Law Review *Breakthrough Britain: Every Family Matters* (Centre for Social Justice 2009) section 6, 6.1 and 6.2

²⁶³ Home Office *Supporting Families: A Consultation Document* (Stationary Office 1998) Section 4 of this document aims to reduce conflict post-separation. At 4.47 they state that they want less legislation regulating this sphere.

centric and over-generalising by not taking into account the various differences that exist amongst women according to socio-economic backgrounds, or cultural and racial differences.²⁶⁴ Nevertheless, feminism is still a useful mechanism that provides a theoretical basis for research which specifically questions the relationship between Law and gender and thus exposes potential bias. In doing so, a feminist methodology provides new understandings of the Law's limits and potential reform opportunities to attain greater gender equality.²⁶⁵ Feminism, therefore, in the context of my research design, provides a tool to consider how the different schemes in England and Wales, Scotland, New Zealand and Queensland, Australia affect the interests of women.

2.2.2.2 *Asking the Woman Question*

Feminism is, as Dalton explains, 'dedicated first, to describing women's subordination...; second to asking both *how*...and *why*...women continue to occupy this position; and dedicated third to change.'²⁶⁶ Bartlett contends that feminist inquiries use three main methods:²⁶⁷ feminist practical reasoning, consciousness-raising and asking the woman question. Of these three major methodologies, asking the woman question seems to be most suitable for this thesis' research question. While both consciousness-raising and feminist practical reasoning could contribute to this area, they tend to draw on more empirical questions which aim to expand knowledge on women's lived experiences and the way that they reason differently from men.

Asking the woman question essentially considers the gender implications of a social practice or rule, exposes bias by confronting the assumption of neutrality and addresses exclusion.²⁶⁸ Largely concerning the social position of women, this feminist method therefore moves beyond the external question of 'what' the Law consists of and instead delves deeper into an analysis of implicit cultural norms and gendered constructs that are embedded within the legal doctrine. Accordingly, this critique asks whether women's values and experiences are overlooked or neglected by the law, thus disadvantaging and/or subordinating women.²⁶⁹ Asking the woman question can therefore reveal whether the law of financial provision on relationship breakdown in each jurisdiction best serves the interests of women or whether it in fact overlooks or discriminates against women. This is essentially a textual analysis which

²⁶⁴ M Malik, 'The Branch on Which We Sit': Multiculturalism, Minority Women and Family Law' in A Diduck and K O'Donovan (eds), *Feminist Perspectives on Family Law* (Routledge: Cavendish 2006) 189, 212 - 213

²⁶⁵ R Hunter, 'Would You Like Theory with that? Bridging the Divide between Policy-Oriented Empirical Legal Research, Critical Theory and Politics' (2008) 41 *Studies in Law, Politics and Society* 121; K Bartlett and R Kennedy, *Feminist Legal Theory: Readings in Law and Gender* (Westview Press 1991) 121, 144

²⁶⁶ C Dalton, 'Where We Stand: Observations on the Situation of Feminist Legal Thought' (1987) 3 *Berkeley Women's Law Journal* 1, 2 - 3

²⁶⁷ A Bartlett, 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829, 830

²⁶⁸ A Bartlett, 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829, 830

²⁶⁹ A Bartlett, 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829, 873 - 974

includes identifying the gendered nature of the language of law as well as considering the aims and the role of the law, and its theoretical implications for the interests of women. Therefore this approach allows for a direct comparison of the black letter law and its gendered implications in each country under examination in this thesis. Yet, what shape should the inquiry into the legal systems take and how do feminist opinions divide over the route to reform?

2.2.2.3 *The Public/Private Divide*

Pateman describes the public/private debate as being 'ultimately what the feminist movement is about.'²⁷⁰ This feminist inquiry examines the ideological divide between the public sphere (the market, the state and the political arena) and the private sphere (the family and the home). While both spheres are inhabited by both sexes on a daily basis (which blurs the boundaries between the two),²⁷¹ the divide is inherently gendered, with women being most inclined to remain within the domestic sphere. Subsequently, and as the aforementioned statistics demonstrate,²⁷² women are less engaged with the labour force and consequently are often in an economically disadvantaged position in comparison with their male counterparts. This inquiry therefore examines and challenges the boundaries between these two spheres in a bid to reduce these apparent inequalities. Yet, within this area, distinct schools of feminist thought have opposing views on the stance that law reform should take. In particular, opinions differ on how far matters regarding the private home-life should remain outside of the law's control. Essentially, this can be equated to the polarities of autonomy and protection, independence and dependence: those who value the importance of a woman's ability to remain autonomous in her home (and economic) life, and thus her ability to privately order her affairs as she chooses, versus the extent to which this must, or should be sacrificed to ensure that woman's voice is adequately represented within the public sphere.²⁷³ The public/private debate is the 'struggle of recognising motherhood versus avoiding the institutionalised violence of patriarchal motherhood.'²⁷⁴

There are three core feminist schools of thought which conflict within this debate.²⁷⁵ liberal feminists, radical feminists and cultural feminists. For liberal feminists such as Deech and

²⁷⁰ C Pateman, *The Disorder of Women* (Polity Press 2003) 118

²⁷¹ S Baker, 'Risking Difference: Reconceptualising the Boundaries between the Public and Private Spheres' in S Baker and A van Doorne-Huiskes (eds), *Women and Public Policy: The Shifting Boundaries Between the Public and Private Spheres* (Athenaeum Press 1999) 6-7

²⁷² See text and notes 249 - 248 above

²⁷³ M Freeman, *Lloyd's Introduction to Jurisprudence* (7th edn, Sweet and Maxwell 2001)

²⁷⁴ M Stacey, 'Social Sciences and the State: Fighting Like a Woman' in E Gamarnikow, D Morgan, J Purvis and D Taylorson (eds), *The Public and The Private* (Heinemann 1983)

²⁷⁵ This is by no means an exhaustive list of the divisions of feminist schools of thought.

Pateman,²⁷⁶ the key to solving gender inequalities is by recognising autonomy and choice. Women are rational individuals, as rational as men, and therefore have the ability to decide how to order their relationships and whether they assume a role within the private or public sphere. Therefore, the law should treat men and women the same, encouraging women to engage more in the public sphere; there should be some basic level of essential sameness contained within the law.²⁷⁷ To 'offer state protection' that interferes in the private realm presents women as weak and disadvantaged and consequently would contradict public freedom and equality.²⁷⁸ For liberal feminists, 'protection [is] the polite way to refer to subordination'²⁷⁹ and it reinforces patriarchal values of the 'woman' as the protective remedy is only available to those women who conform to their 'traditional' function within the domestic sphere. Williams contends that male and female stereotypes within the law must be challenged and instead their similarities must be stressed; the female should not be simply reduced to the mother.²⁸⁰ Here, differential treatment such as valuing domestic contributions perpetuates socially constructed gendered roles. It would enforce patriarchal ideals by accentuating dissimilarities between the sexes and thus legitimising women's disadvantage from remaining in the private, domestic sphere.²⁸¹ Therefore, valuing domestic and financial contributions equally is to re-embolden and perpetuate gender stereotypes which prevent women from extending beyond the private sphere; it encourages gendered dependency rather than empowering women.

At the other end of this debate, 'radical' and 'cultural feminists both argue that the law needs to intervene to achieve gender equality, and to do so it needs to lessen or at least change the boundaries of the public/private divide. For radical feminists, the divide is about power relations, where male work in the public sphere is valued and female work in the private sphere is ignored. MacKinnon argues that the public/private divide is a way of dominating women, stating that 'an equality question is a question of the distribution of power'.²⁸² She takes the view that patriarchy and public oppression has its roots in the family, stemming from social concepts of reproduction and sexuality.²⁸³ For some radical feminists, the extension of state control into the private sphere will then merely be an extension of patriarchal power.

²⁷⁶ This echoes some of the aforementioned equality arguments.

²⁷⁷ J Flax, 'Beyond Equality: Gender, Justice and Difference' in G Bock and S James (eds), *Beyond Equality and Difference: Citizenship, Feminist Politics and Female Subjectivity* (Routledge 1992)

²⁷⁸ C Pateman, *The Disorder of Women* (Polity Press 2003) 185

²⁷⁹ C Pateman, *The Disorder of Women* (Polity Press, 2003) 185

²⁸⁰ W Williams, 'The Equality Crisis: Some Reflections on Culture, Courts and Feminism' in L Nicholson (eds), *The Second Wave: a Reader in Feminist Theory* (Routledge 1997) 15, 28

²⁸¹ W Williams, 'The Equality Crisis: Some Reflections on Culture, Courts and Feminism' in L Nicholson (eds), *The Second Wave: a Reader in Feminist Theory* (Routledge 1997) 15, 22 - 23

²⁸² C MacKinnon, 'Difference and Dominance: On Sex Discrimination' in M Freeman (eds), *Lloyd's Introduction to Jurisprudence* (7th edn, Sweet and Maxwell 2001) 1175, 1180

²⁸³ C MacKinnon, 'Difference and Dominance: On Sex Discrimination' in M Freeman (eds), *Lloyd's Introduction to Jurisprudence* (7th edn, Sweet and Maxwell 2001) 1175, 1179 - 1180

Similarly, there is a concern that treating men and women according to similar idealised standards (that in the same way as men, women must become equal economic actors within the public sphere) by getting women to match male characteristics is another way of exerting control as women are pushed into these male determined boundaries and thus controlled within the public sphere.²⁸⁴ Therefore, women must conform to more masculine characteristics in their everyday working lives to succeed. For Imray and Middleton,²⁸⁵ it is necessary for the law to intervene to redefine structures and limit female subordination. There must, and can be a neutral 'equal' ground between men and women that is different from our current starting point of sex and gender, which recognises some differences, and some similarities.

For difference feminists, great weight is placed on that which is essentially feminine; they argue that there are qualities or characteristics that are inherently female and which differ from that inherently male characteristics. Often drawing on the work of psychologist Carol Gilligan's *In a Different Voice*,²⁸⁶ this body of feminists argue that there are fundamental differences between women and men. In this study, Gilligan demonstrates that men and women speak different moral languages; women's voice embodied 'the truth of an ethic of care, the ties between relationship and responsibility, and the origins of aggression in the failure of connection.'²⁸⁷ Yet, men instead placed a higher value on rights and an ethic of justice. This ethic of justice which 'proceeds from the ethic of equality' differs from the ethic of care which rests on the premise of non-violence – that no one should be hurt – and is based on connections and relationships rather than separation and abstraction.²⁸⁸ It is this ethic of care that should be included within our own system of justice. Accordingly, the goal of difference feminists 'is to give equal recognition to women's moral voice of caring and communal values.'²⁸⁹ Fineman adopts the approach and argues that care-giving relationships, rather than sexual relationships, should be at the centre of Family Law.²⁹⁰ West in fact argues for a connection thesis, one that recognises that 'women are actually or potentially materially

²⁸⁴ L Imray and A Middleton, 'Public and Private: Making the Boundaries in E Gamarnikow, D Morgan, J Purvis and D Taylorson (eds), *The Public and The Private* (Heinemann 1983)

²⁸⁵ L Imray and A Middleton, 'Public and Private: Making the Boundaries in E Gamarnikow, D Morgan, J Purvis and D Taylorson (eds) *The Public and The Private* (Heinemann 1983)

²⁸⁶ C Gilligan, *In a Different Voice* (3rd edn, Harvard 2001) 173

²⁸⁷ C Gilligan, *In a Different Voice* (3rd edn, Harvard 2001) 173

²⁸⁸ C Gilligan, *In a Different Voice* (3rd edn, Harvard 2001) 174

²⁸⁹ 'Feminist Jurisprudence: An Overview (*Legal Information Institute*) <http://topics.law.cornell.edu/wex/feminist_jurisprudence> accessed 9 October 2008

²⁹⁰ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995). This is discussed at length in section 2.2.2.4

connected to other human life.²⁹¹ Thus, there is a consensus that a difference lies between men and women.

Consequently, for difference feminists such as Baker, the public/private divide legitimises a double role for women²⁹² as it does not recognise that women do have gendered lifestyles. Lacey furthers this argument stating that the public/private divide allows the government to effectively clean its hands of responsibility²⁹³ and consolidates the *status quo*, as the term 'private' essentially implies that the private sphere is outside the influence of both the state and market relations.²⁹⁴ A lack of recognition of the 'private' sphere means that women are marginalised as they are no longer at the forefront of the debate.²⁹⁵ Therefore, little recognition of the value of domestic contributions (the traditional female role) in a relationship means that women's rights within the home are restricted compared to that of males. Therefore, to redress the imbalance and ensure women have a say in their everyday lives, the law must regulate the 'private' and recognise (along with the rest of society) the weight and impact of such domestic contributions.

These three schools of feminist thought clearly have different perceptions on how gendered inequalities brought about through women's economic disadvantage in the private sphere should be approached. For liberal feminists the public/private barriers should remain: the private sphere should stay private where people can order their family life as they choose. Instead the focus should be on discouraging women from choosing a role that is based in the private sphere; women need to start engaging more within the public sphere. For radical feminists it is about completely redefining structures and the public/private divide based on new social values. Finally, difference feminists argue that there should be greater state intervention in the private sphere in order to protect women by taking account of gendered differences that give rise to the economic disadvantages. Consequently, there is no clear consensus that can be drawn from this debate on the approach that financial provision on relationship breakdown should take and whether contributions made in the private sphere should be recognised to protect those in financially weaker positions.

This thesis therefore sets out to determine the most appropriate way for Family Law to value domestic contributions at the end of a relationship. In order to provide greater insight on this matter, this project uses the divergent stances of Ruth Deech (who represents liberal

²⁹¹ R West, 'Jurisprudence and Gender' (1988) 55(1) *The University of Chicago Law Review* 1, 12

²⁹² S Baker, 'Risking Difference: Reconceptualising the Boundaries between the Public and Private Spheres' in S Baker and A van Doorne-Huiskes (eds), *Women and Public Policy: The Shifting Boundaries Between the Public and Private Spheres*, (Athenaeum Press 1999) 6-7

²⁹³ N Lacey, 'Theory into Practice? Pornography and the Public/Private Dichotomy' (1993) 20 (1) *Journal of Law and Society* 93, 97

²⁹⁴ M Freeman, *Lloyd's Introduction to Jurisprudence* (7th edn, Sweet and Maxwell 2001) 1130

²⁹⁵ M Freeman, *Lloyd's Introduction to Jurisprudence* (7th edn, Sweet and Maxwell 2001) 1131

feminists) and Martha Fineman (who represents cultural feminists), who embody the polarised positions within this debate, to formulate a heuristic device that shall be used to analyse the jurisdictions in the following chapters. (The radical feminist position is not used as a lens here given that it calls for a fundamental restructuring of the public/private divide and is beyond the remit of this thesis.) These jurisdictions have been selected as they give Fineman and Deech's feminist positions a practical framework of effect. They each value domestic contributions differently and consequently align in varying degrees with these divergent feminist stances (discussed below).²⁹⁶ Therefore, this feminist critique (using Fineman and Deech as the lenses) will gauge the practical gender implications and expose any bias or exclusion within the schemes and ask whether one feminist approach is more appropriate than the other in practice or whether a compromise can be achieved between the two.

2.2.2.4 The 'Fineman' and 'Deech' Lenses

As addressed above, the public/private debate essentially concerns a division between autonomy and protection and this section draws predominantly on the clash between liberal and difference feminist aims exemplified through the contrasting viewpoints of Ruth Deech and Martha Fineman. Deech and Fineman are directly concerned with the regulation of the family in law and the level of state intervention that is required to remove gender inequalities from within the private sphere. Deech's focus is on Family Law within England and Wales and her argument presented here is taken from a series of journal articles and lectures where she critiques the current system. Her primary argument represents the liberal notions that the private sphere should remain private, autonomy should be protected and women are capable of engaging within the public sphere and should not be discouraged from doing so. In contrast, Fineman's work critiques American political dialogue and legal regulation and proposes reform options for the family in American society. For the purpose of this thesis, two of her works are being used to set out her argument: *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies*²⁹⁷ and *The Autonomy Myth: A Theory of Dependency*.²⁹⁸ The central elements of her thesis argue that the recognition of the family in law should be centred on care-giving relationships and not relationship status, as dependency arises from the care-dyad, and that the public sphere, the state and the market has a collective responsibility for this dependency. A detailed examination of both commentators will provide a comprehensive comparison of the fundamental differences between these two feminist schools of thought. Furthermore, by presenting their arguments in a deliberately reductive form designed to

²⁹⁶ Discussed below at page at section 2.2.2.4.3

²⁹⁷ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995)

²⁹⁸ M Fineman, *The Autonomy Myth: A Theory Of Dependency* (New Press 2004)

encapsulate the key differences in their standpoints of greatest significance to legal developments in this sphere, this thesis will create a heuristic device which will be used to analyse the jurisdictions explored within this thesis. This provides an original lens through which to judge the operation of the four jurisdictions and provides a platform for discussing reform.

2.2.2.4.1 Deech's Position

Deech's stance (as aforementioned) reflects the liberal feminist position which holds that autonomy and financial independence (and therefore self-sufficiency) is the key to gender equality. Deech argues that women are as capable as men of acting with legal rationality and independent thought and she vehemently opposes the image of the vulnerable, weak woman who is compelled to remain in the domestic sphere against her own wishes. It is the shift in women's position²⁹⁹ through education, political status and participation in the workforce which, in Deech's eyes, means that women can and should be treated equally to men without any concession to their choice to take on a childcare/homemaker role. To have a system which 'recognises' contributions traditionally made by women in the private sphere would remove the idea that women are capable of choosing their own lifestyles.³⁰⁰

Consequently, Deech promotes the liberal values of 'voluntarism' or 'choice'. Therefore, she argues that as women are equal to men and should be treated so, they should be accountable for the choices that they have made in accordance with their own free will. Deech accordingly argues that women who do not engage in the economic sphere have failed (rather than being prevented from doing so) and that 'failures in those fields do not mean that the divorcing husband is responsible for them.'³⁰¹ To have a state imposed solution removes some of the power and freedom that women have in the private realm, to organise their own affairs and choose how to carry out their day-to-day roles and how to have their assets and childcare divided on relationship breakdown. This, in turn, perpetuates the concept that women are unable to be rational in comparison to men. Their choice to give up economic employment is 'a free choice to opt for the home rather than the office'³⁰² and therefore women should take the financial consequences of having made this decision. Accordingly, to have greater state regulation within the private sphere would compromise gender equality by perpetuating gendered stereotypes; 'female dependency tends to deny freedom of choice'.³⁰³ However,

²⁹⁹ Or 'background conditions' as Fineman refers to below in section 2.2.2.4.2

³⁰⁰ R Deech, 'The Case Against the Legal Recognition of Cohabitation' (1980) 29 *International and Comparative Law Quarterly* 480, 486

³⁰¹ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1142

³⁰² R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1142

³⁰³ R Deech, 'The Principles Against Maintenance' (1977) 7 *Family Law* 229, 230

Deech's position freely ignores the 'irrational' desire to care for the family at the expense of woman's own career. Furthermore, it fails to consider the couples' joint benefits relating to the child welfare or from avoiding the practical difficulties of finding quality childcare.

Maintenance provisions at the end of a relationship (in stark contrast to Fineman's perspective where they may provide some way of equalising resources between unequal family members³⁰⁴) therefore pose serious difficulties for Deech. Her primary concern is that recognising and quantifying domestic contributions or the homemaking position will legitimise the perception of the homemaker's role as being inherently feminine.³⁰⁵ To do so would, from Deech's position, be counterproductive to gender equality in two ways: deterring women from engaging with the public sphere and limiting gender equality in the public sphere.

Firstly, using her rationale, maintenance will persuade women out of the working environment to choose a legitimised lifestyle characterised by financial dependence:

*It is actually considered degrading to women...and perpetuates the common law proprietary relationship of the husband and wife even after divorce...*³⁰⁶

Deech describes extensive maintenance provisions as essentially punishing husbands while at the same time rewarding women for assuming the stereotypical gendered role by carrying out domestic contributions and caretaking. This fundamentally encourages the development of a 'meal-ticket' attitude, making it more beneficial for women to remarry than to find work.³⁰⁷ Deech also fears that the valuing of domestic contributions will create an easier route for women and encourage 'gold-digging' as it would essentially make the homemaker 'exempt from financial responsibility for the family.'³⁰⁸ This in turn serves to reinforce stereotypes of male superiority and increases hostility between former husbands and wives.³⁰⁹ Deech argues that the theory of compensation behind this (that there is a need to compensate non-monetary contributions and handicaps in the labour market) is erroneous given that for:

*...most women work, [caretaking] is a matter of choice; childcare does not take up the whole of a long marriage...*³¹⁰

The dependency that Fineman discusses below is therefore from Deech's perspective temporary and fleeting. Furthermore, carrying out domestic work is to some extent self-

³⁰⁴ See below

³⁰⁵ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1142

³⁰⁶ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1142

³⁰⁷ R Deech, 'The Principles Against Maintenance' (1977) 7 *Family Law* 229

³⁰⁸ R Deech, 'The Principles Against Maintenance' (1977) 7 *Family Law* 229. This was in the context of marriage and divorce, but it echoes her concerns that women should not be encouraged to be supported by their male partners.

³⁰⁹ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1142

³¹⁰ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1142

interested as housework, whether single or cohabiting, must be done.³¹¹ Deech therefore argues that instead the law ought to be promoting the principle that women should and can strive for economic independence to limit the subordination of their sex through a dependency on male finance.

Her second argument is that state interference in the private sphere may actually defeat the progress made for gender equality in the public sphere. She argues that economic disadvantages suffered by wives should not be shouldered solely by the husband and actually large awards to rich women serve to further disadvantage the low paid married working woman. These sorts of awards legitimise employers' attitudes that discriminate against women 'as they are aware of the meal-ticket-for-life mentality.'³¹² Consequently, Deech wants the private sphere to stay just that: private.

Deech therefore wants to see an end to discretion-based financial provision at the end of relationships and instead a greater recognition of autonomy by enforcing the use of pre- and post- nuptial contracts between couples. Where there is no contract, Deech favours the continental community-of-property approach of formally dividing narrowly defined matrimonial property³¹³ between the couple. Short term marriages of three years or less should be returned to the position that they were in before they married. Those with children, or small assets should be allowed to remain in the home until the children are 18. Maintenance from Deech's position should be eliminated except where children are present or the spouse is unable to work and should aim solely to be rehabilitative to enable financial autonomy post-divorce.³¹⁴ Therefore, she prioritises formal equality and certainty in a bid to 'reduc[e] costs and promot[e] negotiation in a better spirit.'³¹⁵ This is in stark contrast to Fineman's perception that equality of resources should be the focus of any post-separation financial provision.

Deech's choice and autonomy arguments also extend to her views on cohabiting couples. While Fineman maintains that all care-givers should be treated the same,³¹⁶ for Deech, treating cohabitants synonymously with married couples is dangerous. Firstly, they are different entities; cohabitants have chosen not to marry and cohabitants have no outward signs of

³¹¹ R Deech, 'The Case Against the Legal Recognition of Cohabitation' (1980) 29 *International and Comparative Law Quarterly* 480, 486 - 487

³¹² R Deech, 'It's Time to Update our Divorce Laws' (*The Guardian*, 15 September 2009)

<<http://www.guardian.co.uk/commentisfree/2009/sep/15/divorce-law-maintenance-update>> accessed 29 September 2009

³¹³ Premarital assets should be excluded, especially when the parties are older or have been previously married, and so should legacies and gifts. R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1143

³¹⁴ A Diduck and F Kagnas, *Family Law, Gender and the State: Texts, Cases and Materials* (2nd edn, Hart 2006) 240

³¹⁵ R Deech, 'What's a woman worth?' (2009) 39 *Family Law* 1140, 1142-3

³¹⁶ Again, see below at section 2.2.2.4.2

commitment³¹⁷ and so are unstable.³¹⁸ Therefore, to protect them using the same legal measures as married couples would be unfounded as both the spouse and the cohabitant have different expectations; cohabitants, she assumes, have freely chosen not to marry and thus should forego any benefits on relationship breakdown, whether it be to retain benefits from not being married or to avoid the legal consequences of marriage. Cohabitants' choice not to marry (and correspondingly their responsibility for the consequences of this) should be respected and 'there should be a corner of freedom where couples may escape Family Law with all its difficulties.'³¹⁹ Deech therefore argues that to have specific cohabitation law interferes with the rights of the individual: 'autonomy, privacy, a sphere of thought and action that should be free from public and legal interference, namely the right to live together without having a legal structure imposed on one without consent or contract to that effect.'³²⁰

Secondly, Deech fears that extending remedies on divorce to the cohabiting context (particularly in their current state) would 'retard the emancipation of women' as it would enforce regulation based on entrenched gendered stereotypes. Furthermore, it would encourage women to take an easier path, to become 'gold-diggers':

*What message would such a Bill give to young girls contemplating further education, when it opens the way to huge hand-outs to women who have been fortunate enough to live with a rich man for a while, while others, equally deserving, will get nothing at the end of a relationship because there are no assets available to be shared?*³²¹

Consequently, Deech argues that cohabiting contracts should be recognised and enforced to 'build on [cohabitants'] autonomy rather than take it away.'³²² Deech does not want to reinforce gender stereotypes and consequently wants to avoid the homemaker/breadwinner presumption that she feels is present in the marital context. Yet, she argues that, if necessary, the extension of Schedule 1 of the Children Act 1989 may be appropriate³²³ to ensure that cohabitants are responsible for their children while at the same time respecting their autonomy.³²⁴ Currently, having a system which does not protect financial autonomy may dissuade couples (particularly those with big assets) from marrying. However, Deech argues

³¹⁷ See R Deech, 'The Case against the Legal Recognition of Cohabitation' (1980) 29 *International and Comparative Law* 480, 485

³¹⁸ S Daniels and A Elhage, 'Living Together: How Cohabitation Undermines Marriage and the Family' (North Carolina Family Policy Council, 1992) <<http://ncfamily.org/PolicyPapers/Findings%200506-Cohabit.pdf>> accessed 12 June 2007

³¹⁹ R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 41

³²⁰ R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 41

³²¹ This is in reference to the proposed extension of legal remedies to cohabitants in the Cohabitation Bill 2009, R Deech 'Cohabitation' (2010) 40 *Family Law* 39, 43

³²² R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 43

³²³ Which forces parents to pay periodical payments, lump sums or property transfers to the carer of the child until that child leaves education. This is discussed further in Chapter 6.

³²⁴ R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 43

that as the most stable place for children is within a marriage, it is important to not have a legal structure in place that will deter people from marriage.³²⁵

2.2.2.4.2 Fineman's Position

Fineman has a fundamentally different perspective on what the relationship between the state and the family should be. Like Deech, she is dissatisfied with the dual message that women have to care-take or to perform in the economic field,³²⁶ but her answer to this problem lies in the reordering of the family, to move it from its focus around sexual relationships to care relationships.

In *The Neutered Mother*, Fineman critiques how sexual relationships are at the centre of legal regulation; the current husband-wife structure, she argues, serves to disadvantage the mother and care-giving relationships. By focusing on a sexual bond rather than 'motherhood', Fineman contends that the core concepts of patriarchy are reinforced; namely sexuality and intimacy; and thus patriarchy continues to be the dominant discourse in family arrangements.³²⁷ Consequently, Fineman critiques the general trend towards formal equality between husband and wife as advocated by liberal feminists such as Deech. She maintains that this move, which has fundamentally involved degendering or neutralising relationship roles and a shift towards sameness in treatment between sexual partners, in fact ignores differences between genders rather than eradicates them:

*Ignoring differences in favour of assimilation has not made the differences in gender expectations and behaviour disappear. These differences operate to women's disadvantage as the material implications of motherhood, for example, have negative consequences in the context of career development and opportunity.*³²⁸

Fineman argues that this 'sameness' argument is overly simplistic and therefore an obstacle to finding an adequate solution for the societal and economic problems that women face.³²⁹ She contends that it is necessary to '...recognise the reality of existing systemic and persistent inequalit[ies] and move beyond the simplistic equality paradigm, establishing an affirmative feminist theory of difference.'³³⁰ While Deech asserted that women are as rational and capable as men, Fineman stresses that women are different and these 'differences' extend far beyond the biological to include cultural disparities with the latter being harder to change than the former: 'to state that something is socially constructed, in [Fineman's] opinion, is to concede

³²⁵ R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 43

³²⁶ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1142

³²⁷ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 22

³²⁸ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 26

³²⁹ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 41

³³⁰ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 41

that it is powerful and resistant to change.³³¹ Consequently, she develops the concept of 'gendered lives' to demonstrate that:

*...as a socially and legally defined group, women share the potential for experiencing a variety of situations, statuses, and ideological and political impositions in which their gender is culturally relevant...*³³²

Fineman is careful to point out that she is not claiming that all women will react identically or that all women's experiences will be wholly dissimilar from men's experiences. Rather, she states, that there are some experiences, such as aging, that women typically experience in a unique way.³³³ Consequently, despite the infinite differences that exist between women, all women must care about the social and legal construction of gender as inevitably all women will be treated by and measured by this interpretation. Fineman uses motherhood to explain this:

*...Although we may make individual choices not to become mothers, social construction and its legal ramifications operate independent of individual choice. As is demonstrated in everyday existence, women will be treated as mothers (or potential mothers) because 'Woman' as a cultural and legal category inevitably encompasses and incorporates socially constructed notions of motherhood in its definition.*³³⁴

By creating a space for women's perspectives³³⁵ to be seen as distinct from men's and making gender central, Fineman argues that it is possible to consider and challenge these differences to 'remedy socially and culturally imposed harms to women.'³³⁶

Accordingly, Fineman is critical of the 'gender-neutral fetish of liberal legalism'³³⁷ and argues that the equality rhetoric has a negative impact on the mother. The move towards equality between the husband-wife dyad has neutered 'mother' to 'parent' and at the same time reclassified 'mother' as 'wife' to suggest an equal or full partnership between husbands and wives.³³⁸ Wives are therefore expected to act as economic actors as Deech's stance demonstrates. Yet, Fineman argues that this position held by liberal feminists is extremely detrimental to children.³³⁹ To contend that women should participate as equals in the public sphere ignores differences and the fact that women (as a gendered category) bear the burden

³³¹ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 35

³³² M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 48

³³³ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 48

³³⁴ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 51

³³⁵ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) Fineman does not claim that women's reactions to this gendered existence will be the same.

³³⁶ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 48

³³⁷ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 70

³³⁸ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 68

³³⁹ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 27

of intimacy;³⁴⁰ women bear children and therefore dependency. Those who assume the primary care for children (most typically women) become dependent on others so that the care can be conducted³⁴¹ and yet, the institutions in place in society³⁴² do not facilitate the care of children. Consequently women are disadvantaged by this dependency in terms of their ability (and their expectation) to engage as equals in the public sphere.³⁴³ 'It is only legal discourse, not society that is now formally Mother purged. The very gendered and mothered lives most women live continue.'³⁴⁴

Yet, despite the impact that dependency has on the caretaker's ability to engage in the public sphere, dependency is hidden within the private family sphere. The move towards a concept of partnership in the husband-wife dyad has meant that dependency is no longer the justification for reallocating marital wealth to women³⁴⁵ and as a result Fineman argues that dependency is an underdeveloped discourse within the family.³⁴⁶ While dependency, she argues, is natural and inevitable,³⁴⁷ society's traditional assignment of caretaking to women, wives, mothers, daughters, daughters-in-law and sisters³⁴⁸ and the historic division of labour in the family make the continued importance placed on the nuclear family harmful and a repository of dependency: 'dependency is naturally assigned to this private family by the state. Within the family, this dependency is further directed by continued gendered role division.'³⁴⁹ The gender-neutral equality rhetoric therefore disadvantages care-givers and fails to adequately value the importance of this nurturing role in society. Fineman also focuses on those who do not conform to the traditional family, such as single mothers, who in direct contrast to the nuclear family, lack privacy and seem to warrant what Fineman deems as 'punitive' state intervention.³⁵⁰ Consequently, while Deech argues that the private sphere should remain private, Fineman contends that the private family is not a sufficient space to deal with single motherhood or the lack of equality in the family.

Fineman's solution to these fundamental problems within Family Law is to propose a radical restructuring of Family Law. To 'provide a protected space for nurturing and caretaking',³⁵¹ she suggests a shift in the focus of Family Law from the husband/wife dyad to the mother/child

³⁴⁰ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 26

³⁴¹ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 27

³⁴² M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 27

³⁴³ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 162

³⁴⁴ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 89

³⁴⁵ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 158

³⁴⁶ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 160

³⁴⁷ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 164

³⁴⁸ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 164

³⁴⁹ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 228. However, this is more so in America as America does not have a welfare system, but still in terms of childcare the Welfare State is limited in the UK.

³⁵⁰ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 164

³⁵¹ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 231

dyad where 'mother' also means those who take care of dependants, and child refers to all those who are dependent. This, Fineman argues, will protect the weaker nurturing units³⁵² and it will consequently place responsibility on the state to protect and regulate the family rather than relying just on the private family. The Law would be asserting an imposed solution on how to recognise domestic contributions and thus give greater weight to those in the home-caring role. Therefore, the state protects the care-relationships by preventing the law from overlooking them purely because they happen within the private sphere. Therefore, it would mean ending marriage as a category with any legal significance and reforming the law around the functional family.³⁵³

In *The Autonomy Myth: A Theory of Dependency*, Fineman critiques American political dialogue for overusing the term 'autonomy' and develops the idea of dependency that she raised in *The Neutered Mother*, presenting it as a natural and inevitable societal condition. Consequently, *The Autonomy Myth* advances her position to argue that society owes a social debt to caretaking and therefore there should be a 'collective responsibility for dependency.'³⁵⁴ Her thesis moves beyond the focus of the family and the traditional private sphere to re-examine and challenge the public/private divide itself. Therefore Fineman also examines the role of the workplace and the state and in turn argues that the public/private boundaries need remodelling so that dependency is no longer hidden within the private family sphere. Thus, Fineman argues that the care-dyad should be supported and subsidised by these public institutions rather than left to the private realm of the family which inevitably serves to damage care relationships and perpetuates gendered inequalities.

Fineman identifies 'autonomy' and 'equality' as ideological terms frequently used in the political and legal arena of American society. Autonomy is 'characterised by self-sufficiency and independence...only if we are economically self-reliant can we be considered independent'³⁵⁵ and so dependency and subsidy are therefore highly stigmatised antonyms.³⁵⁶ Autonomy, for Fineman, can be understood as the mandate for equality of opportunity.³⁵⁷ However, 'terms such as autonomy and equality...can be understood in conflicting and incompatible ways.'³⁵⁸ For example 'equality of opportunity' could mean allowing individuals to succeed or fail based on their own merits or it could justify affirmative action to equalise

³⁵² M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 231

³⁵³ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 230

³⁵⁴ M Fineman, *The Autonomy Myth: A Theory Of Dependency* (New Press 2004) XIII

³⁵⁵ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 19 - 20

³⁵⁶ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 8

³⁵⁷ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 26

³⁵⁸ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 25 - 26

possibilities for potentially excluded groups.³⁵⁹ In family terms, Fineman emphasises the approach taken severely affects the division of matrimonial assets and ongoing financial responsibilities post-divorce.³⁶⁰ Should there be a formal division of assets between husband and wife that will recognise equality at the expense of the caretaker's autonomy as Deech contends or should the care-dyad be able to achieve autonomy at the expense of equality and the other party's autonomy to choose the extent of their contributions?³⁶¹

For Fineman, the answer to this dilemma is to recast autonomy. In its current form, autonomy is not possible while 'only some individuals bear the burdens of family and reproduction in society';³⁶² autonomy only works where inequalities are not present.³⁶³ However, dependency currently is hidden within the private family which hinders gender equality as it is impossible to break the gendered division of labour.³⁶⁴ Therefore Fineman argues that for autonomy to exist there needs to be an equality of resources and a collective responsibility for the care-dyad. Consequently she proposes a new definition of autonomy; 'autonomy supported by societal commitment for the provision of basic social needs.'³⁶⁵ This definition will shift dependency from the hidden realms of the family to give it greater social recognition.

There are different ways in which this shift can occur. Fineman places a higher value on childcare, but the question that this demands is how this is to be translated into the private sphere. Should there be greater state provisions for childcare such as the extensive ones seen in Scandinavia, or should there be a higher valuation of these contributions on relationship breakdown through Family Law? For Fineman, to attain family equality, the workplace must be retheorised and the whole public/private divide rethought:³⁶⁶ the care-dyad must be at the heart of the family, rather than hidden in the family. In fact Fineman once again indicates that sexual relationships should not give rise to legal structures. Therefore a structural change in other societal institutions outside of the family is necessary³⁶⁷ to take account of the double burden to meet the conflicting demands of workers and care-giving.³⁶⁸ To ignore care-giving not only perpetuates this autonomy myth but it also serves to continue the economic disadvantages suffered by caretakers.³⁶⁹ Thus, Fineman wants the state and the family to no longer be cast as distinct public/private spheres, but rather to anchor the caretaking family

³⁵⁹ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 26

³⁶⁰ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 27

³⁶¹ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 27

³⁶² M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 26

³⁶³ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 29

³⁶⁴ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 37

³⁶⁵ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 37

³⁶⁶ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 165

³⁶⁷ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 174

³⁶⁸ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 203

³⁶⁹ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 193

firmly within the state and she uses the metaphor of social contract to develop this idea. Fineman argues that the responsibility for care-giving should be spread to social institutions other than the family³⁷⁰ to make dependency more visible rather than just absorbed by the family.³⁷¹ She therefore argues that there should be collective responsibility for dependency with a more tenable workplace and state. In the workplace, Fineman argues that there should be a greater sharing of the fruits of the labour for employees and employers which take into account the organisation and functioning of the family.³⁷² For the relationship between the individual and the state, Fineman argues that there should be a more substantive concept of equality which addresses equality of resources through a 'lifelong provision of fundamental social goods, which are necessary for individual survival and flourishing, and specific additional subsidies that support the caretaker and caretaking.'³⁷³

Yet, this utopia for Fineman has some practical limitations. To restructure the social fabric in such a way demands enormous societal change to this social contract and the boundaries of the public/private divide. Consequently, Fineman's design seems beyond current financial possibilities. Furthermore, it would require a dramatic shift in attitudes by both reformers and the general public and it does not seem possible for this change to be a rapid one. Therefore, for the foreseeable future Fineman's reconception of the family is not fully realisable. Instead, it is necessary to consider more realistic ways in which Fineman's care-dyad family can replace the current patriarchal family. In the absence of larger structural reforms to the way in which society views the family, it is possible to use Family Law and particularly financial provision on divorce as a means through which 'care' and therefore dependency can be placed at the heart of the family. In *The Autonomy Myth*, Fineman believes dependency should have greater social recognition because it should not be cast as a societal 'problem',³⁷⁴ it is inevitable through undertaking care and therefore 'independence from subsidy and support is not attainable, nor is it desirable; we want and need the webs of economic and social relationships that sustain us.'³⁷⁵ Therefore, it should not be viewed as (as Deech sees it) an autonomous 'choice' to assume the care-giving role or at least not a choice to consent to the 'societal conditions accompanying that role and the many ways in which that status will negatively affect her and her children's economic prospects.'³⁷⁶ Instead, Fineman argues that there is a social debt owed

³⁷⁰ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 223

³⁷¹ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 233

³⁷² M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 233. See Chapter nine of M Fineman, *The Autonomy Myth: A Theory Of Dependency* (New Press 2004) XIII

³⁷³ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 285

³⁷⁴ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 31

³⁷⁵ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 28

³⁷⁶ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 42

to care-givers given that 'caring for dependents is a society-preserving task.'³⁷⁷ Yet this vital societal function carries with it a double burden: firstly the economic disadvantage of care-giving and secondly that at the same time families that require subsidy are considered to be failing. It therefore is a matter that Fineman believes should be an issue of social concern rather than hidden away in the family sphere.³⁷⁸ Consequently, for Family Law this requires a more holistic consideration of the inevitable dependency that arises from the economic impact of care-giving.

By contending that care-giving should be a societal concern rather than remaining a private family matter, Fineman inevitably questions the public/private divide. Here Fineman reiterates her argument voiced in *The Neutered Mother* that the family should not be centred on the husband-wife dyad: '...marriage allows us to ignore dependency in our policy and politics because we can always safely refer that nasty subject to the waiting societal receptor.'³⁷⁹ However, while the private sphere has traditionally been seen by feminists like Deech as dangerous and detrimental to women,³⁸⁰ Fineman argues that this is because the private sphere's boundaries are drawn around the husband-wife relationship. As a consequence, dependency has been privatised, absorbed by the family and is therefore invisible; inevitably the economically stronger spouse will carry the power in a relationship and thus the traditional gendered division of roles will continue.³⁸¹

*...it is the role of mother, not her sex that is disadvantageous to a woman in a workplace that has been designed for a 'breadwinner' who is supported by someone at home doing dependency work...*³⁸²

Consequently, assuming the role of care-giver within the private sphere is not, as Deech would argue, an autonomous choice. Fineman argues that autonomy for the care-dyad is not possible: 'motherhood is mired in dependency' for both the child and the carer³⁸³ and yet the workplace is not designed for the caretaker or the family and therefore the family is disadvantaged.³⁸⁴ Equality is only feasible if someone else is carrying out the caretaking.³⁸⁵ Therefore, it is the arbitrary division of the public/private spheres that disadvantages women in the private domestic sphere and yet at the same time this perpetuates the autonomy myth

³⁷⁷ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 43

³⁷⁸ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 47

³⁷⁹ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 140

³⁸⁰ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 154

³⁸¹ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 164

³⁸² M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 179

³⁸³ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 169

³⁸⁴ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 178

³⁸⁵ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 178

that autonomy (or self-sufficiency/independence) is attainable for everyone in society.³⁸⁶ While, for Fineman, the answer to this dilemma is in a radical restructuring of societal institutions, it is possible that Family Law could be used to achieve entitlement to equality of resources. By reallocating family property at the end of the relationship in a manner based on entitlement but that is designed to meet needs and provide ongoing support for the care-dyad, it is possible to allow parties to achieve substantive rather than formal equality.

2.2.2.4.3 The Lenses

Deech and Fineman clearly have different conceptual stances on how the law should regulate the family sphere as exemplified in table 2.1 below. It is evident that the core differences between the liberal and difference feminist schools of thought can result in diametrically opposed reform options. However, how would these reform options work in practice? Would systems which embrace the core principles of either commentator solve the gender inequalities and dissatisfaction that currently exist within the provisions in England and Wales? Or given that Deech seems to focus more on couples without children while Fineman really only focuses on families with care-dyads present could a balance be achieved between these two viewpoints? To explore the answer to this question the jurisdictions selected have systems that embody these positions to varying degrees on the spectrum between Deech and Fineman.³⁸⁷ New Zealand is most Deech-like, embodying the values of certainty, autonomy, formal equality and clean break and separating long and short duration marriages. Scotland is also Deech-like with greater elements of Fineman: while it embodies similar values to New Zealand, it also introduces concepts of an economic burden of care and a greater focus on compensatory provisions designed to protect the homemaker. Queensland, Australia seems to have Fineman as a starting point with elements of Deech: it is discretionary, specifically valuing domestic contributions although they are not equated equally to financial contributions and maintenance provisions are rarely awarded. Finally, England and Wales has the most pro-Fineman approach which is discretionary and focuses on future needs at the most basic level of financial provision, but it also makes room for compensation and equal sharing and it also regularly awards maintenance where property division will not meet needs. Thus, Fineman and Deech's polarised positions (that embody core difference and liberal feminist values) are given a framework of effect.

Furthermore, by using the lenses of both commentators as a means to evaluate these jurisdictions, this critique will be able to consider the effect that such approaches have on

³⁸⁶ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 174

³⁸⁷ Each of the Chapters that focus on these jurisdictions will expand on this

women, whether there is any resulting gendered bias or exclusion and whether one approach or a balance of the two would be a favourable approach to law reform in England and Wales. The next section shall now address the empirical methods that shall be used hand in hand with the feminist methods to test whether these theoretical feminist ideals work in practice. This will provide a three-dimensional approach to looking at whether these jurisdictions satisfy feminist demands and practical demands.

Table 2.1 A Comparison of Deech and Fineman's positions

Ruth Deech's Position	Martha Fineman's Position
Women and men should be treated equally; women are as rational as men	Women are different from men; this difference lies in gendered lives
Autonomy: Imposing a solution will subordinate, and undermine women's autonomy	Autonomy myth! Dependency is inherent, thus the Mother/child care-dyad needs protecting by state
Responsibility for choice to assume caretaking role	Assume caretaking role is not a product of free will
The Law should promote autonomy and economic independence	The Law should protect the care-dyad; collective responsibility for dependency
The Law should remain outside of the private sphere	The Law should protect and recognise the private sphere, make sure the carer's voice is 'heard' in the public sphere
Formal equality	Entitlement to equality of resources
Domestic contributions should have no value; financial contributions and property ownership is central. To value them is to retard the emancipation of women	Care, and therefore domestic contributions should be central and highly valued by state/law
Cohabitants should have no remedy; their free choice not to marry should be recognised	The family should be based on function rather than form. Therefore around the care-dyad regardless of relationship status. It shouldn't be based around the husband/wife dyad
Ideally financial agreements; maintenance should only apply in extreme circumstances and be rehabilitative.	Maintenance and discretion to support the care-dyad in addition to entitlement to equality of resources
End of discretion – certainty is key	Needs discretion: dependent on it to work out how to protect care dyad

2.2.3 Empirical Investigation

The empirical phases of this thesis will provide important insight into the ways that law reform could value domestic contributions. The University of Exeter's ethics committee gave research ethics approval, having scrutinised the empirical methods employed.³⁸⁸ Further ethical

³⁸⁸ See Appendix V

considerations are discussed below.³⁸⁹ This part of the project will answer research question 1(c) and research questions 2(a) and (b) outlined above in section 2.1.

As aforementioned, empirical methodology has been chosen as it was felt that analysing the law at solely a theoretical level would in fact only present a superficial examination into the effects of the differing legal systems. Empirical methods will allow deeper investigation into ‘the impact that law, legal institutions, legal personnel and associated phenomena have on people, communities and societies, as well as the influence that various social, economic and political factors have on law, legal phenomena and institutions.’³⁹⁰ Research question 1(c) is addressed through interviews with lawyers which explore the practical impact of the schemes, and research question 2(a) is explored by analysing these interviews to consider what lessons England and Wales can learn from these different jurisdictional approaches. This will help avoid the simplistic transplanting of other jurisdictions’ legal schemes into our own system.

Given the calls for change in both the married and cohabiting context,³⁹¹ research question 2(b) is vital to address the opinions of those who would be directly affected by altering the law of financial provision on relationship breakdown. As the Nuffield Inquiry on Empirical Legal research stated:

*As [the] Government increasingly regulates economic, social and family relationships in rapidly changing contexts, there is a need for empirical evidence about the impact of law and regulation; how mechanisms of regulatory control could be improved and adapted; how individuals and organisation[s] respond and adapt to the legal environment and how law can contribute to the overall well-being of society.*³⁹²

Furthermore considering Article 8 of the ECHR conveys a right to respect for one’s private and family life and one’s home, reform that has implications on legal responsibilities between family members requires some consideration of the views of those who are most likely to be affected. This next section will outline the research methods involved in answering firstly research question 1c (structured interviews) and then research question 2b (focus groups).

2.2.3.1 Qualitative versus Quantitative Stratagems

This thesis adopts a mixture of quantitative (structured interviews) and qualitative techniques (focus groups) to answer RQ1c and RQ2b respectively for what Bryman terms as

³⁸⁹ See Section 2.2.4.4

³⁹⁰ M Israel and I Hay, ‘Good Ethical Practice in Empirical Research in Law’ (Web Resource for the United Kingdom Centre for Legal Education 2007) <<http://www.ukcle.ac.uk/resources/israel.html>> accessed July 2009

³⁹¹ See Chapter 1

³⁹² H Genn, M Partington and S Wheeler, *Law in the Real World: Improving Our Understanding of How Law Works* (The Nuffield Foundation 2006) 2

'completeness' where 'the researcher can bring together a more comprehensive account of the area of inquiry.'³⁹³

These two types of methodology represent different epistemological stances. Quantitative strategies are predominantly connected with positivism which advocates the objective collection of numerical and statistical data and a 'predilection for a natural science approach.'³⁹⁴ This 'fact-finding' nature, manifest in questionnaires, seeks trends and patterns within data, searching to explain events. Alternatively, qualitative stratagems are intrinsically linked to interpretivism which advocates subjectively 'focus[ing] on words rather than numbers, capturing data through open-ended questions using techniques such as historical analysis, focus groups...and interviews.'³⁹⁵ Its emphasis on 'the properties, the state and the character'³⁹⁶ (the participants' rather than the researcher's viewpoint³⁹⁷) enables the research to develop an understanding of why particular events occur. Consequently, a combination of these two approaches has traditionally been met with controversy, with some arguing that qualitative and quantitative stances cannot be combined due to conflicting theoretical commitments.³⁹⁸

Yet, the use of both together is something that is becoming more popular within social science and socio-legal research projects as it is felt that each stratagem will compensate for the other's shortfalls.³⁹⁹ Quantitative methods are accused of losing some context or element of understanding by overlooking the respondent within the process, consequently presenting a static view of social reality and an artificial sense of precision.⁴⁰⁰ In comparison qualitative methods have been called too subjective, vague, and imprecise,⁴⁰¹ therefore qualitative research is difficult to replicate due to its unstructured nature, and there is a risk of over-generalising because its sample size is so small. These methods often lack transparency⁴⁰² and so raise data validity issues.⁴⁰³ Furthermore, the two different approaches will possess and search for different concepts of true or acceptable knowledge: 'focus[ing] on the different dimensions of the same phenomenon.'⁴⁰⁴ RQ1(c) seeks to generate knowledge and measure the regimes' effectiveness and thus the use of structured interviews will enable a direct

³⁹³ A Bryman, *Social Research Methods* (2nd edn, OUP 2004) 611

³⁹⁴ A Bryman, *Social Research Methods* (2nd edn, OUP 2004) 62

³⁹⁵ A Labuschagne, 'Qualitative Research - Airy Fairy or Fundamental' (2003) 8(1) *The Qualitative Report* 57 <<http://www.nova.edu/ssss/QR/QR8-1/labuschagne.html>> accessed 30 January 2010

³⁹⁶ A Labuschagne, 'Qualitative Research - Airy Fairy or Fundamental' (2003) 8(1) *The Qualitative Report* 57 <<http://www.nova.edu/ssss/QR/QR8-1/labuschagne.html>> accessed 30 January 2010

³⁹⁷ A Bryman, *Social Research Methods* (2nd edn, OUP 2004) 287

³⁹⁸ A Bryman, *Social Research Methods* (2nd edn, OUP 2004) 455

³⁹⁹ See for example A Barlow, *Cohabitants and the Law* (Butterworths 1997)

⁴⁰⁰ D Kruger, 'Integrating Quantitative and Qualitative Methods In Community Research' (2003) 36 *The Community Psychologist* 18

⁴⁰¹ A Bryman, *Social Research Methods* (2nd edn, OUP 2004)

⁴⁰² A Bryman, *Social Research Methods* (2nd edn, OUP 2004) 284

⁴⁰³ See A Bryman, *Social Research Methods* (2nd edn, OUP 2004) for further debate on validity.

⁴⁰⁴ T Das, 'Qualitative Research in Organisational Behaviour' (1983) 20(3) *Journal of Management Studies* 301, 311

comparison of the pros and cons of the differing jurisdictions. RQ2(b), on the other hand seeks to understand and test the parameters of the general public's opinions on the direction of reform, therefore focus groups will facilitate some insight into this approach. Consequently using these quantitative and qualitative approaches together will present a thorough examination as each element will complement and strengthen the deficiencies of the other approach.

This project uses a combination of structured interviews (which also included some open-ended questions) and focus groups, both signifying different relationships between theory and research. Whereas structured interviews are deductive, testing theories where the researchers must already be aware of the range of possible answers⁴⁰⁵ (which shall be deduced from some of the feminist conceptions of fairness perhaps), focus groups are more inductive providing flexibility to accommodate and encourage the exploration and revelation of non-prescribed issues. Consequently, the structured interviews will test whether the trends and patterns⁴⁰⁶ of the differing positive and negative effects in the jurisdictions differ and how. This presents a more general overview of the system and allows a comparison of how the schemes function in reality. This method will further allow for measurement of opinions and patterns enabling 'more precise estimates of the degree of relationship between the concepts.'⁴⁰⁷ In contrast, focus groups provide a social context that permits the exploration of a participant's experiences and beliefs to generate a detailed understanding of the particular social phenomena in question and thus will determine how well the schemes would be received, and what the public actually want.

2.2.3.2 Interview Stage

Structured interviews can take place face-to-face or over the phone. Instead of encouraging dialogue, the participant has a far less significant role to play (a hierarchy between researcher and participant is visible); the questions are predominantly closed and (through the use of an interview schedule) read out in an exact order so as to produce exactly the same stimuli or context in each interview to reduce the amount of interviewer variation and potential bias infiltrating results. This technique reveals patterns and trends which are broader and more generalising by standardising the methodology⁴⁰⁸ and provides enough closed questions to make a better direct comparison between the jurisdictions. Furthermore it was felt that a

⁴⁰⁵ B Gillham, *Developing a Questionnaire* (2nd edn, Continuum 2004) 2

⁴⁰⁶ A Bryman, *Social Research Methods* (2nd edn, OUP 2004) 348

⁴⁰⁷ A Bryman, *Social Research Methods* (2nd edn, OUP 2004) 66

⁴⁰⁸ A Bryman, *Social Research Methods* (2nd edn, OUP 2004) 109

more structured schedule of questions would facilitate a better way of comparing the jurisdictions, as the codes are already set prior to the interview taking place.

Nevertheless, it was felt that a structured interview would in fact be more appropriate than a self-completion questionnaire. While self-completion questionnaires would remove the issue of transcribing altogether, it was felt that it limited the possibility of probing, and insuring that questions were fully understood and fully answered. A structured interview also allows for any issues that have not previously been thought of beforehand to be followed up. This is not to standardise, but to facilitate comparisons and it is possible to ask some open questions, whereas with the questionnaires, respondents are less likely to write longer answers. Self-completion questionnaires often have lower response rates and a greater risk of having unanswered questions; using structured interviews instead will ensure that all questions are answered. This allows prompting and probing ensuring answers are complete. It also keeps interviewer control, whereas the questionnaires would lose it to some degree.

Each structured interview was carried out by telephone, due to geographical factors. Thus to keep the context the same, the legal professionals in England and Wales were approached by telephone, even though it would here be feasible to contact them in person. Although some research suggests there are lower response rates to interviews by telephone,⁴⁰⁹ it was a practical necessity in this project.

2.2.3.2.1 Sample

The sample for this thesis is not intended to be statistically representative, and thus does not need to be nationally representative within the jurisdictions or representative of the composition of the legal professions. It was felt that this would be an unachievable aim given the time-span and cost-limitations. Accordingly, this section aims to collect a small cross-section of the legal professions in each country to compare their interpretation of their jurisdiction. Therefore, from each of the four jurisdictions, between 13 and 16 lawyers were selected as these respondents encounter the schemes' practical effects as they are involved in its day-to-day running. Given that the Australian cohabitation regime which applies to all states bar Southern and Western Australia had only been enacted since 1st March 2009,⁴¹⁰ this thesis selected respondents from Queensland, Australia which had (prior to 2009) similar State provisions for cohabiting couples.⁴¹¹ It was therefore hoped that respondents from Queensland would have greater insight into how the new Federal regime would operate in

⁴⁰⁹ A Bryman, *Social Research Methods* (2nd edn, OUP 2004) 198

⁴¹⁰ The Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 had only been enacted on 1st March 2009.

⁴¹¹ Discussed in Chapter 5

practice. Of those participants involved, there was an equal number of men and women from each jurisdiction except New Zealand (perhaps due to the fact that gaining participants from this jurisdiction most heavily relied on snowballing in comparison to the others), in case concepts of fairness and bias towards clients differ between genders, and each jurisdiction had a range of those who had practised from three to over 40 years, thus the respondents had a detailed knowledge of this legal area, and experience with a large number of cases. The characteristics of the samples are discussed in subsequent chapters.

Contact was made in a number of ways and the predominant method in each jurisdiction was approaching practitioners through e-mail. Websites which listed the membership of specialist Family Lawyers were identified and then an e-mail was either sent to individual members or an e-mail was sent to the organisation and asked to be distributed to its registered members such as the Family Law sections of the Queensland Law Society and the New Zealand Law Society, also Scotland's Faculty of Advocates and Family Law Association and Resolution and the Family Law section of the Law Society of England and Wales. Furthermore, key firms were also identified and targeted and adverts were placed in popular legal resources. Snowballing was also used, and respondents tended to forward the e-mail to other colleagues who might be interested in taking part.

The aim was to get a range of lawyers from a variety of locations within each jurisdiction to give a broad overview of the practical operation of the scheme. However, in England and Wales, most of the respondents who came forward in response to advertising the project were located in the South of England and in Queensland, Australia the majority were from Brisbane itself. Scotland and New Zealand had a much wider geographical range of lawyers.

2.2.3.2.2 Interview schedule

A pilot was carried out on three interviewees to test out the schedule and this fed back into the design. The final interview schedule was split into three parts (the initial socio-demographic characteristics were collected through e-mail exchange prior to the interview). Section A looked at general attitudes towards statements relating to the perception of same-sex/different sex cohabiting and civil partners/married couples (this altered according to relationship statuses terminology in each jurisdiction). These were ranked on a likert scale of strongly agree, agree, neither agree nor disagree, disagree, strongly disagree. Section B was concerned with the practical elements of each jurisdiction. A variety of questions were posed which looked at firstly the overall principles which guided their jurisdiction and the lawyers' satisfaction with these. Secondly, the questions addressed how their jurisdiction value contributions and the interview schedule also assessed the lawyers' opinion on these issues.

These looked at a number of relationship models (homemaker/breadwinner, dual earner, fulltime/part-time) as well as comparing relationship styles and also addressed the impact that the presence of children made. These questions were answered on a likert scale of 0 (agree) – 10 (disagree) and were also followed up by a qualitative question which asked respondents to expand their answers. Each of these questions were asked in the context of married, civil partner (where relevant), different-sex cohabitant and same-sex cohabitants. Section C finally used two scenarios of couples breaking up: the first based on *Burns v Burns*⁴¹² and the second based on *Miller v Miller*⁴¹³ with a number of variables to establish how their jurisdiction would settle financial provision and how satisfied they were with this approach. A copy of the interview schedule is provided in appendix A.

As a large proportion of the interview questions were closed questions, each interviewee's response was recorded down by hand and to reduce interviewer effects, the questions were adhered to as closely as possible and question order did not vary, and awareness is given to the preceding questions. The interviews were also recorded to capture the open questions and this was done by the use of telephone recording equipment.

2.2.3.2.3 Data Analysis:

The interviews were recorded and the closed questions were coded before the interviews and then the results entered into SPSS for analysis. For the open questions, the responses were transcribed, entered into NVivo for analysis, manually coded using thematic analysis according to the six step process suggested by Braun and Clarke.⁴¹⁴ This involved the researcher familiarising herself with the content, generating initial codes, searching for themes, reviewing, defining and naming themes before setting out the findings. Specifically, theoretical thematic analysis⁴¹⁵ was used as themes were generated against the backdrop of the opposing stances of Deech and Fineman. Therefore, the themes generated were based around Deech's position of financial autonomy, clean break and formal equality and Fineman's position that places importance on care-giving, discretion and substantive equality. The chapters which explore New Zealand, Scotland and Queensland, Australia present the jurisdictional findings which largely reflect on the qualitative results that came out of the open ended questions on the structured interview. The final jurisdictional chapter which examines England and Wales has a

⁴¹² *Burns v Burns* (1984) Ch. 317

⁴¹³ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186

⁴¹⁴ This six step process was 1) to familiarise one's self with the data, 2) generate initial codes, 3) search for themes, 4) review themes, 5) define and name themes and 6), produce the report. V Braun and V Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77, 87 See Chapter 2, section 2.2.4.3.3

⁴¹⁵ V Braun and V Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77, 84

larger comparative section which makes use of the quantitative data in order to draw broader comparisons between all four jurisdictions.

2.2.3.3 Focus Groups:

For this section of the thesis, focus groups in England and Wales were used to establish the opinions of those most affected by the schemes. Focus groups are group interviews focusing on a particular theme, in this instance the division of assets on relationship breakdown, and the valuation of domestic contributions. These sessions provide a more natural setting for participants to voice their opinions in a setting where the presence of other group members encourages the sharing of experiences and anecdotes and comments on one another's contributions,⁴¹⁶ allowing members to probe each other's opinions causing others to qualify their view.⁴¹⁷ It gives the participants more control over the direction of the argument, allowing them to raise issues that they feel are important in this area. Accordingly, focus groups are a qualitative technique which is inductive. It generates theory from data, and thus can develop the issues that are pertinent to the group and express their wishes for law reform. The lack of hierarchy between interviewee and participant also facilitates a greater freedom of speech. Moreover, it is possible to have a number of interviews at one time, and observable comparisons between conflicting opinions and socio-demographic features may reveal themselves in the course of the dialogue, rather than comparing structured interviews, one-by-one. Each applicant was also asked to fill out a brief questionnaire presenting their socio-demographic characteristics (discussed below).

2.2.3.3.1 Sample

The sample was not intended to be statistically and therefore nationally representative. Instead, the aim was to represent opinions from a range of different socio-demographic groups on how domestic contributions should be valued. It was decided that the groups would be divided according to relationship status and gender to test whether this affected attitudes to the different schemes. Other characteristics were desired to test whether these had an impact. Consequently, this project sought a sample to include a range of those with or without children, employment status, gender, income grouping and relationship duration to get a complete spectrum of the population and only one partner from each couple was used. Altogether five groups took place ranging between four and six participants. This is discussed in more detail in Chapter 7 along with group numbers and the demographics of those groups.

⁴¹⁶ J Kitzinger and A Barbour, 'Introduction: the Challenge and Promise of Focus Groups' in R Barbour and J Kitzinger (eds), *Developing Focus Group Research, Politics, Theory and Practice* (Sage 1999) 4, 4

⁴¹⁷ A Bryman, *Social Research Methods* (2nd edn, OUP 2004) 348

The sample was drawn from the East Devon area to make it feasible to organise the groups. To gather participants, a number of strategies were deployed. Advertisements were placed around the University and in the local newspaper. Local nurseries were contacted and asked to place adverts on their notice boards. Additionally, a group was set up on the Facebook networking site advertised to people within the Exeter University website. E-mails were sent out to organisations asking for distribution, and snowballing was used with not only participants, but also from people who had been approached but did not fit within the research criteria.

2.2.3.3.2 Focus Group Schedule

A pilot focus group was carried out which fed into the design of the focus groups. The focus group schedule⁴¹⁸ focused on general discussions of types of contributions, how domestic contributions should be valued beside financial contributions and what scope relationship property should take. In these questions, the groups were also asked whether this altered according to relationship status or differed between same-sex and different-sex relationships. The participants were then given a hand-out⁴¹⁹ which presented five models based on each of the jurisdictions' approaches. The groups were asked to outline their opinions on the approaches, which ones they preferred or disliked and whether different approaches were more or less suitable according to different relationship statuses. Then, finally, the groups were presented with two scenarios (again based on *Burns*⁴²⁰ and *Miller*⁴²¹) which had a number of potential outcomes based on the differing approaches of the jurisdictions and were asked to select which outcome they preferred. Throughout the session, the moderator's involvement was kept to a medium level; the group remained directed which 'emphasises the research team's focus [and is] better for consistent comparison.'⁴²² To have less structure would potentially surrender control of the group which would have made it difficult to compare the groups.⁴²³ Each session took place at the University of Exeter and was recorded using an MP3 recorder and notes were made if any significant body language signified agreement also.

Additionally, at the start of the session, the groups were given a self-completion questionnaire⁴²⁴ to outline their socio-demographic characteristics.

⁴¹⁸ Appendix B

⁴¹⁹ Appendix C

⁴²⁰ *Burns v Burns* (1984) Ch. 317

⁴²¹ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186

⁴²² D Morgan, *The Focus Group Guidebook: Focus Group Kit 1* (Sage Publications 1998) 46-7

⁴²³ A Bryman, *Social Research Methods* (2nd edn, OUP 2004) 78-79

⁴²⁴ Appendix D

2.2.3.3.3 Data Analysis

The recordings were transcribed and thematic analysis was used to analyse the data from the focus groups using the six step process suggested by Braun and Clarke⁴²⁵ outlined in section 2.2.4.2.3. Deech and Fineman's contrasting positions were used to generate the themes.

2.2.3.4 *Ethical Considerations*

This project adheres to the School of Law's Statement on ethical practice which acknowledges the British Sociological Association and the Socio-Legal Studies Association's statement of ethical practice. Furthermore, the project corresponds to the ethical guidelines in the jurisdictions studied, including the Australian National Statement on Ethical Conduct in Human Research and the Australian code for the responsible conduct of research.⁴²⁶ For New Zealand, this project abided by the Association of Social Science Researchers' Code of Ethics.⁴²⁷

Participation was completely voluntary and the participants had to complete a consent form which they had to sign and return.⁴²⁸ Each respondent was supplied with an information sheet to ensure that the participants were fully informed of the research procedures and the nature of the research itself.⁴²⁹ They were informed that the sessions were being recorded. Throughout, the participants were aware that they could withdraw from the process at any time. All participants retained anonymity with any identifying information being removed by redacting any names or data that might make the participant identifiable. Additionally, the other focus group members came to an agreement on their own rules of confidentiality. To further ensure confidentiality, no one had permission to access any un-anonymised data for any purposes without the prior consent of the participants. The data was stored securely in secure filing cabinets and on password-locked computers. The data will be kept in an anonymised format for a period extending beyond the thesis deadline to ensure that it is no longer needed.

2.2.3.5 *Researcher Considerations*

Objectivity in empirical work is always a challenge for any researcher embarking on such a project. While all efforts were made to ensure that as much impartiality was kept as possible, inevitably it is not feasible for a researcher to be wholly objectively neutral. Bias inevitably arises in two forms: firstly the direct influence that the researcher may have over the

⁴²⁵ See note 423 above. V Braun and V Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77, 87. This is discussed in more detail in Chapter 7, section 7.2

⁴²⁶ The *Code* is also a reference for people outside the research community who require information on the standards expected in responsible conduct of research within Australia. See <http://www.nhmrc.gov.au/publications/synopses/r39syn_summary.htm> accessed 1 February 2009

⁴²⁷ The Association can be found at: <<http://assr.rsnz.org/ethics.html>> accessed 1 February 2009

⁴²⁸ This was either physically or electronically given that some of the interview participants were based abroad. See Appendices E and F

⁴²⁹ See Appendices G and H

participant's behaviour and secondly the researcher's own beliefs.⁴³⁰ The first form was limited as far as possible by keeping rigorously to the structured questionnaire for the interview stage of the project and by limiting moderator involvement to a medium level of interaction in the focus group stage. The second form of bias affects the way in which the data was analysed which hinges on the researcher's approach due to its subjectivity.⁴³¹ Again, although the researcher tried to stay as objective as possible, it is possible that the fact that the researcher is based in England and Wales may affect the analysis.

2.3: Conclusion

These three phases will present three dimensions to assessing the direction of reform. By using these different methods, a complete picture shall be given of the effectiveness of each different approach to valuing domestic contributions. However, there are some limitations, the samples are not nationally representative and are relatively small, thus the aim is to identify some major positives or negatives that these schemes may offer for consideration of reform in England and Wales. The next four Chapters use these combined methods in the context of New Zealand, Scotland, Queensland Australia and England and Wales.

⁴³⁰ J Iacono, A Brown and C Holtman, 'Research Methods – a Case Example of Participant Observation' (2009) 7 *The Electronic Journal of Business Research Methods* 1, 39 available online at <www.ejbrm.com> accessed 1 February 2009

⁴³¹ J Iacono, A Brown and C Holtman, 'Research Methods – a Case Example of Participant Observation' (2009) 7 *The Electronic Journal of Business Research Methods* 1, 39 available online at <www.ejbrm.com> accessed 1 February 2009

CHAPTER 3: DEECH'S POSITION IN PRACTICE – NEW ZEALAND

3.1 Introduction

As outlined in Chapter 2,⁴³² New Zealand's approach to financial provision on relationship breakdown, at first glance, most closely resembles Deech's position.

Although a common law jurisdiction, New Zealand now espouses a deferred community-of-property system under which all relationship property (narrowly defined)⁴³³ is divided equally between the parties except for three situations:

- Marriages of short duration (under three years)
- Extraordinary Circumstances
- Economic Disparity

These exceptions provide the courts with greater discretion to consider how property awards should be made. However, certainty as a result of formal equality is at the heart of New Zealand's framework. Accordingly, settlements are very predictable and it is extremely unusual for awards (especially the homemaker's) to achieve anything other than 50% of relationship property. Furthermore, New Zealand also has a strong concept of financial autonomy. Not only are pre-nuptial agreements recognised, but the system firmly adheres to the principle of clean break. Therefore maintenance is rarely awarded and where it is granted, it is solely rehabilitative, for example to retrain those who receive it. This jurisdiction therefore has a system which strongly protects property rather than the needs of the parties.

Consequently, New Zealand's regime embodies autonomy, formal equality and clean break and therefore it appears to be as close as possible to Deech's position. Yet, at the same time, some elements of Fineman's stance seem to have permeated the system through the exceptions to equal sharing. In particular, since the Property (Relationships) Amendment Act 2001, the courts are able to consider any economic disparity which exists between parties at the end of the relationship. This provision was designed to produce a fairer outcome for traditional homemaking wives by allowing the courts to have greater recognition of the economic impact that a care-giving role can have. Some purists have criticised these statutory

⁴³² See Chapter 2, section 2.2.2.4.3

⁴³³ This definition is discussed below.

provisions for weakening community-of-property within New Zealand.⁴³⁴ Nevertheless, despite these discretionary provisions, it seems that this overarching focus on formal equality rather than on the care-dyad (and its subsequent needs) means that New Zealand's approach is far from satisfying Fineman's position. Thus, New Zealand presents an opportunity to explore a system that embraces more of Deech's core principles in practice while acknowledging some of Fineman's concerns about the care-dyad.

Therefore, this chapter examines a scheme that gives Deech's position a practical framework of effect. Using Deech's and Fineman's positions as heuristic devices, this chapter considers the doctrinal implications that New Zealand's scheme has for homemakers and care-givers. Furthermore, the empirical phase shall build a picture of how this approach operates from the user's perspective. By combining these methods, this chapter will evaluate whether a balance has been achieved between these two feminist positions and in turn, how far New Zealand's approach feeds into and develops broader considerations of how England and Wales should value domestic contributions.

Additionally, New Zealand is particularly interesting because of its unique way of dealing with cohabiting couples. Since 2001 and the Property (Relationships) Amendment Act which amended the 1976 Matrimonial Property Act, New Zealand has treated married and cohabiting (also known as de facto couples) of over three years duration in exactly the same manner. This, since 2004, now includes same-sex cohabiting couples. Under the Civil Union Act 2004, both same-sex and different-sex couples can enter a civil union which has the same legal remedies as married couples have on divorce. One difference between cohabiting and married couples is that cohabiting couples on relationship breakdown simply have to stop living together whereas married couples must file for divorce. Thus, on the whole, these relationships are treated exactly the same when it comes to financial provision on relationship breakdown. This therefore provides an opportunity to consider the extension of a scheme closer to Deech's position with regard to cohabiting couples.

Before it is possible to begin the analysis, it is important to first consider the cultural similarities and differences between New Zealand, and England and Wales to avoid the dangers of transplanting legal provisions from one jurisdiction to the next.⁴³⁵ New Zealand is a common law jurisdiction and has strong historical connections (legally, politically and culturally) with England and Wales; New Zealand is part of the commonwealth and the Queen

⁴³⁴ Nicola Peart, 'The Property (Relationships) Amendment Act 2001: A Conceptual Change' (2008) 39 *Victoria University of Wellington Law Review* 813, 827 - 828

⁴³⁵ E Özücü, 'Law as Transposition' (2002) 51(2) *International and Comparative Review* 205

is its Head of State, represented by the Governor-General. New Zealand also has an uncodified, unwritten constitution much like England and Wales and it also closely follows a Westminster style Government clearly separating the legislature, the executive and the judiciary. However, New Zealand only has one house of Parliament (the House of Representatives) following the abolition of the upper house (the equivalent to the House of Lords) in 1951. Since the Statute of Westminster (1947),⁴³⁶ the New Zealand Parliament has unrestricted power to legislate, although it still has some UK statutes embedded in its system and there is still the possibility that the UK could extend laws to New Zealand with the Wellington Parliament's consent.

Thus, both systems have similar legal foundations with similar sources of law and are governed by the same legal principles of the rule of law, equity, procedural fairness, judicial precedent, prospective legislation and the separation of powers. In fact, as McLintock identifies, in New Zealand the courts' policy has been to preserve uniformity with the common law in England.⁴³⁷ Consequently, the courts often refer to decisions from the Supreme Court in England and Wales, and correspondingly, some English decisions refer to decisions made by the courts in New Zealand as can be seen in Lord Nicholls' judgment in *White*.⁴³⁸ Nevertheless, one important difference is that New Zealand, is influenced by the 1840 Treaty of Waitangi which guides relations between the government and the Maori people. Although this does not directly influence Family Law approaches, it is an important difference between the nations and there are attempts in Family Law to make provisions for Maori customary law. For example, the Property (Relationships) Act 2001 makes provision for the Maori in two ways. Firstly, s6 excludes Maori Land from the definition of relationship property and s2 excludes 'Taonga' (treasured goods in Maori culture) from the definition of relationship chattels.⁴³⁹ However, the inclusion of provisions relating to the Maori in Family Law has generally been ad hoc in nature and has been heavily criticised.⁴⁴⁰

Culturally, in the family context, there are also similarities between New Zealand and England and Wales. New Zealand also shares growing rates of cohabitation⁴⁴¹ and a decline in marriage from just under 40,000 in December 1961 to just over 13,800 in December 2008⁴⁴² with people

⁴³⁶ Statute of Westminster Adoption Act 1947 (Public Act no. 28 of 1947)

⁴³⁷ A McLintock, 'Legal System: Sources of Law' (*An Encyclopaedia of New Zealand*, 1966)

<<http://www.teara.govt.nz/en/1966/legal-system/1>> accessed January 2010

⁴³⁸ *White v White* [2000] 2 FLR 981

⁴³⁹ J Ruru, 'Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand' (2005) 19(3) *International Journal of Law, Policy and the Family* 327, 335

⁴⁴⁰ See the discussion in J Ruru, 'Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand' (2005) 19(3) *International Journal of Law, Policy and the Family* 327, 335

⁴⁴¹ 2 in 5 couples living together were unmarried in 2006 (an increase from 1 in 4 in 1996) Statistics New Zealand (2010) *Demographic Trends* (Statistics New Zealand 2009) 10

⁴⁴² Figure 3.01 Statistics New Zealand (2010) *Demographic Trends* (Statistics New Zealand 2009) 9

now marrying far later than ever before.⁴⁴³ Furthermore, the differences in both the public and private sphere between men and women in England and Wales seem also to be reflected in New Zealand. Women on average earn \$438 compared to men's \$681 per week⁴⁴⁴ and are continually recorded as carrying out more housework: the 2006 census established 61% of those caring for someone who was either ill, a child or elderly were women⁴⁴⁵ and men are also recorded as spending far fewer hours on unpaid housework than women.⁴⁴⁶

These similarities, alongside its distinct legal framework, make New Zealand an interesting and appropriate comparison for this study.

3.2 Financial Provision on Divorce/Dissolution

The Property (Relationships) Act 1976 (henceforth P(R)A) as amended by the Property (Relationships) Amendment Act 2001 (henceforth P(R)AA) governs financial provision on divorce or dissolution. Since the Civil Union Act 2004, the P(R)A 1976 has been amended to include civil unions which are available to both same-sex couples and different-sex couples. Thus, while there are few reported cases on this type of relationship, it is presumed that exactly the same provisions will apply to Civil Unions as to Married couples.

At the heart of this system is 'the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.'⁴⁴⁷ This reflects the ideal principle that Deech thinks a system of financial provision should embody and New Zealand also focuses on reducing in-court litigation. The courts can make a series of orders under the Property (Relationships) Act 1976 (P(R)A) s33(4) ranging from lump sums to periodical instalments. However, the goal of financial provision in New Zealand is to facilitate a clean break where possible.

The framework further echoes Deech's standpoint in relation to pre-nuptial agreements. Part 6 of the P(R)A, s21, allows for the parties to opt-out of the statutory regime through pre-nuptial (to contract out), nuptial or post-nuptial agreements⁴⁴⁸ to settle relationship property entitlements. For Deech, the presence of marital agreements allows for the 'recognition of autonomy...with the aim of reducing costs and promoting negotiation in better spirit'⁴⁴⁹ as it allows the couples to regulate their affairs. Yet, in New Zealand there are some safeguards in

⁴⁴³ Statistics New Zealand (2010) *Demographic Trends* (Statistics New Zealand 2009) 10

⁴⁴⁴ New Zealand Income Survey, *Hot off the press: Latest Statistics from New Zealand* (Statistics New Zealand 2009)

⁴⁴⁵ Statistics New Zealand *Census Data* (Statistics New Zealand 2006)

⁴⁴⁶ Ministry of Women's Affairs *Men's Participation In Unpaid Care: A Review Of The Literature* (Department of Labour 2009)

⁴⁴⁷ S1(n)(d)

⁴⁴⁸ Before, during or after marriage.

⁴⁴⁹ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1144 - 1145

place and these agreements must meet the minimum requirements set out in s21F: the agreement must be in writing and signed by both parties,⁴⁵⁰ be witnessed by a lawyer⁴⁵¹ and both parties must have had independent legal advice⁴⁵² which explains the effect and implication of the agreement.⁴⁵³ S21J states that the courts can set these agreements aside if they are seriously unjust either from the outset or over time; the court cannot give partial effect to these agreements. Serious injustice is not defined in the Act although there is a list of matters to which the court must have regard, including 'whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made (whether or not those changes were foreseen by the parties).' This gives recognition to the potential for an inequality in bargaining power in these early negotiations. However, Richardson (2002) fears that there may be limited public awareness about the possibility of using these agreements to contract out of the Act⁴⁵⁴ so it is questionable how far these are applied in practice.

3.2.1 Property Settlement and Equal Sharing: Defining Relationship

Property

Equality is the overriding principle on property separation and all spouses/partners are entitled to equal division of relationship property. Yet, relationship property is narrowly defined; including only the family home,⁴⁵⁵ family chattels⁴⁵⁶ and any other relationship property listed under s8(a) – (l).⁴⁵⁷ Thus separate property which is not subject to equal division (defined by s9) includes: all property not owned for family purposes; gifts; inheritances and business assets (and therefore business gains made throughout the relationship). This suggests a narrow conception of partnership limited to a direct nexus between property and the relationship. Consequently it upholds Deech's principles of financial autonomy by discouraging 'gold-digging' and prolonged financial dependence on their partners. Deech specifically argues that 'subject to the existence of an agreement...the post-marital matrimonial assets could be divided equally.'⁴⁵⁸ Yet formal equality presumes a position of equality between spouses. For Fineman, this equality rhetoric works to disadvantage mothers and those whose lives are

⁴⁵⁰ S21F(2) P(R)A 1976

⁴⁵¹ S21F(4) P(R)A 1976

⁴⁵² S21F(3) P(R)A 1976

⁴⁵³ S21F(5) P(R)A 1976

⁴⁵⁴ N Richardson, 'The New Zealand Property (Relationships) Amendment Act 2001'[2002] *International Family Law Journal* 86

⁴⁵⁵ S11(1)(a) P(R)A 1976

⁴⁵⁶ S11(1)(b) P(R)A 1976 as defined in S2

⁴⁵⁷ S11(1)(c) Relationship property is defined as 'all property owned immediately before the marriage, civil union or de facto relationship began'

⁴⁵⁸ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1144 - 1145

characterised by dependency in a care-dyad as it ignores differences and inequalities that arise through gendered lives. Fineman instead argues that striving for equality of resources between spouses would provide a fairer outcome.⁴⁵⁹ However, Deech argues that 'some certainty about the way to split assets may be more important than total fairness, especially when considering...difficult negotiations.'⁴⁶⁰

Nevertheless, it is possible under s9A⁴⁶¹ for separate property to become relationship property if a nexus can be established between the separate property and the other (non-owning) spouse. If a relationship is found, the non-owning spouse's share is limited to the increase in value of the property which reflects their contributions rather than the whole property being subject to formal equality. For example, in *Rose v Rose*,⁴⁶² the husband had owned a farm in partnership with his brother and father before their 25-year-long marriage. During this marriage he established a successful wine-making business on the farm and at the time of separation, Mr Rose's separate property amounted to \$2.8 million. While s9 P(R)A states that this would be separate property and thus not subject to equal sharing, Mrs Rose argued that her child-care and household contributions and the income she earned 'off-farm' (which amounted to a significant proportion of the household income) had indirectly contributed to the increase in value of the separate property under s9A as it enabled Mr Rose to work on his farm and business. The courts agreed and awarded her 40% of the increased farm value and 50% of the increased business value which amounted to 20% of the \$2.8 million assets. This award, Atkin believes, reflects the fact that the increase in the separate asset pool was derived not solely from the owning spouse.⁴⁶³ Furthermore, considering that the property was the core asset at the end of the relationship,⁴⁶⁴ fairness dictated that the indirect contributions should be reflected in the award to achieve fairness. Section 9A allows for fairness to infiltrate awards. As a result, s9A has been heavily criticised by a number of commentators such as Briggs and Peart who have both argued that the section dilutes formal equality and is conceptually incompatible with the aims of the P(R)A and therefore requires amendment.⁴⁶⁵

While s9A clearly offers the courts a chance to give greater recognition to care-giving activities undertaken within the domestic sphere and to integrate fairness to some degree when

⁴⁵⁹ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 22

⁴⁶⁰ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1143

⁴⁶¹ Brought in by the Property (Relationships) Amendment Act 2001

⁴⁶² *Rose v Rose* [2009] NZSC 46

⁴⁶³ B Aitken, 'New Zealand – Reflections on New Zealand's Property Reforms 'Five years on'' in B Aitken (eds), *The International Survey of Family Law* (Jordan Publishing 2007) 217

⁴⁶⁴ B Aitken, 'New Zealand – Reflections on New Zealand's Property Reforms 'Five years on'' in B Aitken (eds), *The International Survey of Family Law* 2007 (Jordan Publishing 2007) 217

⁴⁶⁵ M Briggs and N Peart 'Sharing the Increase in Value of Separate Property Under The Property (Relationships) Act 1976: A Conceptual Conundrum' (2010) 24 *New Zealand Universities Law Review* 1, 3

granting awards, this in practice seems to be a limited opportunity. The award granted to Mrs Rose (despite being a revolutionary case) seems particularly small given that her dual role of both care-giving and earning an income outside of the farm meant that she made a significant contribution to the family for over a quarter of a century. It is possible to argue that a 20% share is therefore not reflective of the extent of her contribution. Furthermore, *Rose* is generally considered to be a ground-breaking case with regards to relationship property and therefore such s9A variations are uncommon; the narrow approach to separate property contained within s9 is typically applied. While from Deech's position this generally restrictive approach to separate property promotes financial autonomy and prevents any 'gold-digging',⁴⁶⁶ it clearly hinders, or caps the awards that the homemaker or primary care-giver can achieve. The emphasis placed on nexus makes it difficult for Fineman's care-dyad to access separate property unless the spouse can demonstrate a link to an increase in its value. Consequently, in the majority of cases it is unlikely that care-giving activities will be able to establish such a connection between the contribution and the separate property. This may be particularly detrimental to longer relationships with children where greater resources may be required to meet needs.

3.2.2 Exceptions to Equal Sharing

Yet, the courts have discretion to depart from the principle of equal sharing in three circumstances: marriages of short duration; extraordinary circumstances; and economic disparity which are designed to create fairer outcomes and limit discrimination against the homemaker. In these situations, the courts have the ability to analyse any contributions made in a relationship which are listed in s18(1)(a) – (h).⁴⁶⁷ While this list can seem limiting as it is exhaustive and thus anything outside of these factors cannot be considered,⁴⁶⁸ it encompasses only three specific monetary contributions and s18(1)(h) seems to include emotional support.⁴⁶⁹ Therefore, the Act evidently recognises non-financial contributions and s18(2) of the Act specifies that there is no presumption that monetary contributions are to be considered more valuable than non-monetary contributions.

As a result of s18(2), the courts tend to adopt a global approach to valuing contributions;⁴⁷⁰ they look at the overall contributions to the partnership rather than individual contributions to

⁴⁶⁶ For example, in *Vowles v Vowles* unreported, Family Court, Palmerston North FAM-2005-054-000401, 8 December 2006 NZ which concerned inherited farm land, the wife had made contributions to the land as a farmer's wife, and so was awarded 20%.

⁴⁶⁷ S18(1)(a) – (h) Property (Relationships) Act 1976, s 2F (as amended by the Property (Relationships) Amendment Act 2005, s 3) See Appendix J

⁴⁶⁸ *Reid v Reid* [1979] 1 NZLR 572 (CA), [1980] 2 NZLR 270 (CA) at 609 and *Gerbic v Gerbic* [1992] NZFLR 481

⁴⁶⁹ *Lebajo v Lebajo* (1994) NZFLR 665 – where the claimant got her husband permanent residency.

⁴⁷⁰ *Besley v Besley* (1993) 10 FRNZ 128 (CA)

specific property (different to Australia's nexus approach);⁴⁷¹ and consider the quality and significance of the contribution, rather than its size or weight.⁴⁷²

*Ultimately, the assessment of the respective contributions to the marriage or de facto relationship will be one of impression by the Court and is not something capable of precise measurement.*⁴⁷³

This offers an opportunity for the courts to give serious weight to domestic contributions preventing a rigid equal division of relationship assets which would leave the homemaking spouse or the financially weaker spouse in a particularly vulnerable position. Yet, it is questionable how effective this recognition of contributions can be, especially in light of a limited definition of relationship property and at the same time Deech argues that domestic contributions should receive no value at all.⁴⁷⁴ So how have the courts applied this section?

3.2.2.1 Section 14 and Marriages of Short Duration

The courts approach marriages classified as short duration (under three years including any pre-marital cohabitation)⁴⁷⁵ differently when dividing assets. Instead of equally dividing relationship property, the property is divided according to the s18 contributions made by each party.⁴⁷⁶ This approach under s18 accords with Deech's belief that there should be a difference between the treatment of long and short marriages which she too defined as three years or less.⁴⁷⁷ Here, the family home and chattels are not subject to equal sharing⁴⁷⁸ if the asset is owned substantially by one party at the date of the marriage, the source is from gifts,⁴⁷⁹ inheritance or trust,⁴⁸⁰ or where 'the contribution of one spouse to the marriage has clearly been disproportionately greater than the contribution of the other spouse.'⁴⁸¹ However, other relationship property will be divided equally unless there is evidence to suggest that one party had made a greater contribution than the other.⁴⁸² Therefore, the majority of claims that come to court argue that interests in property should be altered on account of contributions (similarly to the evaluative approach evident in Australia).⁴⁸³ This is perhaps more generous

⁴⁷¹ See Chapter 5 section 5.4.2.2 Australia does have a global approach as an option but this is narrowly construed.

⁴⁷² D Hicks, 'Matrimonial and Relationship Property' in *The Laws of New Zealand* (30 June 2011) para. 70

⁴⁷³ *KLW v STC FC Fam-2007-549* 31 March 2010 quoted *Reid v Reid* [1979] 1 NZLR 572 (CA), [1980] 2 NZLR 270 (CA) [160]

⁴⁷⁴ R Deech, 'The Principles Against Maintenance' (1977) 7 *Family Law* 229, 230

⁴⁷⁵ S2E P(R)A although this can be longer: S2E(1)(A)(ii) P(R)A 1976. See also D Sturm, *Judgments from the Family Court* (June 2002, Family Court of New Zealand) <<http://www.justice.govt.nz/family/publications/articles/default.asp?inline=column4.asp>> accessed January 2011 which discusses a case concerning a marriage of just over three years that was held to be of short duration due to the Husband's cold nature.

⁴⁷⁶ S14 P(R)A (1)(a) – (c)

⁴⁷⁷ R Deech, 'The Principles Against Maintenance' (1977) 7 *Family Law* 229, 230

⁴⁷⁸ S14(1)(a) – (c) P(R)A 1976

⁴⁷⁹ S14(2)(b)(iv) P(R)A 1976

⁴⁸⁰ S14(2)(b)(i) – (iii) P(R)A 1976

⁴⁸¹ S14(2)(c) P(R)A 1976

⁴⁸² S14 (4) P(R)A

⁴⁸³ See Chapter 5, section 5.4.2.1

than Deech would like as she indicated that in short marriages: 'there should be no division at all, but the parties should go back to the position they were in before they were married.'⁴⁸⁴

Yet, while s18(2) of the P(R)A suggests equal valuation of different types of contributions, Judge MacCormick in *Walker v Walker*⁴⁸⁵ stated that although there was no presumption that monetary contributions carried more weight:

...nevertheless greater weight is given to [them] during the length of a marriage that has been relatively short, such that there has not really been time for the non-monetary contributions to have built up in value.

This sentiment has been reiterated in a number of subsequent cases.⁴⁸⁶ In *VN v SH*,⁴⁸⁷ the wife had intermittently worked fulltime during the three year relationship and where she did not, she had cared for their daughter. She had brought in funds that were dissipated and earned an income where the husband did not. Here the tenancy was in the husband's name and he received \$50,000 from his mother to buy the property. The judge stated:

*There is little challenge to the two jobs which the wife undertook. Nor is there any challenge to the wife's care and the home after their daughter was born. In other words, there was nothing which would suggest this was anything other than a typical marriage where the wife worked prior to her pregnancy and, after giving birth, cared for their daughter.*⁴⁸⁸

So it seems that domestic contributions must build up value over time, yet by the time that they will have accrued any value, the equal sharing provision will apply. Consequently, domestic contributions are lost in formal equality and completely invisible from the court's scrutiny. It seems that this valuation is attributable to a general perception that there is nothing particularly great about domestic contributions compared with financial contributions. This echoes Deech's belief that 'housework has to be done whether single or cohabiting'⁴⁸⁹ and in practice it goes some way to putting the parties back in the position that they would have been in had they not married. This offers much protection for financial autonomy within the private sphere and yet it seems particularly unjust that even the presence of children does not qualify the relationship to receive equal division.

⁴⁸⁴ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1143

⁴⁸⁵ *Walker v Walker* (2002) 22 FRNZ 452

⁴⁸⁶ See for example *B v W* FC Hamilton FAM-2006-019-1056, 12 February 2008 [31]

⁴⁸⁷ *V N v S H* FC FAM 2007-1948

⁴⁸⁸ *V N v S H* FC FAM 2007-1948 [36]

⁴⁸⁹ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1142

However, there are some rare circumstances where non-financial contributions will be considered substantial. In *IS v CB*⁴⁹⁰ the couple had been separated for five years; the husband was a seaman whose whereabouts were unknown. The wife had started her own business during this time and cared for their child. He was on the deeds of the house to help him gain entry to New Zealand, but had contributed nothing to the mortgage or business, was an alcoholic and there were indications of domestic violence. The court found that the wife's contributions were disproportionate. Similarly, in *Treloar v Treloar*,⁴⁹¹ a marriage under three years with one child, it was found that monetary and domestic contributions were equal. Mrs Treloar contributed \$40,311.62 to a house and he contributed \$17,443.68. Mr Treloar's income was \$15,000 greater than hers and he helped her catering business with unpaid manual work. She ran this part-time and cared for their child. They held that because she was ill, a 60/40 split of the assets was fair. The courts recognise extreme hardship on the homemaker; where the breadwinner's financial contributions are equally beneficial to both parties, the homemaker must have suffered. By doing so a clear message is given out; homemaking is nothing special and Fineman's care-dyad therefore has no position in the court's consideration; the court overlooks the gendered nature of Motherhood and consequently the extent to which a relationship of even three years can give rise to financial dependency or vulnerability.

3.2.2.2 Section 13 and Extraordinary Circumstances

Another exception to equal sharing where the courts will consider s18 contributions is defined in s13 P(R)A where extraordinary circumstances exist that would make sharing 'repugnant to justice' which Judge Quillan described as something 'so out of the ordinary that an equal division is something the Court feels it simply cannot countenance.'⁴⁹² This allows the courts to look at the impact of equal sharing where it might cause great hardship to one party by either suspending it completely or by postponing it until a later date.⁴⁹³

Yet, it seems from subsequent case law that extraordinary circumstances will rarely be granted for domestic contributions as, once again, the courts are looking for something extraordinary rather than the average day-to-day undertaking of household duties. In *SAB v JJB*⁴⁹⁴ (a 20-year marriage) the wife assumed the homemaker role, also assisting on her husband's farm and caring for their son. This, she argued, was without any emotional support as the husband

⁴⁹⁰ *IS v CB* (2006)FC FAM-2005-113

⁴⁹¹ *Treloar v Treloar* (1988) 5 NZFLR 209

⁴⁹² *Castle v Castle* (1977) 2 NZLR 97, 102

⁴⁹³ s26(A)1 P(R)A 1976 inserted by s25 P(R)AA 2001

⁴⁹⁴ *SAB v JJB* (2009)FAM-2005-003163 29

suffered from depression; she claimed she was the only one 'functioning' in the marriage and attempted to use s13 to justify a departure from equal sharing. The husband countered the wife's s13 argument given that he had tried his best and that most of the financial contributions came from his inheritance in the last two years of their relationship. The wife's s13 claim failed and the inheritance was excluded from equal sharing and Judge Somerville stated:

*It is disappointing that their life together had more than its fair share of life's vicissitudes, but they were not extraordinary, either singly or in combination.*⁴⁹⁵

Instead, the courts seem to be looking for factors such as dishonesty, mental health conditions or addictions which impact family fortunes⁴⁹⁶ and accordingly (as with marriages of short duration) they are looking for a negative contribution or hardship rather than a positive contribution, or that of a 'superwoman'. As Judge Woodhouse stated in *Martin v Martin*:

*The phrase 'extraordinary circumstances' refers, I think, to circumstances that must not only be remarkable in degree but also be unusual in kind. It is vigorous and powerful language to find in any statute and I am satisfied that it has been chosen quite deliberately to limit the exception to those abnormal situations that will demonstrably seem truly exceptional and which by their nature are bound to be rare.*⁴⁹⁷

This case held that there was nothing extraordinary about the husband providing home and money even if the relationship was unhappy. *Park v Park* (1980)⁴⁹⁸ and *D v D* (1997)⁴⁹⁹ both held that someone who shoulders both financial and domestic contributions while the other does nothing will be taken to be a gross disparity and thus an extraordinary circumstance. In fact, unless domestic contributions are accompanied by some hardship or some major financial contribution, they will not be enough to establish extraordinary contributions; again there is the emphasis on domestic contributions being 'normal' or expected. Consequently, Fineman's care-dyad and the homemaker have little room to vary equal sharing.

On the other hand, financial contributions that demonstrate a skill can be enough to satisfy the definition of 'extraordinary circumstances'. *Reid v Reid*⁵⁰⁰ concerned a marriage where the wife was the homemaker and the husband had built up a highly successful business and was awarded 60% of the business assets stating that he made a 'clearly greater contribution'.

⁴⁹⁵ *SAB v JJB* (2009)FAM-2005-003163 29 [39] Somerville J

⁴⁹⁶ A Manuel, 'The Equal Sharing Regime – A 'Straitjacket' that Cannot be Avoided' (*New Zealand Lawyer Online*, 20 July 2007) <<http://www.nzlawyermagazine.co.nz/Archives/Issue69/F1/tabid/355/Default.aspx>> accessed 13 February 2010

⁴⁹⁷ *Martin v Martin* [1979] 1 NZLR 97 (CA) [102] (Woodhouse J)

⁴⁹⁸ *Park v Park* (1980) 2 NZLR278

⁴⁹⁹ *D v D* (1997) NZFLR 424

⁵⁰⁰ *Reid v Reid* (1979) 1 NZLR 572 (CA), [1980] 2 NZLR 270 (CA)

Furthermore, in *Byrne v Byrne*,⁵⁰¹ a 12.5 year marriage, the wife contributed \$124,000 (largely inheritance money) and the husband \$20,000 to buying and building their family home. The home was therefore relationship property and subject to equal sharing and the couple occupied the home six months before separation. However, Mrs Byrne was awarded 65% of the assets on account of her extraordinary financial contribution to the purchase and construction of their home. Financial contributions can sway the courts, and it seems this preoccupation with money or extreme hardship reflects the doctrine either of 'special contribution' in Australia or 'stellar contribution' in England and Wales which grants the courts the ability to give a larger sum on account of these (usually financial) contributions which in turn ignores the 'super mother'.

This approach clearly matches with Deech's contentions of promoting financial autonomy and not ascribing a value to domestic contributions. Yet, it seems that section 13 provides a trifling amount of recognition for homemaking and care-giving contributions. It requires the homemaker to suffer a substantial disadvantage through physical hardship in comparison to the breadwinner's substantial financial advantage. Consequently, this offers little protection to Fineman's care-dyad and may reflect a growing expectation of women to engage with the labour market as a mandatory requirement which in itself 'has operated to harm the most disadvantaged and defenceless mothers.'⁵⁰²

3.2.2.3 Section 15 and Economic Disparity

Given the limited scope for the homemaker to make a claim against equal sharing, s15 P(R)A was introduced under the P(R)AA with the aim to ameliorate the position of those in homemaking or care-giving roles and overcome standard of living and income inequalities caused by a breadwinner/homemaker role division.⁵⁰³ S15 allows the courts to grant orders to redress economic disparities where the division of relationship responsibilities has resulted in one party being significantly better off than the other.⁵⁰⁴ The key point here under s15(1) is that the financial disparity between the parties is a result of the division of relationship functions. To identify this, the courts can have regard to each partner's earning capacity, responsibilities to children and other relevant circumstances⁵⁰⁵ and can use a lump sum or property transfer from the stronger party to adjust accordingly. Consequently, it presents an opportunity to 'compensate' the primary care-giver who has sacrificed her career for the sake

⁵⁰¹ *Byrne v Byrne* (1986) 2 FRNZ 430 also see *I v I* [1995] NZFLR 276, and *Crossan v Crossan* (2003) 23 FRNZ 305. Similarly in *AL v LT* (2006) FC Fam-2003-198 a 16 year marriage with 2 children the home consisted largely from the wife's inheritance received in 2000. It was also held that as a result this was extraordinary circumstances.

⁵⁰² M Fineman, 'The Neutered Mother' (1992) 46 *University of Miami Law Review* 653, 661

⁵⁰³ See K Locke, 'Property (Relationships) Amendment Bill' (*Greens*, 2009) <<http://www.greens.org.nz/speeches/property-relationships-amendment-bill>> accessed 13 January 2011

⁵⁰⁴ S15(1) P(R)A1976 inserted by s17P(R)AA2001

⁵⁰⁵ S15(2)(a) – (c) P(R)A 1976

of raising children or taking on the homemaker role and as a result her husband's career has flourished.

The introduction of s15 was not without controversy and some feared that this would undermine a community-of-property regime as it shifted a pure formal equality focus to one of substantive equality.⁵⁰⁶ In fact Peart argues that it defies one of the Act's core principles and has 'no place in a code of rules that is expected to provide an inexpensive, speedy and simple resolution to relationship property questions.'⁵⁰⁷ Yet it offers a chance to effectively recognise and value care relationships that the previous sections have failed to do although its effectiveness is limited due to its retrospective rather than prospective focus. However, for Deech, compensation is an unrealistic basis for awards as she feels that career sacrifices in relationships are an advantage rather than a disadvantage for the homemaker: 'either it is a career which one would give up with a sigh of relief with the prospect of being kept, or it is a free choice to opt for the home rather than the office.'⁵⁰⁸

The courts have so far narrowly interpreted s15 and the burden of proof lies with the claimant (most usually female)⁵⁰⁹ to establish a causal link between the economic disparity and the division of roles,⁵¹⁰ without which a claim will fail. This evidence is specifically looking at what career or position the claimant would have been in had it not been for the role division. Yet, as *LL v JL* demonstrated,⁵¹¹ without evidence of what career the wife would have pursued, a s15 award will not be made even if there is a great economic disparity.⁵¹² The difficulty in proving this therefore places a high hurdle before the claimant in achieving a claim based on s15 and as a result limits the scope of the award. Furthermore, it relies on what the claimant was liable to earn – yet what if she had only been stacking shelves before she gave up her career?

However, s15 can go some way to redressing disparities. In *M v B*⁵¹³ a 25-year marriage with two children, the wife gave up a successful senior position in market research to raise their two children while undertaking part-time work. The husband became an equity partner in a law firm. At the time of separation her income was 5% of his. It was determined that his

⁵⁰⁶ See B Atkin, 'Economic disparity – how did we end up with it? Has it been worth it?' (2007) 5 *New Zealand Family Law Journal* 299; J Miles, 'Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation' (2004) 21 *New Zealand University Law Review* 268; J Miles, 'Dealing with Economic Disparity: An Analysis of Section 15 Property (Relationships) Act 1976' [2003] *New Zealand Law Review* 535 and N Peart, 'The Property (Relationships) Amendment Act 2001: A Conceptual Change' (2008) 39 *Victoria University of Wellington Law Review* 813

⁵⁰⁷ N Peart, 'The Property (Relationships) Amendment Act 2001: A Conceptual Change' (2008) 39 *Victoria University of Wellington Law Review* 813, 827 - 828

⁵⁰⁸ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1142

⁵⁰⁹ In fact none of the lawyers interviewed in this project could think of a case where a male participant had raised a s15 claim

⁵¹⁰ *Nation v Nation* [2005] NZSC 14; *De Malmanche v De Malmanche* [2002] NZFLR 579, *M v B* [2006] 3 NZLR 660; [2006] NZFLR 641 (CA)

⁵¹¹ This was a 15 year marriage with two children

⁵¹² *LL v JL* [2008] FAM-2007-000504

⁵¹³ See *M v B* [2006] 3 NZLR 660; [2006] NZFLR 641 (CA)

success was not a result of the division of functions, but her sacrifice was and the court awarded her \$75,000 on top of half of the \$900,000 relationship property.⁵¹⁴ Yet despite recognition being given, the award is still arguably small where sacrificing a career was only worth \$75,000.⁵¹⁵ How far does this reflect the long-term lasting financial impact of someone who has been out of work for 25 years? Similarly, in *V v V* a sum of \$67,000 was awarded to compensate a wife's calculated shortfall in earnings for an eight-year period from the separation. It seems that the courts are awarding modest sums where this section is being used, and for Miles, it seems that there is fear in the courts that the use of this section could lead to a double accounting of contributions from the homemaker.⁵¹⁶

In *X v X*⁵¹⁷ (a marriage of 21 years), the courts stated that this was a case for which s15 had been designed. Both parties had attained an accountancy degree, the wife had excelled at her studies and had a job at a major accounting firm, so they started off their careers at equal levels. She subsequently gave up her job to raise their children and at the time of separation Mr X was earning \$1.5 million annually and could earn \$180,000 a year. In comparison, Mrs X was only expected to achieve up to \$65,000. She was awarded \$240,000 out of a total \$7.5 million relationship property pool. The court supported Miles' 2003⁵¹⁸ observation that there are two types of economic disparity: 'but for', where the party has suffered from the division of functions for taking the role, and 'economic enhancement', where a party's position has been enhanced as a result of the division of functions. This echoes Scotland's economic advantage and disadvantage provision in its framework for financial provision on divorce.⁵¹⁹ Furthermore, the court identified that:

...to ensure that the reality of decision-making in relationships is reflected, it should be presumed that functions within a marriage are agreed to by both parties unless that presumption is meaningfully impugned. [105] (Robertson J)

Consequently, the courts recognised that a decision to divide the roles is attributable to both parties, not just one's choice to stay at home. Yet, while the court recognised that this was a joint decision and that this case was a classic s15 case, the actual departure from equal sharing was considerably small in size. Mrs X achieved just a 53.5% share and therefore only an additional 3.5% (five years calculated wage post-divorce) was granted to compensate her for

⁵¹⁴ The \$800,000 matrimonial home was owned by trusts and so was not included

⁵¹⁵ See S Pettigrew, 'Relationship Property – What is fair?' (2006) <<http://www.andersonlloyd.co.nz/publications/relationship-property-what-is-fair/>> accessed 14 February 2010

⁵¹⁶ J Miles, 'Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation' (2004) 21 *New Zealand Universities Law Review* 268. Miles also argues that anecdotal evidence suggests that section 15 would not be awarded in big money cases with large assets and therefore it reverts back to a needs-based asset, 297

⁵¹⁷ *X v X* [2009] NZCA 399, [2010]1 NZLR 601

⁵¹⁸ J Miles, 'Dealing with Economic Disparity: An Analysis of Section 15 Property (Relationships) Act 1976' [2003] *New Zealand Law Review* 535

⁵¹⁹ See Chapter 4, Part 4.4.2

the career sacrifices she made during a 21-year-long relationship. Additionally, this small percentage is only half of the actual calculated loss. So, if the applicant requires 10% to rebalance any economic disparity, the actual adjustment will only be 5% so that the applicant would receive 55%. This is because this adjustment will result in a 10% *difference* (55:45) between the applicant's and the respondent's award. This limits the extent through which the settlement will be able to recognise the full economic impact of the care-giving role.

Thus, the aim of s15 is not to achieve substantive equality and therefore not to achieve Fineman's equality of resources. Rather, s15 awards are only made where an imbalance exists that prevents the courts from achieving formal equality between the parties. This consequently confirms Miles' belief that this section actually imposes an 'equality ceiling' as it should do no more than bring the parties to substantially identical incomes and living standards.⁵²⁰ This approach is focused on relationship functions and formal equality rather than separate property and the actual long-term financial positions of the party.⁵²¹

Nevertheless, discussion before the 2001 Act indicated that it was to apply to 'the exceptional case, not the norm'⁵²² and in *Speller v Chang*⁵²³ the court stressed that s15 was not to give the courts discretion to redress all economic disparities, nor to achieve generalised social justice or gender equality objectives and therefore this narrow approach is perhaps to be expected. Consequently, s15 does not seem to falsely inflate claims of potential careers (as some feared) as it is so strictly applied, and additionally it does not ignore the fact that it is a free choice to assume the homemaker role. However, it creates a great deal of uncertainty and does not seem to reflect a partnership choice in the division of relationship functions. It protects those who have sacrificed a career in a limited capacity and only where there is sufficient evidence. Furthermore, s15 is only used to redress an imbalance, and therefore it seems to fail to recognise the care-dyad and at the same time conflicts with Deech's position. This dissatisfaction is heavily discussed in the empirical section below.

3.2.3 Maintenance

It is possible to get maintenance – a needs-based remedy – on separation under s64 (subject to s64A) of the Family Proceedings Act 1980 which may alleviate the restrictive nature of

⁵²⁰ J Miles, 'Dealing with Economic Disparity: An Analysis of Section 15 Property (Relationships) Act 1976' [2003] New Zealand Law Review 535, 295

⁵²¹ J Miles, 'Dealing with Economic Disparity: An Analysis of Section 15 Property (Relationships) Act 1976' [2003] New Zealand Law Review 535, 296

⁵²² Associate Minister Of Justice In The Whole Committee Hearing Of The Bill (1998) 591 NZPD 8625

⁵²³ *Speller v Chang* [2003] NZFLR 385

property settlement in New Zealand. This is a separate consideration to property settlement (although it can be heard at the same time)⁵²⁴ and is rarely used.⁵²⁵ S64(2) provides a list of factors that can be taken into consideration⁵²⁶ and awards made can either be periodical payments or lump sums, again reflecting the clean break principle within New Zealand's jurisdiction.

Where it is used, s64A reflects Deech's rationale that maintenance should have a rehabilitative function and imposes the limitation on s64 that the party must resume responsibility for their own needs in a reasonable time at which time they will no longer be able to get maintenance. However, 'reasonable time' is not defined by the Act, and it seems that maintenance will only be ongoing in extreme situations, such as the ongoing care of an autistic child⁵²⁷ and even then the focus will still be on retraining and rehabilitation. When awarding maintenance, the courts consider two elements: whether it is unreasonable for party A to do without maintenance from party B;⁵²⁸ and whether it is reasonable to require party B to provide maintenance to party A.⁵²⁹ To determine this, the courts will consider a range of factors including the ages of each party, the effect of the division of functions and duration, ability to self-support and other relevant circumstances.⁵³⁰

While this may even go too far for Deech who contends that maintenance should solely be used for those incapable of finding employment rather than a mechanism for retraining, the actual awarding of maintenance is incredibly uncommon⁵³¹ as it conflicts with clean break principles even though it can be awarded as a lump sum. Consequently, the courts have a strict interpretation of both the applicant's 'reasonable needs' and 'actual income' to determine if this is necessary and also the respondent's ability to pay.

Yet, this restrictive approach to maintenance means that the courts limit extensive financial dependency post-separation and instead encourage the principles that Deech advocates: rehabilitation, self-sufficiency and joint economic responsibility for any children of the relationship. However, from Fineman's position, this approach is potentially over simplistic. Fineman argues that financial autonomy through self-sufficiency is unattainable without equality of resources. Yet, the narrow application of maintenance provisions in New Zealand

⁵²⁴ S32 P(R)A

⁵²⁵ J Heath, 'Spousal Maintenance' (*Family Law*, 22nd November 2010) <<http://www.wtr.co.nz/news/article.htm?id=14>> accessed 13 February 2011

⁵²⁶ This is listed in Appendix U

⁵²⁷ *FB v BL* (2006) FAM2004-001894

⁵²⁸ S64A(2)(a) Family Proceedings Act 1980

⁵²⁹ S64A(2)(b) Family Proceedings Act 1980

⁵³⁰ S64A(3) Family Proceedings Act 1980

⁵³¹ J Heath, 'Spousal Maintenance' (*Family Law*, 22nd November 2010) <<http://www.wtr.co.nz/news/article.htm?id=14>> accessed 13 February 2011

limits the extent and the frequency with which this form of equality can be achieved. Consequently, this approach fails to enable Fineman's care-dyad to achieve economic autonomy in the majority of cases.

3.3 Cohabitation

Since 2001, cohabiting couples have had almost the same property rights on relationship breakdown as married couples. A cohabiting relationship is defined under section 2D of the P(R)A as two people living as a couple⁵³² and the courts determine this by taking into consideration all the circumstances of the relationship.⁵³³ Despite these guidelines, the courts generally struggle with defining cohabitation relationships⁵³⁴ and some cases have established that living together fulltime is not necessarily a prerequisite to coming under the definition of the Act.⁵³⁵ For all intents and purposes, cohabiting couples are treated almost synonymously with married couples and civil unions, thus the principle of equal sharing on relationship property⁵³⁶ and the exceptions of s13 extraordinary circumstances and s15 economic disparities apply without any difference. This, for Deech, imposes the law on two people who have chosen not to marry. On the one hand it legitimises claims made by undeserving mistresses and on the other it undermines financial autonomy and 'retards the emancipation of women, degrades the relationship, takes away choice.'⁵³⁷

Part 6 of the Act also allows cohabiting couples to enter an agreement subject to the same requirements as aforementioned in the married/civil union context. This provision compensates to some level Deech's concern of imposing a system on people's private lives as it allows those who consciously avoid marriage or civil unions to opt out of the regime and protect their assets as well as organise their own affairs. However, there are concerns raised above that people are firstly not aware that they can contract out, and secondly that couples in cohabiting relationships do not actually know that the law applies to them, and thus will not make an agreement.⁵³⁸ Therefore, while these agreements enable couples to prevent the law from interfering in their private sphere, there is still the danger

⁵³² s2D(1) Property (Relationships) Act 1976

⁵³³ See Appendix K

⁵³⁴ See for example N Peart 'De Facto Relationships (or Maybe Not) in New Zealand' [2008] *International Family Law* 130

⁵³⁵ See *RRB v GF* [2008] NZFC and see *Scragg v Scott* [2006] NZFLR 1076, *Horsfield v Giltrap* (2001) 20 FRNZ 404 (CA)

⁵³⁶ S11 Property (Relationships) Act 1976

⁵³⁷ R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 40

⁵³⁸ N Richardson, 'The New Zealand Property (Relationships) Amendment Act 2001' [2002] *International Family Law Journal* 86

that in some circumstances the default scheme will be an unwelcomed interference in the private ordering of a couple's family life.

Furthermore, the 2001 amendments also removed sexuality discrimination and, again while few same-sex cases exist, the presumption is that same-sex cohabiting couples will be treated the same as different-sex cohabiting couples. Consequently, the same critique of the P(R)A applies to civil unions and cohabiting relationships. While this is a positive step from Fineman's position, it is perhaps important to note that, rather than placing Fineman's care-dyad at the heart of Family Law, instead this extension further legitimises sexual bonds as a central focus of Family Law from which Fineman argues Family Law should move away. Nevertheless, by extending the legal entitlements once available at the end of marriage to now include same-sex and unmarried couples, New Zealand's system has in effect increased the number of care-dyads that can access financial relief post-separation. This provides greater protection for a wider number of Fineman's care-dyads.

3.3.1 Cohabiting Relationships of Short Duration

One key difference between cohabiting and married relationships lies in relationships under three years' duration. Whereas married relationships will be subject to a consideration of the contributions made by the spouses, in the cohabitation context, this is not automatic. Section 14A establishes that a short cohabiting relationship be treated in the same way as short duration marriages only where there is a child of the relationship,⁵³⁹ or one party has made a substantial contribution that means no property order would result in a serious injustice.⁵⁴⁰ If these two situations can be established, then the share will be determined by the cohabitants' relative contributions⁵⁴¹ and the aforementioned s18. If not, then claims will fall outside of the scope of the P(R)A and have to rely on trust and Property Law. This consequently may reduce the fears that Deech has of abuse by 'undeserving mistresses' as there is a three-year qualification period before the scheme applies. However, Deech herself preferred a much longer period of ten years.⁵⁴²

There has been a lack of continuity over the definition of substantial contribution. *Schmidt v Jawad*⁵⁴³ defined 'substantial' as a 'considerable amount', 'real importance or value' that has gone 'far beyond the norm'. *LS v ZJ* emphasised that substantial meant real importance but

⁵³⁹ See Part 2 s2 Property (Relationships) Act 1976 which defines a relevant child as a child of the cohabitants

⁵⁴⁰ s14A(2) inserted by section 17 P(Relationships) Amendment Act 2001

⁵⁴¹ s14A(3) Property (Relationships) Act 1976

⁵⁴² R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 44

⁵⁴³ *Schmidt v Jawad* [2003] NZFLR 1050

said that it did not need to go that far, just beyond the norm.⁵⁴⁴ *Lawson v Perkins* also followed this latter definition.⁵⁴⁵ Here, Ms Perkins was responsible for all the household tasks, used her income towards the relationship and helped Mr Lawson in his business (cleaning and painting). This was held to not have gone beyond the norm and once again, unsurprisingly the courts have an extremely restrictive view of domestic contributions and it is unlikely that homemaking or care giving would be defined as a substantial contribution. Fineman's unmarried care-giver is without any protection for the first three years of a relationship.

On top of requiring a substantial contribution, this contribution must have caused a 'serious injustice'. There has also been a range of definitions of this term and Justice Chisholm in *S v W*⁵⁴⁶ described it as a 'relatively high threshold' and cases seem to link this to financial disparities and financial hardship.⁵⁴⁷ In fact, *TF v AH*,⁵⁴⁸ described it as requiring the claimant to be 'on all fours' financially indicating the level of extreme dependency required whereas married couples in short relationships do not have to establish a serious injustice. While this high bar aligns with Deech's position it seems that in actuality the P(R)A offers protection in a limited way for cohabitants without children.

3.3.2 Maintenance

Maintenance under the Family Proceedings Act 1980 can also be awarded to cohabiting couples. But s70B states that to grant a maintenance award under s70, the cohabitants (much like a marriage of short duration) must either have (a) a child of the relationship or have carried out a substantial contribution and (b) that a failure to make an order would result in serious injustice. This higher threshold indicates that there seems to still be a hierarchy between relationship forms and future provisions, with this protection being much harder to achieve, particularly when serious injustice is interpreted so stringently. This seems unsatisfactory from both feminist perspectives: for Deech, the mere concept of maintenance for cohabitants is abhorrent⁵⁴⁹ particularly when she believes cohabitation is a union that Family Law should refrain from interfering with. For Fineman, the extent of maintenance as previously discussed is too narrow and does nothing to protect the financially vulnerable care-dyad.

⁵⁴⁴ *LS v ZJ* [2005] NZFLR 932 [66]

⁵⁴⁵ *Lawson v Perkins* HC AK CIV-2008-404-002473 [2009] NZHC 763

⁵⁴⁶ *S v W* [2006] NZLR 699

⁵⁴⁷ *T v B* [2006] FAM-2004-019-1304, *G v C* (2006) FAM-2004-004-1558 and *M v T* (2009) FAM-2007-020-355

⁵⁴⁸ *TF v AH* [2006] NZFLR 86

⁵⁴⁹ See R Deech, 'Cohabitation' (2010) 40 *Family Law* 39

3.4 Doctrinal and Feminist Analysis Conclusion

New Zealand's system of financial provision on relationship breakdown most closely embodies Deech's perspective of the form that the law should take. Little regard is given to domestic contributions which, for Deech, would serve to promote the emancipation of women from the private sphere. This, combined with New Zealand's equal sharing of (narrow) relationship property that is strictly adhered to, and its restrictive approach to maintenance, strongly protects individual rights and property and prevents a patriarchal dominance exerting itself in the private sphere. It respects people's rational ability to choose how they order their lives with limited interference from the courts, and its strengths also seem to lie in the rigid application of certainty, meaning that awards are predictable and the legal principles are clear to understand.

Yet, it seems that by doing so domestic contributions are completely invisible to the courts. The equal sharing provision which represents Deech's position by advocating formal equality between spouses has, as Fineman argues, degendered and neutralised relationship roles, ignoring differences that arise from 'gendered lives'.⁵⁵⁰ Consequently, given the limited application of maintenance, it means that in actual fact where there is a financial disparity, there is little remedy available for the economically dependent spouse. Even where the courts can address contributions, greater weight is given to financial contributions and instead domestic contributions must be accompanied by a severe hardship. Too little recognition is given to domestic contributions. Consequently, it seems that s15 has failed in its objectives due to the courts' preoccupation with ownership rights and equality causing an overly narrow application of their own discretion. Therefore, the homemaker seems overly disadvantaged by New Zealand's framework as equal sharing only applies to narrowly-construed relationship property and at the same time there is little relief available from s15 or the maintenance provisions.

It is strongly debatable whether, as Deech claims, this serves to emancipate women from the private sphere and encourage them to be financially autonomous. The mere fact that s15 was introduced into the community-of-property regime in fact suggests that a pure Deech-like regime is too extreme and supports contentions made by O'Donovan⁵⁵¹ and also Ingleby⁵⁵²

⁵⁵⁰ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995) 22

⁵⁵¹ K O'Donovan, 'The Principles of Maintenance: An Alternative View' (1978) 8 *Family Law* 180

that wider changes must first come from society rather than the law. It seems to presume financial equality between spouses and fails to recognise any inequality or long lasting financial disadvantage that may be caused through 'gendered lives' particularly caused by the presence of children. Consequently, New Zealand's approach may be unsuitable for long-term relationships with dependents.

While the treatment of cohabitants in a similar manner opens up more possibilities to protect the care-dyad, an extension of the legal framework in New Zealand is unsatisfactory as it does not focus on this aspect of family life at all. Even for Deech, treating cohabitants in the same way poses a dilemma, as it enforces a legal framework on the unsuspecting cohabitant when their rational choice has meant that they have not chosen this for themselves. It would be unsatisfactory for such a scheme to be imposed in England and Wales.

3.5 Empirical Analysis of New Zealand Lawyers

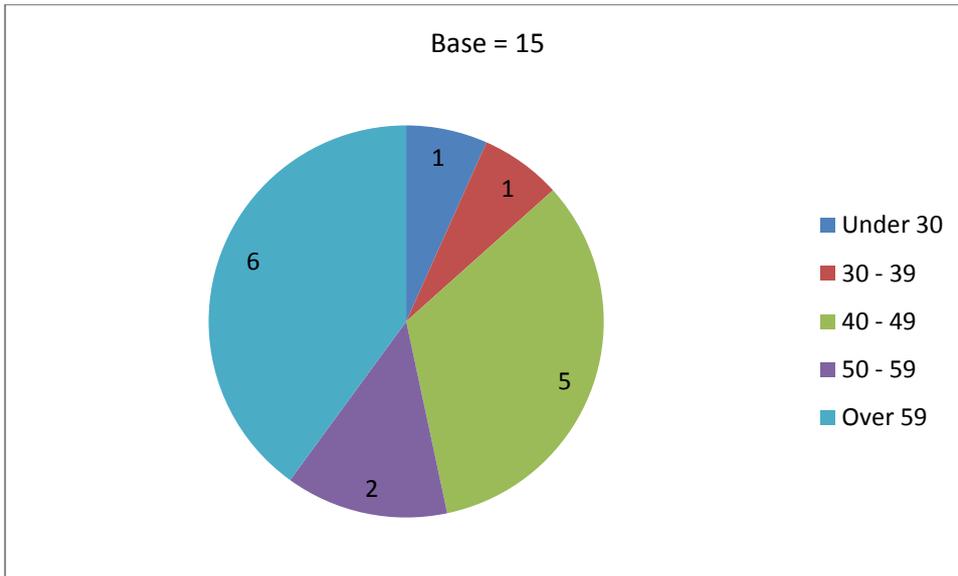
Yet how does a scheme which most closely resembles Deech's position work in practice? What did the thematic analysis reveal about the lawyers' thoughts on how New Zealand's system operates in reality? After setting out the socio-demographics of the respondents, this section shall explore the major themes that emerged from the analysis in the married, cohabiting and same-sex context.

Altogether, 16 practitioners were interviewed from various locations around New Zealand. Out of these, 11 were male and five were female, meaning that answers may be skewed to some degree towards the male responses. There was a wide range of ages within the group as shown in Table 3.1. The most frequent category was over 60, meaning that the respondents in this jurisdiction were older than the other jurisdictions. Most of the practitioners had been practising in the categories of 21-30 and 31-40 years and one had practised between 41-50 years. Three fell in the 11-20 years category and two had practised for under 10 years, thus on average the lawyers had longer experience in this field than in the other jurisdictions. This also means their perspectives encompassed the system before and after the 2001 P(R)AA changes.

⁵⁵² R Ingleby, 'Lambert and Lampposts: The End of Equality in Anglo-Australian Matrimonial Property Law' (2005) 19 *International Journal of Law Policy and the Family* 137

3.5.1 Socio-Demographics of the Interviewees

Table 3.1: Ages of the respondents



3.5.2 Responses in the Marriage Context

Table 3.2: Qualitative themes in New Zealand in the married context

Overarching Themes	Themes	Sub-Themes
Deech-centric	Equality equates procedural certainty	Predictability Simplicity Out of court settlement One-size-fits-most
	Equality avoids evaluation	Practical Partnership
Insufficient substantive fairness	Too rigid	
	Exceptions (ss13–15)	Infrequently awarded Ignores dual burden Ignores future impact Negligible awards
	Gendered disadvantage	
Limited maintenance	Deech-centric	Clean break Rehabilitative maintenance
	Too limited	Low awards Asset Size
Short marriages	-	-

As demonstrated in Table 3.2, out of the thematic analysis in New Zealand, the 'Deech-centric' stance emerged as an overarching theme in the marriage context and it was evident that the lawyers embraced the core aim of the P(R)A. However, the lawyers were also conscious of the fact that property settlement often involved a fine balance between certainty and fairness and arguably, therefore, a balance between Deech's and Fineman's positions:

This is a law that is one size is supposed to fit all as much as possible. Then it becomes a matter of balancing; should we change it so that we can provide a fair solution in a larger number of cases at the expense of certainty? (NZLaw11)

The qualitative data also revealed the parallel overarching theme of 'insufficient substantive fairness'. It seems that the lawyers' overwhelming preference for procedural certainty was often at the expense of more substantive fairness.

3.5.2.1 Deech-Centric Views

A number of clear positive themes emerged with regards to the operation and process of New Zealand's legal system. At the heart of this was the theme that 'equality equates procedural certainty' and therefore predictability. The lawyers identified that the fundamental benefit attached to a starting point of equality was 'simplicity': the system is easier for legal practitioners to apply and also for the general public to understand. Consequently some of the participants emphasised that, on breakup, individuals were aware of their financial entitlements:

So when people enter relationships, they know what the outcome's going to be if they separate. And people very quickly adapt to it. (NZLaw9)

The certain fifty-fifty split of matrimonial property creates a clearer and simpler path to remedying property disputes at the end of a relationship. The direct consequence of a simpler system is the higher frequency of out-of-court settlements for financial provision on relationship breakdown. The qualitative analysis within New Zealand indicated that the deferred community-of-property approach resulted in a lower level of litigation. The lawyers were content with this outcome as less litigation also means lower costs and rapid family dispute settlements:

I think it's working extremely well. It's avoiding huge amounts of litigation...and vast cost...it's a good thing... (NZLaw9)

This rule-based approach obviously reflects Deech's position that a system of property settlement should be clear, predictable and certain and the majority of the interviewees stated that the one size fits all approach generally produced fair outcomes:

The regime that we have on the face of it can be very fair...I think it works very well for the majority of people... (NZLaw4)

These procedural benefits were also connected to the theme that 'equality avoids evaluation'; dividing assets equally prevents the courts from having to value the contributions that either parties have made. The lawyers generally wanted to avoid evaluating contributions because they felt that it would disadvantage the homemaker as (typically) she would have to establish the nexus between her contributions and the property:

Well I think [equal sharing] means that the homemaker doesn't start on a, with a disadvantage and having to prove that her, usually her, contributions are of equal value to the breadwinner. And, um, I think that's good. (NZLaw11)

Equal sharing was therefore seen to prevent the courts from effectively 'judging' the homemaker's contribution.

Additionally, the lawyers thought that there were strong pragmatic reasons for avoiding evaluation. Three quarters of the respondents emphasised the inherent difficulty in valuing domestic contributions beside financial contributions stating that it was like comparing 'apples and oranges'. Therefore there were concerns that it would be impossible to ever place a tangible value on these types of homemaking activities. Furthermore, the lawyers felt that there would be fundamental problems with evidence not only relating to the documentation of such activities but also that clients may over-exaggerate their contributions altogether:

...it's one of those notorious areas where it is the tendency for the client to overstate their contribution and understate that of the other. (NZLaw6)

Therefore the practical result of quantifying non-financial contributions would potentially increase litigation by making it too hard to settle and subsequently this would cause uncertainty within the system. The lawyers felt that New Zealand currently avoided these problems as a result of equal sharing:

Well I don't think there are difficulties because of the way in which our legislation works which is as I say contributions are irrelevant except in a few cases. (NZLaw9)

Another theme that explains the lawyers' belief that there should be equal division of family assets was that marriage was a 'partnership' and thus property settlement should reflect this:

...because it's a partnership; whatever you contribute in your relationship should count equally. (NZLaw1)

This strong discourse surrounding partnership meant that a large proportion of the respondents believed that assets should be divided equally whether or not there were children:

...the provision to care for the children is just one of the examples of a contribution to a relationship partnership. You can still have a relationship with no children where one person or both people are contributing equally to each other. (NZLaw7)

This focus on certainty and the benefits of a rule-based system is not to say that the lawyers felt that New Zealand's approach was without discretion. Nearly half of the respondents felt that New Zealand has a good level of discretion which takes account of relationships where one size does not fit all. This discretion refers to the courts' ability to depart from equality using ss13-15 P(R)A. Yet, as the 'too rigid' theme below shall discuss, the practical application of this discretion has been heavily criticised. Nevertheless, despite these concerns, 12 out of the 16 lawyers indicated overall satisfaction with their system in practice and there was a stark sense of realism here; the participants recognised that, yes there was room for improvement, but overall the system worked as well as it could in practice:

...it works as best it can and I guess the reality is that...there's no perfect solution financially in trying to divide a whole into a half... (NZLaw7)

3.5.2.2 Insufficient Substantive Fairness

While the lawyers were generally happy with the Deech-centric nature of the New Zealand system, there were concerns that the system was far 'too rigid' in places and the practitioners clearly wanted greater flexibility. This meant that often the lawyers thought that there was 'insufficient substantive fairness':

...generally, it's fair, but...because it's one-size-fits-all it can create an enormous unfairness. (NWLaw2)

Most notably, the respondents heavily criticised s13 (extraordinary circumstances) and s15 (economic disparity) for failing to alleviate the harshness of equality. The perceived failure of these sections fell into two categories: failure to recognise any 'dual burden', and a failure to recognise the future impact of the homemaking role. The first of these related to s13 which was most criticised in relation to the dual earner relationship model where one party was predominantly responsible for the care-giving activities. The second category related to the compensatory section of the P(R)A, s15. Furthermore a few lawyers were concerned that s15 was not wide enough as it only compensates someone for a career loss, thus is limited to those who had the clear potential of a high flying career. In practice, the lawyers indicated that equality was difficult to depart from as the hurdles that needed to be overcome before a claimant could use either ss 13 or 15 were set too high:

You could be a drunken sod and there are no exceptions to the law, there are no exceptions really unless there are extraordinary circumstances [s13] but they are that hard to prove that no-one ever bothers really. (NZLaw9).

We have got s15 which does give some compensation, but the test is harder to satisfy, and therefore...those efforts or the disadvantage, sorry, isn't really going to be adequately compensated. (NZLaw4)

Consequently, claims under ss13 and 15 were 'infrequently awarded'. Thus, in reality, the homemaker is hard-pressed to achieve an award other than equality and therefore 50% is the maximum award possible. Most practitioners felt that the limited application of ss13 and 15 therefore failed to protect the homemaker.

...some of the cases talk about a career break...that's fine if you're talking about a homemaker who has a university degree and was a professional whatever. But, you know, that's only 3% of the population... (NZLaw13)

Where ss13 and 15 are successfully used, half of the practitioners thought the awards were too modest. NZLaw16 described the awards as 'relatively modest and usually it's not worth the effort' and NZLaw13 describes them as 'negligible'. Subsequently, it is perceived that the cost of litigating is unlikely to be outweighed by any award achieved under section 13 or section 15. It seems that the inevitable cost of bringing a claim under these sections acts as a deterrent as NZLaw16 puts it, 'you'd be silly going to court, it's too expensive'. As a result there is the danger that the economically weaker spouse will settle for equal sharing out of his/her financial inability to access the court system:

...the court does make provision under s15...but to actually initiate litigation in New Zealand under the P(R)A it is very expensive, so the asset pool, it has to be a very big asset pool to justify initiating the application, and that is a big barrier in itself. (NZLaw16)

Most worryingly, the lawyers stated that the disadvantage suffered from the limited use of discretion was in fact a gendered disadvantage. It seems that a limit of 50% therefore places a glass-ceiling for those (usually women) in economically weaker positions:

I suppose there are enough settled cases where there are lawyers just negotiating into a settlement. You'd be silly going to court, it's just too expensive. And...I think there are these barriers for...women going to court. (NZLaw16)

You've got to prove...the economic disparity at the end of the marriage and 99% of the time it's a woman, and she's got to prove that. (NZLaw12)

However, it seems the lawyers' dissatisfaction with these provisions was not because of the actual statutory framework in New Zealand. Rather, it was due to the judges' strict interpretation of the statute and the courts' obsession with equal division:

The issue in NZ is that the...court really doesn't have a lot of discretion; it's equal sharing. It's almost like it's the Holy Grail... (NZLaw13)

Yet, a large proportion of the lawyers also indicated that there were practical difficulties with s15 and the compensatory provision that meant that the judges avoided the discussion of s15:

...it's really hard to prove a career break because it's really hard to get any evidence about what the career would have been. And, um, in practice the economic disparity provisions haven't worked out as I believe, um, the people who came up with them (laughs) first envisaged... (NZLaw13)

Consequently, the courts had stayed away from any discussion of this provision. Thus, while the lawyers are generally satisfied with the Deech-centric approach in New Zealand, there is huge dissatisfaction with the way in which the care-dyad and the homemaker are treated on divorce.

3.5.2.3 Limited Maintenance

The views espoused in relation to maintenance were also inherently Deech-centric. The general consensus was that clean break was preferable to ongoing financial dependency. Maintenance was thought to prevent couples from moving on. Yet most respondents recognised that there were certain situations where maintenance should be awarded. These situations related to the parties' earning potential, the length of the relationship, the age of the parties (namely older parties nearer retirement age) and the presence of any children:

...there are two major groups of generally women, the much older age group within 5-10 years of retirement, and the much younger age group stuck at home with kids. Both two groups in particular need help and just don't have the capability to be financially independent. (NZLaw7)

Half the respondents suggested that the concept of partnership meant that it is the parties' obligation to provide support to one another:

...financial dependence is either explicitly or implicitly part of the bargain while they're together. (NZLaw13)

Yet, where the participants thought that maintenance should be awarded, most argued that maintenance should only be rehabilitative rather than ongoing:

I guess, to a certain extent, things like spousal maintenance can go some way to redress inequity if you look at what the earning potential, uh, one of the partners could have been had they continued in their role as opposed to, uh, what they did by doing domestic work in the house. (NZLaw3)

Generally, the respondents were content with the rehabilitative approach in New Zealand. However, some felt that in certain situations, maintenance awards were very small and insufficient particularly where there were children:

...well there is spousal maintenance, you can apply for it, but it's pretty...low and it lasts for a couple years if you're lucky. (NZLaw2)

This supports Fineman’s argument that children, or a care-dyad should make a difference in the way that awards are allocated post-separation. Furthermore, the theme of ‘maintenance’ emphasised the inadequacy of clean break in cases with small assets, and consequently some lawyers thought the size of assets affected whether maintenance should be applicable:

I do think that the New Zealand system works fine to protect the non-earning spouse where there are high incomes. Where there are not it doesn’t, but that’s probably because it’s the dissolution isn’t dividable for practical reasons. (NZLaw8)

3.5.2.4 Short Marriages

‘Short marriages’ was another theme that the lawyers referred to and it seemed that often these cases tended to settle which one respondent attributed to be due to costs:

I suppose there are enough settled cases where there are lawyers just negotiating into a settlement, you’d be silly going to court it’s just too expensive (NZLaw16).

There was also some division over how appropriate the three year bar was. For some, three years was too long and for others it was too short. Consequently, it seems that the three year rule is applied too rigidly, and therefore greater flexibility is desired by the lawyers:

Because of the rigidity there are often unfair results, especially where there is a relationship of three years...where the law says everything is 50:50. So that rigid result can be unfair sometimes, particularly in shortish relationships.(NZLaw14)

Overall, in the married context, the lawyers were satisfied with the principles that prioritised procedural fairness over substantive fairness. However, it was clear that often this approach went too far towards formal rather than substantive equality. While the respondents were content that equality avoided pragmatic difficulties with valuing domestic contributions, ss13 and 15 exceptions to equality were rarely used and too narrowly applied and, combined with the limited application of maintenance, inevitably disadvantaged Fineman’s care-dyad. Evidently greater recognition of the domestic role is required.

3.5.3 Responses in the Cohabitation Context

Table 3.3 Qualitative themes in New Zealand in the cohabitation context

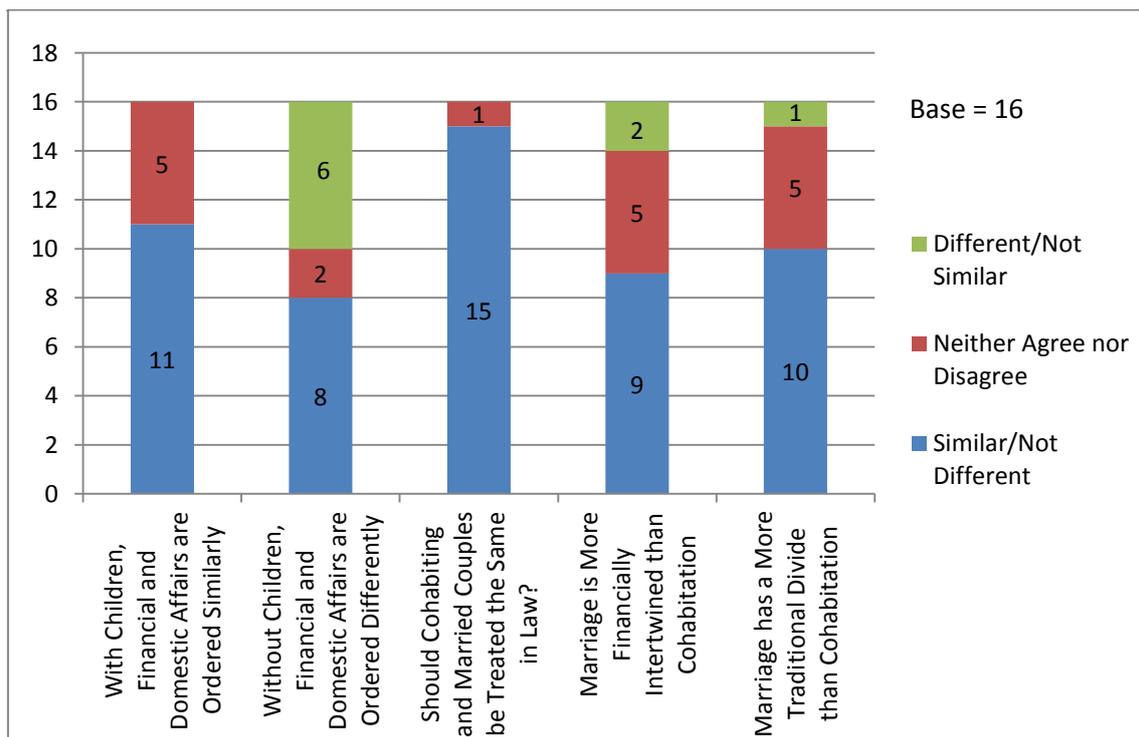
Themes	Sub-Themes
Similar	Function In practice Exception: short duration relationships

The qualitative themes outlined in Table 3.3 demonstrate the lawyers’ belief that cohabiting couples and married couples are, and should be, treated similarly. Throughout the interviews all of the lawyers either discussed the similarities of these relationships or simply gave the same answers as they did in the married context. Despite similarities in treatment, there was some indication that the courts might be a little more restrictive with cohabiting couples. One lawyer emphasised that:

...anecdotally I would say if you’re a de facto wife trying to prove s15, then you’ve got even less chance than if you were married. (NZLaw12)

Nevertheless, nearly all respondents felt that the same principles on relationship breakdown should apply uniformly between married couples, cohabiting couples and same-sex couples. This theme of ‘similarity’ is also evident in Table 3.4, where the lawyers indicated that cohabiting and married relationships were alike, especially where there were children. Thus the lawyers fundamentally reflected Fineman’s position that relationships which are functionally similar should be treated in the same way.

Table 3.4: Attitudes towards cohabitation and marriage



However, despite the overwhelming consensus that these relationship styles were similar, the lawyers were worried about the three-year qualifying period for cohabitants. Firstly, NZLaw13 raised this concern as currently the regime for short duration cohabiting relationships does not go back to Property or Trust Law: ‘the act doesn’t say “in the event of it being applied you go back to general principles”, the act still applies, you just don’t have a remedy’. Consequently it

seems that where the relationship is shorter than three years there is no real remedy available. Therefore, cohabiting relationships under three years may actually be in a worse position than they were before the 2001 amendments.

The second concern was that the cohabitation provisions could apply to casual relationships or to those couples who had made a conscious decision not to marry/enter a civil union:

...with de facto couples you don't know...if you are in one when you started...people fly into them...and then are really shocked to lose the family home because the court says that you were in a de facto relationship even though you didn't, sort of give it a thought. Even though you weren't living in the same house or having [a] sexual relationship. That's sort of quite bizarre. (NZLaw11)

Therefore, it was felt that sometimes the limitation period could be too short. Perhaps if a scheme is to give such entitlement rights then a longer limitation period is required, although this needs to be followed with provision for those who do not fall within the limitation period.

3.5.4 Responses in the Civil Union/Same-Sex De Facto Context

Table 3.5 *Qualitative themes in New Zealand in the same-sex context*

Themes	Sub-Themes
Uncertainty	Lack of experience Presumed similarity Children

The predominant theme here was ‘uncertainty’ as Table 3.5 demonstrates and was generally due to the lawyers’ lack of experience with same-sex relationships. Despite this uncertainty, the majority presumed that same-sex and different-sex relationships would be treated identically. Furthermore, the participants strongly believed that ‘it should make no real difference in the wide world whether they’re same-sex couples or de facto couples.’ However, some lawyers stated that as the courts were more likely to award a clean break where there were no children and at the same time same-sex couples were less likely to have children than different-sex couples, that in reality there would be some difference between same-sex and different-sex relationships:

You usually find that with same-sex couples there is less of a presence of children, although not necessarily so. (NZLaw6)

The lawyers indicated that same-sex couples without children had a greater room for choice which suggests that same-sex couples are perceived as having a greater ability to negotiate roles within the relationship:

...logically there shouldn't be any difference, but, um, if there are children then I think there has to be a distinction...In a same-sex case there could be one who...could have voluntarily taken over that role and made sacrifices so that the other could be the breadwinner. (NZLaw5)

Overall, however, the respondents generally believed that same-sex couples and different-sex couples should be treated similarly, except where there were children. There was a tendency to think that same-sex couples were more egalitarian, or at least more able to negotiate within the private sphere.

3.5.5 The Vignettes

As set out in Chapter 2, two scenarios were posed to the lawyers outlining a set of circumstances surrounding a couple splitting up. For each scenario, the lawyers were given the outcome in England and Wales. The lawyers were asked their opinions on this approach and also how this would differ from the way in which their own jurisdiction would approach the scenario. Both scenarios also had four variables of case facts and the participants were asked how each variable would affect their jurisdiction's approach.⁵⁵³ This provides an opportunity to consider the implications that this scheme would have for cases that have provoked critique of the current system in England and Wales. Would it rectify these criticisms?

3.5.5.1 Scenario A

Scenario A was based on *Burns*⁵⁵⁴ and the outcome given in England and Wales was that the female cohabitant was left with no share in the property, no right to remain in the home and no remedy elsewhere on relationship breakdown. The majority as displayed in Table 3.6 below thought it was too protective to the financial earner and there was a clear shock from the lawyers in the way cohabitants are treated in England and Wales:

If that is a true statement I am horrified. Um, I am horrified (NZLaw6)

All the lawyers agreed that New Zealand's approach would be much more generous, and those who expanded on how indicated that Miss Jones would be entitled to half the house and family chattels. Three also thought that there was a possibility of short term maintenance⁵⁵⁵ and two thought that Ms Jones potentially had a s15 claim.⁵⁵⁶ Thirteen of the lawyers felt that New Zealand's approach was about right. However, three felt that they would like the award to be a little more generous by way of compensation.

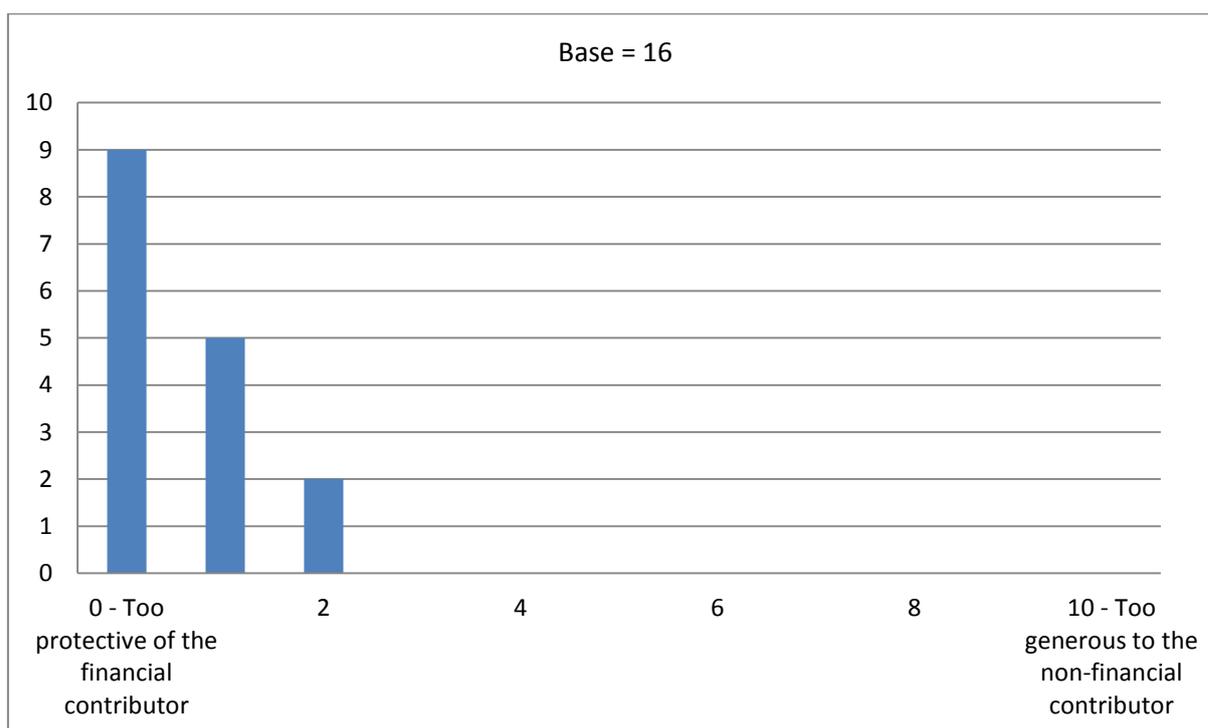
⁵⁵³ Appendix A

⁵⁵⁴ *Burns v Burns* [1984] Ch. 317. See Appendix A for details of the scenario

⁵⁵⁵ NZLaw3,9,12

⁵⁵⁶ NZLaw1,7

Table 3.6: Attitudes to England and Wales' outcome in Scenario A



3.5.5.1.1 Scenario A – The Variables

The lawyers were then asked about how the law would alter its response for four different variables listed in Table 3.7. As Table 3.8 below shows, on the whole, the respondents believed that the approach would stay the same. As we can see on the table, there were two slight variations: employment and children.

The five of the lawyers who thought the outcome would be a little less generous if she had carried on in employment, attributed this to Miss Jones' reduced ability to apply for a s15 claim⁵⁵⁷ or any maintenance.⁵⁵⁸ Two lawyers⁵⁵⁹ thought if Miss Jones had had no children the settlement would be a little less generous as it would reduce the ability to claim economic disparity under s15. Yet the majority stated that this should not affect the award:

Even though they didn't have children and she still didn't work, that must be what they decided their lives together should be like, so she still shouldn't be disadvantaged by it. (NZLaw11)

All of the respondents, when asked how satisfied they were with the outcome, selected '5' on a scale of 0 – 10 which indicated that they believed the outcome was 'about right'. Similarly

⁵⁵⁷ NZLaw4,7,11

⁵⁵⁸ NZLaw3,4,7,12

⁵⁵⁹ NZLaw7

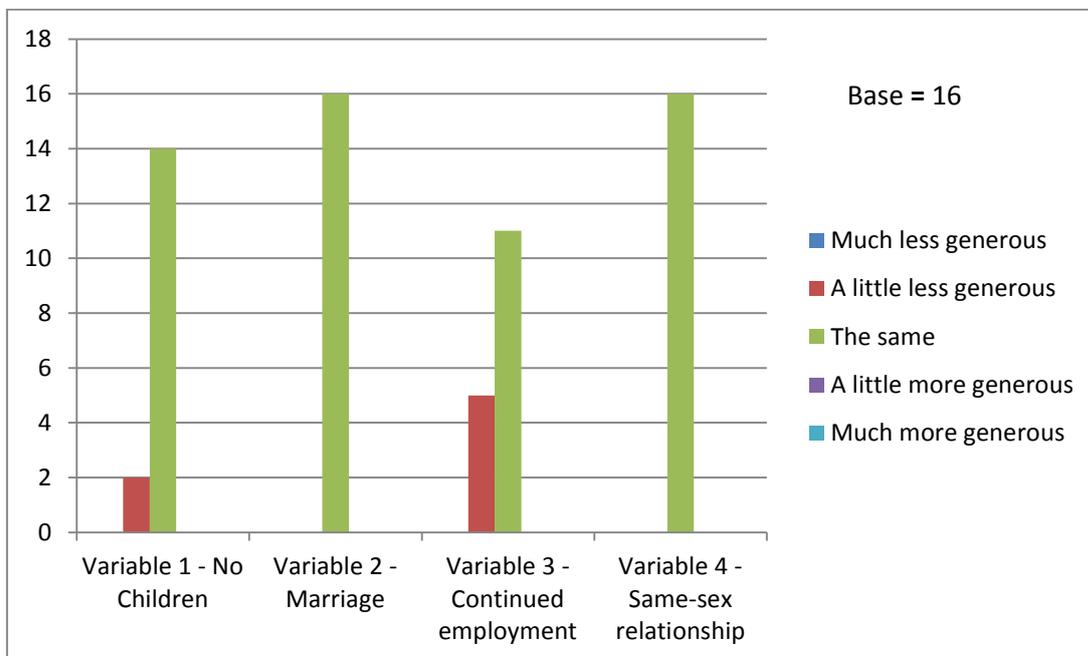
when the lawyers were asked if they would alter the approach in any way,⁵⁶⁰ all selected that they would keep the outcome the same.

Thus it seems that overall, in cohabitation cases similar to *Burns*, the New Zealand lawyers considered the outcome in England and Wales as wholly inappropriate and they are completely satisfied with their own approach in this context.

Table 3.7 Scenario A variables

Variable Number	The Variable
1	Miss Jones had not had any children.
2	Mr Smith and Miss Jones were in fact married
3	Miss Jones had worked throughout the relationship
4	If this was a same-sex relationship with adoptive children

Table 3.8: How would the outcome vary for the variables?



3.5.5.2 Scenario B

Scenario B was based on *Miller*⁵⁶¹ involving a married couple of less than three years without children with a vast pool of money assets.⁵⁶² Unlike Scenario A, the responses were less consistent and while the mode deemed England and Wales' outcome to be too generous to Mrs Higgins, a third felt that this was the right outcome demonstrated in Table 3.9:

I think it's good, it's about right and I wish we could do that. (NZLaw11)

⁵⁶⁰ The participants indicated on a likert scale of 'much less generous, a little less generous, the same, a little more generous and much more generous'.

⁵⁶¹ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186

⁵⁶² Appendix A

Table 3.9: Lawyers' attitudes to England and Wales' outcome in Scenario B

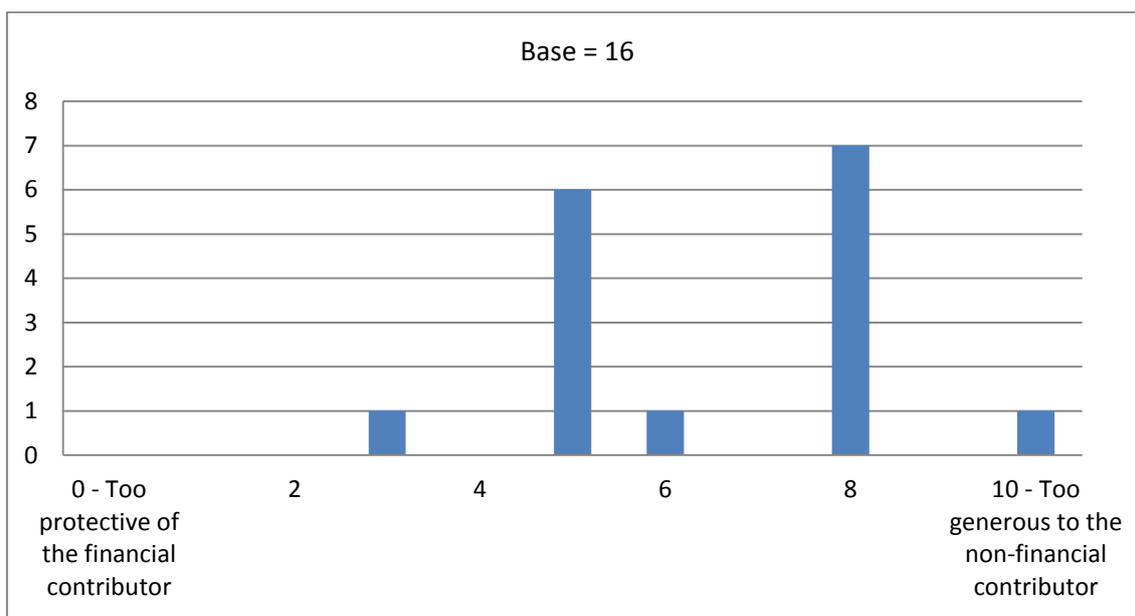
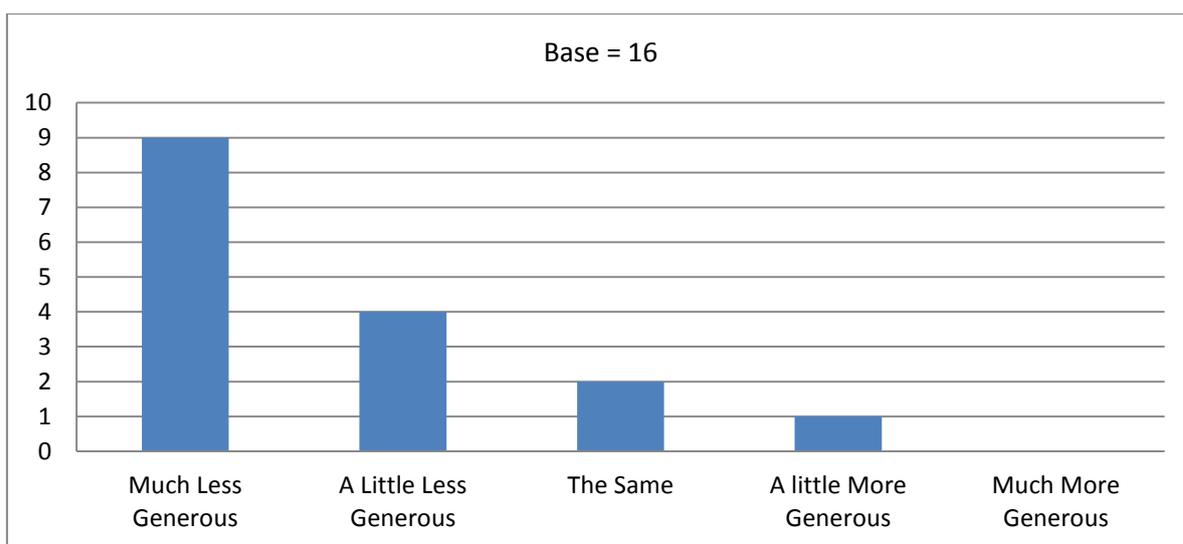


Table 3.10: How would New Zealand's jurisdiction alter in comparison?



When the respondents were asked how New Zealand's approach would alter in comparison to England and Wales (as Table 3.10 displays), nine agreed that it would be much less generous.

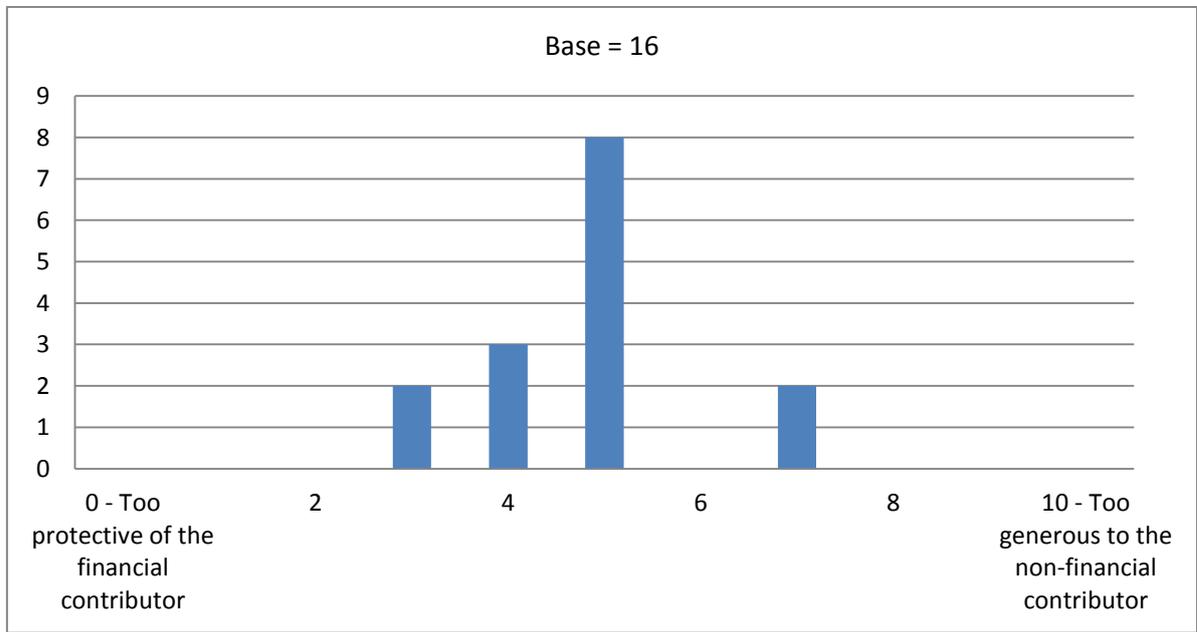
The irony of the situation is we get the answer that you gave in the first scenario.

(NZLaw6)

Three lawyers indicated that these types of relationships were rare and so were unfamiliar with these types of cases. However, it was clear that as this was a relationship of short duration, it would largely depend on the parties' contributions and the lawyers generally felt that they needed more information before they could make an adequate prediction of the outcome. Most felt that the likelihood was that in New Zealand Mrs Higgins would receive

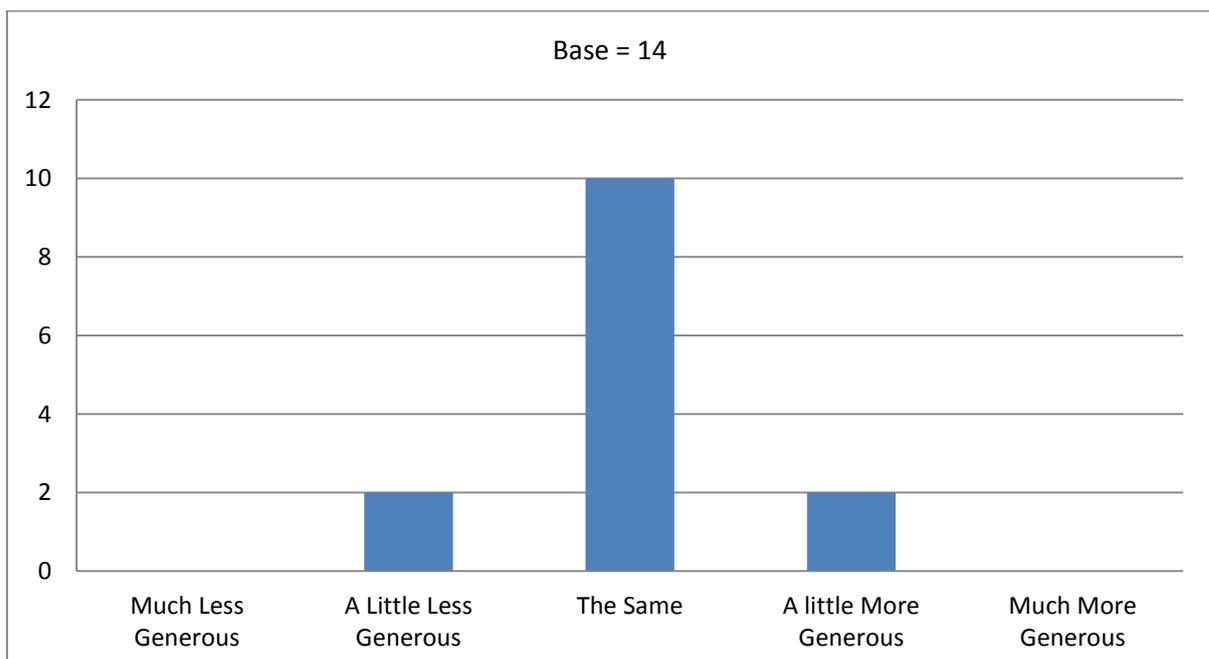
nothing, particularly no capital share of any property. Some indicated that she may be entitled instead to some limited spousal maintenance.

Table 3.11: Lawyers' attitudes on New Zealand's approach



The majority felt that New Zealand's approach was about right ('5') (see Table 3.11), although five felt that it was a little too protective of the financial contributor. There is clearly a greater level of dissatisfaction in this context than in Scenario A. Yet, the mode (nine lawyers) indicated that they wouldn't alter this outcome (Table 3.12).

Table 3.12: How would the lawyer alter their jurisdiction's approach?



3.5.5.2.1 Scenario B – The Variables

Table 3.13: Scenario B variables

Variable Number	The Variable
1	If the couple had had children
2	If the relationship had lasted 20 years
3	If Mrs Higgins had not given up her well paid job.
4	If this was a same-sex relationship (Civil Union)

The lawyers were then asked about how the law would alter its response for four different variables listed in Table 3.13. Table 3.14 clearly shows that if this had been a same-sex relationship, the outcome would not alter. For the other variables there was some difference. For Variable 1, nine believed the outcome would be more generous indicating that it would alter Mrs Higgins' ability to claim maintenance.⁵⁶³ If the relationship had been a long marriage all the respondents agreed that the outcome would be much more generous as the relationship property would be divided equally. Three felt that on top of equal sharing, Mrs Higgins would be able to claim for an economic disparity.⁵⁶⁴ For Variable 3 (if she had remained in employment), seven lawyers believed the award would be less generous, reducing the possibility of maintenance claims,⁵⁶⁵ and some thought it would diminish her contribution to the property.⁵⁶⁶ However, nine believed that it would remain the same as Mrs Higgins is still making a contribution.⁵⁶⁷

Generally, the lawyers felt that the approach towards each variable was about right as Table 3.15 shows. Yet, six selected a number under '5' indicating that they thought that the current approach was a little too protective to the financial contributor where there were children and conversely too generous to the non-financial contributor in the longer relationship. This was reflected in the responses given when the practitioners were asked how they would vary this approach (see table 3.16). Thus it seems that in short marriages New Zealand does not protect the care-dyad enough and one lawyer thought there should be provision specifically for the child.⁵⁶⁸ NZLaw11 felt that Mrs Higgins should have more entitlement for the future because of the child. Furthermore, it seems in big money cases over a long duration that equal division is too generous, and does not protect property rights enough for the main breadwinner. At the

⁵⁶³ 5 felt it would be a little more generous, 4 felt it would be much more generous

⁵⁶⁴ NZLaw4,10,11

⁵⁶⁵ 6 felt it would be a little less generous and 1 believed that it would be much more generous

⁵⁶⁶ NZLaw6

⁵⁶⁷ NZLaw8

⁵⁶⁸ NZLaw2

same time, where there are children, equal division is not enough to meet the homemaker's needs.

Table 3.14: How New Zealand's original outcome would change for each variable?

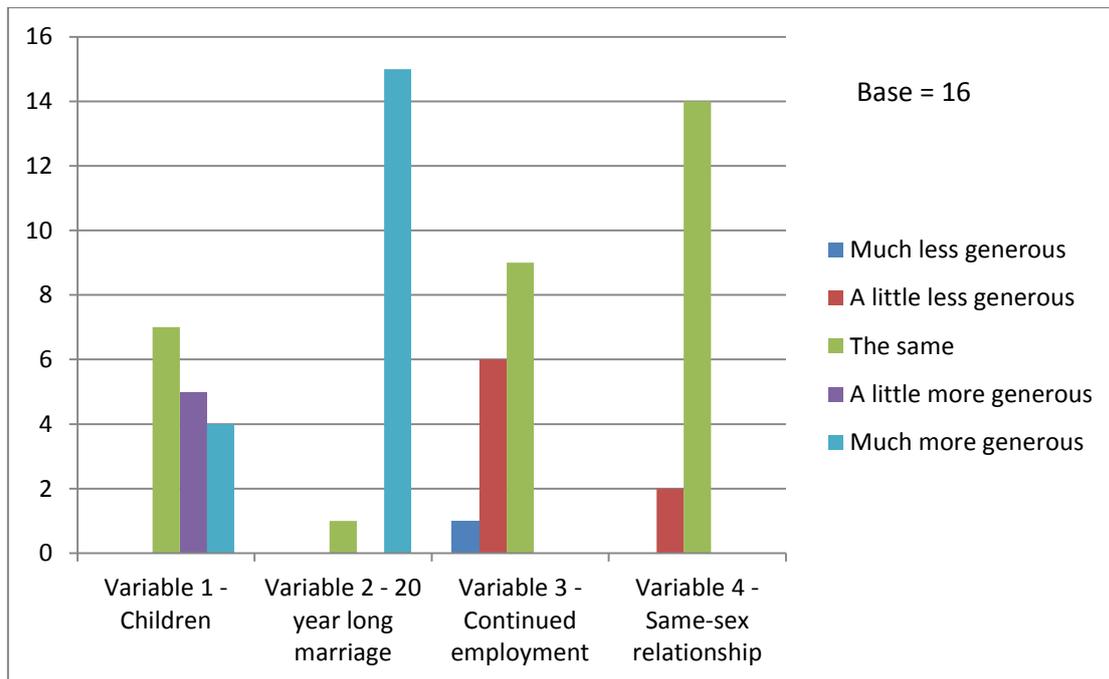


Table 3.15: Attitudes to variables' outcome in Scenario B

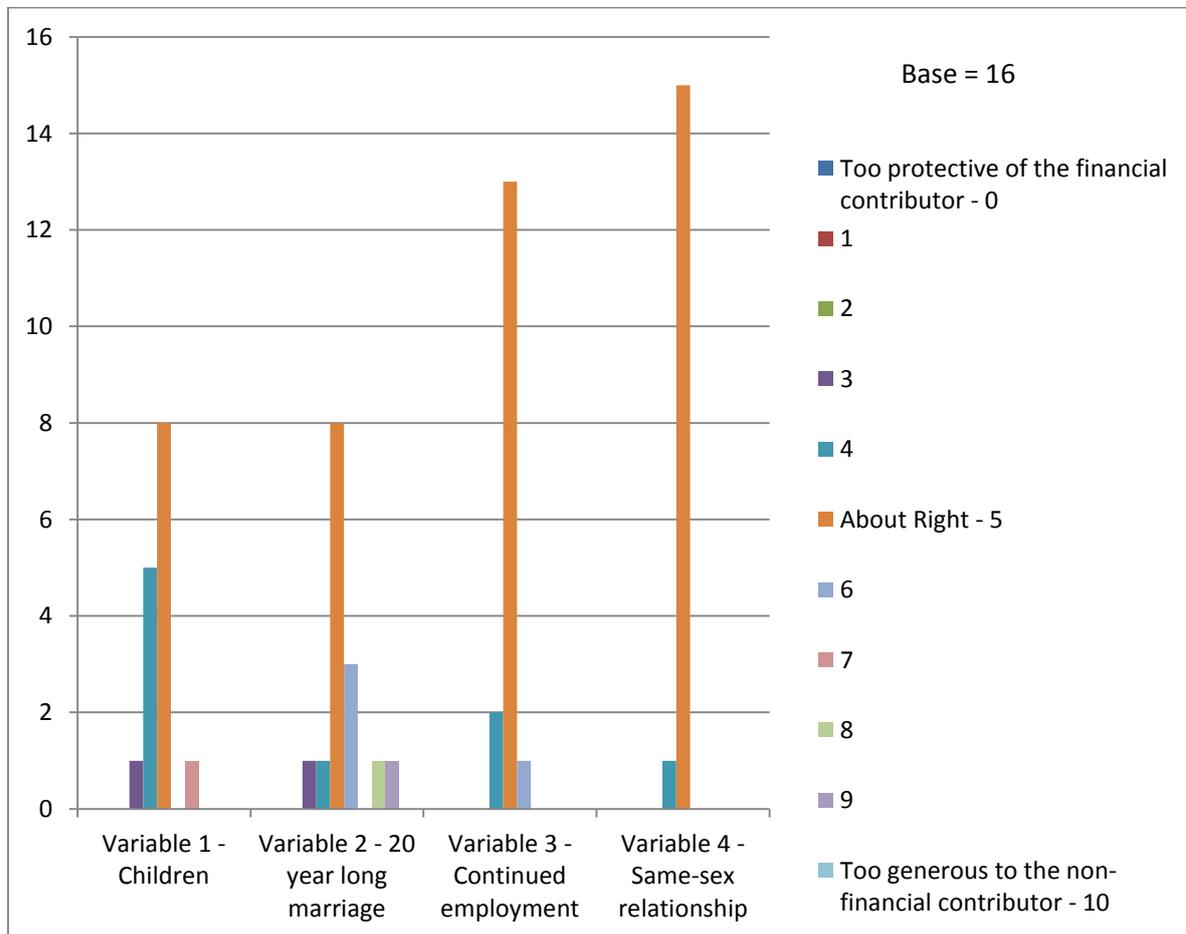
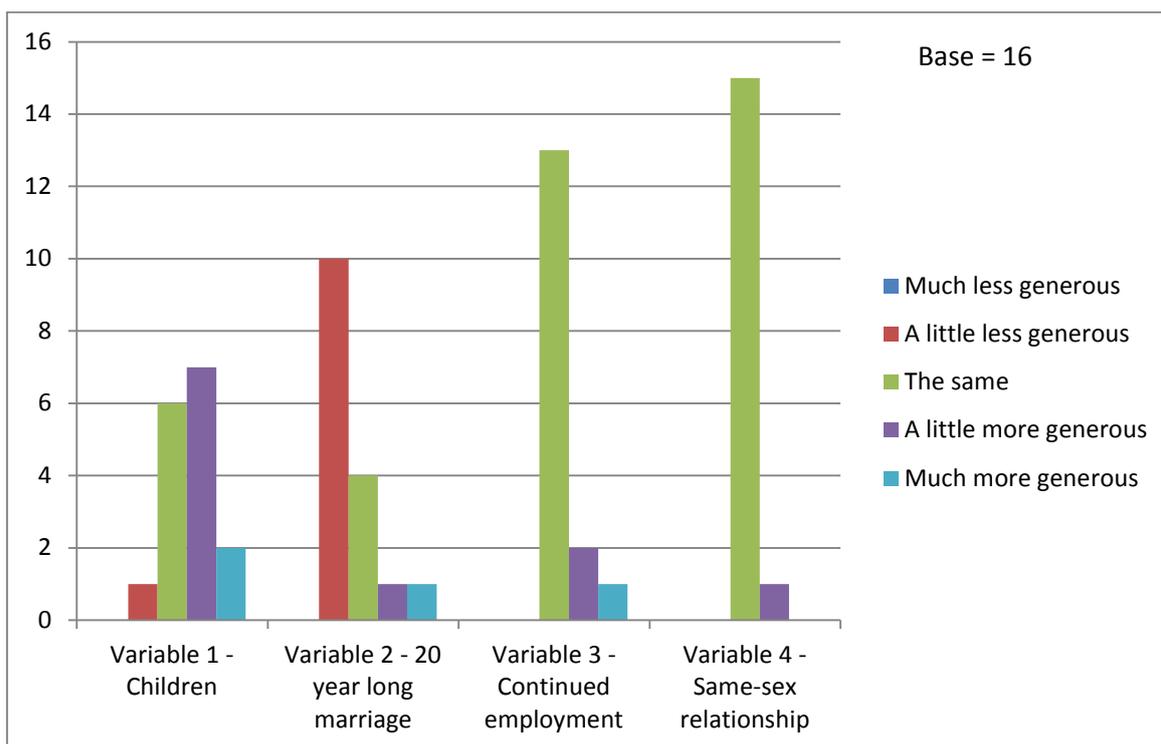


Table 3.16: How would they alter their jurisdiction's approach?



3.6 New Zealand's System of Financial Provision: A Conclusion

The doctrinal, feminist and empirical analysis provides invaluable insight into New Zealand's framework of financial provision on relationship breakdown. Moreover, this jurisdiction has given Deech's position a practical framework of effect and therefore it has been possible to explore the advantages and disadvantages of an approach that aligns with Deech's end of the feminist spectrum. It was evident from the empirical analysis that New Zealand successfully embodies Deech's core principles of formal equality, autonomy and certainty. The lawyers' views were generally Deech-centric and thus they were extremely satisfied with the procedural benefits that accompanied this rule-based approach. The most notable benefit was that certainty enables frequent out-of-court settlements and therefore reduces the amount of litigation. The result is that a formulaic system offers a more cost-effective system with less financial pressure on the courts. Out of court settlement also reduces individual costs and therefore access to justice is not hindered by the cost of litigation; the parties are aware that they are entitled to 50% of the relationship property without having to argue for this share. This also limits any inequality of bargaining power between parties. Furthermore, for the respondents, an additional strength of equal sharing is that the law does not quantify domestic contributions. Rather it considers the parties to be in an equal partnership and thus values their respective roles equally. The lawyers believed that this avoided the pragmatic difficulties

of quantification and also prevented homemaking contributions from being undervalued or effectively judged by the courts. Consequently, it seems that New Zealand's approach has successfully given effect to Deech's proposition that the law should be kept out of the private sphere and couples should be allowed to organise their own affairs in any manner they choose.

However, the direct consequence of not evaluating contributions is that homemaking activities are essentially unseen by the courts and therefore the concept of partnership, rather than Fineman's care-dyad, underpins New Zealand's system. The difficulty with this is that partnership presumes equality, and yet the care-dyad, as Fineman argues, is characterised by dependency. Unsurprisingly, the lawyers identified that the one-size-fits-all approach is unsuitable in certain scenarios, especially where children are present.

While New Zealand's exceptions to equality under ss13, 14 and 15 were designed to alleviate the rigidity of formal equality, in practice these appear to have been applied too narrowly and are rarely used. Consequently, New Zealand failed to effectively consider the future economic implications that the care-giving role can have on a party's ability to be financially autonomous. Unsurprisingly, the lawyers extensively criticised these sections for not effectively protecting the economically weaker party at the end of the relationship (identified as a gendered disadvantage); this emphasis on procedural fairness has, to some extent, sacrificed substantive fairness.

From Deech's position such an approach aids the emancipation of women from the private sphere. Evidently, from the lawyers' perspectives, rather than promote financial independence, this scheme in reality leaves women at a disadvantage. The narrow interpretation of matrimonial property combined with the extreme difficulty of varying an award under ss13-15 means that in reality a cap is placed on the awards that can be achieved. Therefore, while this model may be well suited for parties who are on an equal financial footing, it seems that, the one-size-fits-all approach does not fit relationships where there is a role imbalance. In particular, the vignettes demonstrated that in contexts such as long-term relationships with large asset pools, couples with children and also short duration relationships there is a need for greater recognition of long-term financial sacrifices made in these circumstances. There were also suggestions that the rehabilitative maintenance provisions also supported by Deech (while generally championed as an appropriate approach by the lawyers) were in fact too modest and narrowly applied particularly in small-asset cases and cases concerning children. Therefore, it seems that as O'Donovan has argued in the context of

maintenance⁵⁶⁹ and also Ingleby⁵⁷⁰ has argued, a greater level of social equality is needed before such formal equality can be applied. Until then, as Lady Hale has stated in the English case of *Miller*, equality works to the disadvantage of the primary carer:

*Too strict an adherence to equal sharing and the clean break can lead to a rapid decrease in the primary carer's standard of living and a rapid increase in the breadwinner's.*⁵⁷¹

As both Weitzman and O'Donovan⁵⁷² have argued, as long as social inequalities exist and women are more likely to sacrifice their careers, 'we cannot treat men and women as equals in the divorce settlement.'⁵⁷³ Consequently, until there is a higher degree of social equality between the genders, a greater level of discretion and a more needs-based approach is required to redress the criticisms that New Zealand received from Fineman's lens.

Yet, these criticisms were targeted at the judges rather than the statutory provisions. The judges were too restrictive in their approach and it seems that the simplicity of formal equality may cause the judges to avoid complex discretionary issues. It may also be the practical difficulties of measuring relationship generated disadvantage under s15 which are causing restrictive interpretations of this section. Equality allows the judges to avoid these difficult discretionary questions. This suggests that in a rule-based system, it is necessary to provide adequate guidelines for the judiciary on the application of that discretion. Otherwise, it is possible that the discretion will only be used in an overly limited way.

However, New Zealand provided a fantastic opportunity to consider the impact of treating cohabiting couples and same-sex couples identically to married couples. It was evident that the lawyers believed that functionally similar relationships should be treated similarly regardless of relationship styles or sexuality. Yet, one concern existed over the rigidity of the qualifying time period. It was clear from the empirical results, that in light of the often casual start to cohabiting relationships, the automatic entitlement to equal division of family property after three years made some of the lawyers uncomfortable as it was too short a time period. Instead, it seems that as there was such a huge shift in rights at the end of that time period, the lawyers would prefer it to apply to relationships that were longer than three years. At the same time, the lawyers felt that the provisions were inadequate for those relationships that were shorter than three years and especially where there were children. Consequently, the

⁵⁶⁹ K O'Donovan, 'The Principles of Maintenance: An Alternative View' (1978) 8 *Family Law* 180

⁵⁷⁰ R Ingleby, 'Lambert and Lampposts: The End of Equality in Anglo-Australian Matrimonial Property Law' (2005) 19 *International Journal of Law, Policy and the Family* 137

⁵⁷¹ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186 [142] (Lady Hale)

⁵⁷² In the context of maintenance, K O'Donovan, 'The Principles of Maintenance: An Alternative View' (1978) 8 *Family Law* 180

⁵⁷³ L Weitzman, *The Divorce Revolution* (The Free Press 1985) 218

lawyers appeared to want a more flexible, discretionary qualifying trigger that was not so focused on the length of the relationship, but one that also could include couples who had children. Furthermore, where there were no children, greater protection was needed for the cohabiting couples.

Thus, this need for greater discretion characterises the analysis conducted in this chapter. While New Zealand provides a case for having greater certainty because of the lower costs that follow, it seems that the application of formal equality has perhaps gone to an extreme. Therefore, a system this close to Deech's end of the spectrum is too restrictive for Fineman's care-dyad; a balance has not effectively been reached. Instead, more flexibility and perhaps a greater consideration of needs is required. The next chapter now considers a scheme that is closer to Fineman's end of the spectrum. Scotland, while still embracing Deech's position at its heart, has a greater level of discretion within its statutory framework. Consequently, it remains to be seen whether Scotland's approach offers a greater balance between Deech's and Fineman's positions.

CHAPTER 4: DEECH WITH ELEMENTS OF FINEMAN – SCOTLAND

4.1 Introduction

While New Zealand almost fulfils Deech's approach towards financial provision on relationship breakdown, Scotland's system encapsulates greater elements of Fineman's position. Scotland has a similar starting point to New Zealand equally dividing matrimonial property, advocating certainty, clarity and autonomy. However, this is the first of five principles under the Family Law (Scotland) Act 1985 (henceforth the FL(S)A),⁵⁷⁴ whereas in New Zealand equal sharing is the core principle. Scotland therefore contains much greater discretion for the courts to move away from equal division where there is an economic imbalance between parties. This, (alongside a wider definition of relationship property) provides Fineman's care-dyad with potentially larger settlements and therefore greater protection in comparison with New Zealand's approach. Nevertheless, Scotland still espouses the principle of clean break, and just like New Zealand, maintenance settlements are limited and designed to be rehabilitative. Consequently, where New Zealand seemingly failed to achieve a balance between these two feminist positions due to the overly rigid application of formal equality, Scotland offers a system with greater flexibility. The question now posed in this chapter is how far this framework rectifies the criticisms that arose in New Zealand, and does it therefore achieve a balance between Deech's and Fineman's stances? By also considering how far lawyers perceive their system to be effective, this chapter shall explore how the day-to-day application of this approach treats the care-giving role.

Scotland has a different approach towards different relationship statuses. Under the Civil Partnership Act 2004, same-sex couples can enter a registered relationship that carries with it almost exactly the same entitlements as marriage,⁵⁷⁵ yet, this does not extend to cohabiting couples. Instead, under the Family Law (Scotland) Act 2006 cohabiting couples (same and different-sex) have a similar but different approach in financial provision on relationship breakdown in comparison with marriage/civil partnership. This centres on rebalancing economic imbalances (more narrowly construed than in the marriage/civil partnership context) to ensure that no-one is dramatically better or worse off financially than the other as

⁵⁷⁴ These 5 principles are listed in appendix L

⁵⁷⁵ The Scottish Government intends to legalise same-sex marriage and it is thought that a draft bill will be produced for consultation later in 2012. See 'Same Sex Marriage to be Legalised' (*The Scottish Government*, 28 July 2012) <<http://www.scotland.gov.uk/News/Releases/2012/07/same-sex25072012>> accessed 1 August 2012

a result of the contributions made in the relationship. Moreover, this scheme was specifically designed to find a balance between financial vulnerability and respecting the privacy of the cohabitants.⁵⁷⁶ This balancing act therefore appears to be between Fineman's and Deech's positions respectively. Deech argues that the law should not regulate cohabiting couples, respecting their choice not to marry,⁵⁷⁷ and in contrast Fineman argues that the law should centre on protecting care-giving relationships regardless of relationship status.⁵⁷⁸ Given that Scotland's framework has attempted to find a middle-ground between these positions, does this mean that it has achieved a satisfactory balance between these two commentators?

Once again, before this chapter begins its analysis, it is important to consider the similarities and differences between Scotland and England and Wales. Scotland is geographically much closer to England and Wales than Australia and New Zealand, yet there are some fundamental differences in its legal system. To understand the possibility of using this jurisdiction to help develop options for legal reform in England and Wales, it is necessary to outline the cultural, legal and political similarities and differences between the two.

Scotland's legal system is pluralistic deriving from a number of legal sources like Roman law, Civil Law and also some Common Law. While the Acts of Union 1707 meant it shared the legislature with the rest of the UK, it maintained its fundamentally different and separate legal system, and in 1998 The Scotland Act devolved power to Scotland allowing it to set up its own Executive and Parliament, which adopted a model similar to the Westminster model.⁵⁷⁹ This meant Scotland could now make laws on those areas which were not reserved for Westminster⁵⁸⁰ including family policy and thus family reform is in the hands of the Scottish Executive. Consequently, Scotland has a very different legal background in comparison to the other jurisdictions. However, due to its close history, England and Wales' case law can be very persuasive on Scots Law. The Supreme Court is both the highest appellate court in Scotland and England and Wales and often members of both the Scottish and English judiciary will preside over cases from both jurisdictions. Consequently calls for reform and comparisons between the two jurisdictions can occur in overlapping cases. For example, Lord Hope of

⁵⁷⁶ Scottish Executive *Family Matters: Improving Family Law in Scotland* (Justice Department CPI 2004) 30. See also K Norrie, *The Family Law (Scotland) Act 2006: Text and Commentary* (Dundee University Press 2006) 57

⁵⁷⁷ R Deech, 'The Case Against the Legal Recognition of Cohabitation' (1980) 29 *International and Comparative Law Quarterly* 480; R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 43

⁵⁷⁸ M Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge 1995)

⁵⁷⁹ The core characteristic of the Westminster model has been described as 'the dependence of the executive on the legislature and the leadership of the legislature by the executive' by K Martin, *French Liberal Thought in the Eighteenth Century* (Phoenix House 1962) 165

⁵⁸⁰ See Schedule 4 and 5 to The Scotland Act 1998

Craighead sat on the bench in *Miller; McFarlane*⁵⁸¹ where he called for the Scottish system to be more like England and Wales.

Culturally, there are also similarities between these jurisdictions and a lot of the empirical surveys in the UK family context include respondents from both England and Wales, and Scotland. The Office of National Statistics (ONS) recorded a dramatic growth in the numbers of people cohabiting in both England and Wales and Scotland since the 1960s.⁵⁸² Similarly, there has been a decline in marriage rates⁵⁸³ and again, there appears to be a gendered split in terms of employment patterns (women occupy more lower-wage jobs and are more inclined to be the homemaker). Furthermore, the British Social Attitudes survey (which again recorded attitudes in both Scotland and England) demonstrated a change in attitudes that have become more accommodating to once unconventional living arrangements.⁵⁸⁴ Thus large similarities exist between Scotland and England's demographics.

4.2 Financial Provision on Divorce/Dissolution: Marriage and Civil Partners

As aforementioned, the FL(S)A as amended by the Family Law (Scotland) Act 2006 and Part 3 of the Civil Partnership Act 2004 are the primary legislation concerning property settlement on divorce. Now Schedule 28 Part 2 of the FL(S)A sets out civil partnership provisions which mirror that of married couples. However, while the presumption is that the application of provisions will be identical, only 46 partnerships have been dissolved⁵⁸⁵ since 2004 and none have yet reached the law reports. It remains to be seen whether the provisions will be applied in the same way.

In the married context, the process when determining financial provision on divorce/dissolution was set out in *Sweeney v Sweeney*:⁵⁸⁶

- (1) Identification and valuation of the matrimonial property.

⁵⁸¹ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186

⁵⁸² J Beaumont, 'Households and Families' 41 *Social Trends* (ONS 2009) 10 – 11% unmarried men and 13% unmarried women cohabiting in 1986 compared with 24% and 25% respectively in 2006; K MacLachlan 'Marriages in Scotland 1855 to 2010' (General Register Office of Scotland 2010) <<http://www.gro-scotland.gov.uk/statistics/theme/vital-events/marriages-and-civil-partnerships/time-series.html>> accessed 6 August 2011 - married couples from 51% to 43% between 1991 and 2001, and cohabiting couples from 4% to 7%

⁵⁸³ From 40,103 in 1960 to 1989 28,480 in 2010. See K MacLachlan 'Marriages in Scotland 1855 to 2010' (General Register Office of Scotland 2010) <<http://www.gro-scotland.gov.uk/statistics/theme/vital-events/marriages-and-civil-partnerships/time-series.html>> accessed 6 August 2011

⁵⁸⁴ A Park, J Curtice, K Thomson, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage 2008)

⁵⁸⁵ The Scottish Government *Statistical Bulletin: Crime and Justice Series*, Table 1: Divorces and Dissolutions Granted, 2000-01 - 2009-10 <<http://www.scotland.gov.uk/Publications/2010/12/17151409/4>> accessed May 2011

⁵⁸⁶ *Sweeney v Sweeney* (No 1) [2004] SC 372

- (2) Division of that property between the parties (whether in equal shares or otherwise)
- (3) Consideration of the parties' resources to test whether the 'fair' division arrived at stage 2 is 'reasonable'.

Here, equal sharing is the corner stone of property settlement yet, unlike New Zealand, the Scottish Law Commission⁵⁸⁷ determined that formal equality's one size would not fit all and thus ensured there would also be enough discretion for the courts to move away from equality when necessary.⁵⁸⁸ Consequently, s9 FL(S)A sets out five principles that the courts are to apply when determining awards.⁵⁸⁹ For Scott, the court still retains a large amount of discretion through step 3⁵⁹⁰ and furthermore, the courts are able to choose the most suitable order having regard to the s9 principles and to the resources of the party.⁵⁹¹ These awards can include capital sums, property transfer, periodical allowance and pension sharing orders.⁵⁹² However, the strong emphasis on clean break under s13(2) provides that periodical allowances can only be granted if the other orders are considered inappropriate or unsuitable given the s9 principles or the parties' resources. The essence of Scotland's scheme reflects Deech's viewpoint that a clean break is preferable to promote greater financial autonomy.

4.2.1 Section 9(1)(a): Fairly Sharing Matrimonial Assets

Fair sharing has been defined as equal sharing under the FL(S)A⁵⁹³ to reflect that marriage is an equal partnership,⁵⁹⁴ thus the 'fruits' of that union are to be shared equally between the parties. The definition of matrimonial property is far wider in comparison with New Zealand.⁵⁹⁵ While it similarly includes the family home and family chattels⁵⁹⁶ it also includes any property acquired during the marriage, but before the date of separation⁵⁹⁷ (although this excludes gifts or inheritance from third parties unless it is used to buy the matrimonial home).⁵⁹⁸ This means that (unlike New Zealand) business assets and property not owned for family purposes gained during the marriage will be subject for equal division.⁵⁹⁹ This provides a broader conception of

⁵⁸⁷ Scottish Law Commission, *Aliment and Financial Provision* (Scot Law Com No 67, 1981)

⁵⁸⁸ Scottish Law Commission, *Aliment and Financial Provision* (Scot Law Com No 67, 1981) para 3.62

⁵⁸⁹ See Appendix M

⁵⁹⁰ *McCaskill v McCaskill* [2004] FamLR 123 see J Scott, 'Principle or Pragmatism? The current state of Financial Provision on Divorce' A paper originally delivered on 12 November 2007 at a seminar by BDO Stoy Hayward in Scotland, 2

⁵⁹¹ S8(2)(a) and (b) Family Law (Scotland) Act 1985

⁵⁹² S8(1) Family Law (Scotland) Act 1985

⁵⁹³ S10(2) FL(S)A

⁵⁹⁴ Scottish Law Commission, *Aliment and Financial Provision* (Scot Law Com No 67, 1981) para 3.67

⁵⁹⁵ See in comparison Chapter 3, section 3.4.1 New Zealand P(R)A 1976

⁵⁹⁶ S10(4) (a)

⁵⁹⁷ S10(4) (b) and S10(3) Family Law (Scotland) Act 1985 - the relevant date is either the date they ceased to cohabit or the date of the service of the summons in action of divorce.

⁵⁹⁸ *Davidson v Davidson* [1994] SLT 506 (Lord Maclean) '...any property acquired by the parties during the marriage but before separation is matrimonial property even if it is purchased with funds which one of the parties has acquired by way of gift or succession'

⁵⁹⁹ *McConnell v McConnell* [1993] GWD 34 - 2185

'partnership' as it allows for the recognition of the homemaker's role in enabling their partner to achieve great business success. Furthermore, the wider definition of matrimonial property offers a greater protection for the financially vulnerable partner as there are more resources that can be moved in Fineman's mother/child care-dyad's direction. From Deech's position, as expected, this potentially impinges on one's own financial autonomy.

However, recognising that formal equality is not always equity, Scotland has a number of 'special circumstances' under s10(6)(a) – (e)⁶⁰⁰ where equality can be departed from⁶⁰¹ (not including the four other s9 principles) although these are to be used minimally.⁶⁰² For the purposes of this thesis, the next section shall focus on s10(6)(a),(b) and (d): financial agreements, source of funds and the use of matrimonial property. Yet, the very wording of these exceptions is financial in nature which suggests that they may be designed to benefit the breadwinner rather than the homemaker.

While pre- and post- nuptial agreements have not been fully tested by the Scottish Courts, it is generally held that they and their civil partner equivalents are enforceable.⁶⁰³ Section 16 FL(S)A allows the court to set these aside where the agreement was 'not fair and reasonable at the time it was entered into.'⁶⁰⁴ Nevertheless, there is little specification as to the prerequisites for entering an agreement compared to the extensive requirements within New Zealand. Consequently, the quality of legal advice may not render the agreement unfair, as Sheriff AG McCulloch demonstrated:

*The pursuer may well have received poor quality or inadequate legal advice at the time, and her interests may not have been fully protected by her solicitor, but that does not, in my view, mean that the agreement becomes unfair and/or unreasonable.*⁶⁰⁵

Generally, despite the lack of precise definition and clarity on the enforceability of such contracts, the courts have never regarded them as contrary to public policy (unlike England and Wales until recently) and are reluctant to overturn them.⁶⁰⁶ It is evident how this position would find favour with Deech as it gives weight to the individual's autonomy and holds them responsible for entering such agreements. This raises serious concerns about the extent to which this assumes autonomy, particularly when Fineman argues that liberal conceptions of

⁶⁰⁰ See Appendix M

⁶⁰¹ Examples of the court having had to give consideration to the question of whether or not special circumstances pointed to fair sharing being unequal sharing can be found in cases such as *Little v Little* [1990] SLT 785, *McLean v McLean* [2001] Fam LR 118, *R v R* [2000] Fam LR 43, *Sweeney v Sweeney* (No2) [2006] SC 82 (resources – business) and *McConnell v McConnell* (No2) [1997] Fam LR 108.

⁶⁰² Scottish Law Commission, *Aliment and Financial Provision* (Scot Law Com No 67, 1981) para 3.83

⁶⁰³ S10(6)(a) also see *Milne v Milne* [1987] SLT 45 [47] (Lord Kincaid)

⁶⁰⁴ This was based on recommendations made by the Scottish Law Commission, *Aliment and Financial Provision* (Scot Law Com No 67, 1981) para 3.190

⁶⁰⁵ *Turner v Turner* [2009] F486/05 [18] (Sheriff AG McCulloch)

⁶⁰⁶ See for example *Inglis v Inglis* [1999] SLT (Sh Ct) 59

equality are idealistic and do not recognise any existing inequality of circumstances.⁶⁰⁷ It could mean that the weaker financial party is unable to, or does not consider the possibility of, accessing legal advice at the outset of these agreements and consequently is pressurised into agreeing to terms that they do not fully understand. Consequently, this seems to act to the detriment of the financially weaker party. Not only is there a high bar in place to establish unfairness, but fairness is taken from the time that the contract was entered into. Therefore, an unforeseen change in circumstances in the relationship, such as having children, which materially alters the level of financial independence or equality between spouses, may not render the contract unfair. This concern is especially pertinent when the onus is on the claimant to establish that the terms are unfair. Thompson⁶⁰⁸ believes that this burden lies with the claimant because the alternative (that the respondent must prove that the contract *is* fair) would discourage self-regulation. While this provision supports Deech's position, it seems that there is little protection for Fineman's care-dyad and therefore the real danger exists that pre-nuptial contracts could pose a severe financial disadvantage for those whose lives are characterised by dependency.

Another way the courts can grant an exception to equal sharing is through a source of funds argument under s10(6)(b). This means that if an asset has been purchased, for example, with property owned by one party prior to the marriage or through an inheritance or gift, then it can be excluded from the pool of matrimonial assets.⁶⁰⁹ It acts as a limitation to excessive gain of assets (which would be defined as separate property within New Zealand) by the non-owning spouse, such as the expansion of businesses or purchasing shares through pre-marital business assets. Again, this seems to be weighted in favour of the breadwinner and while this can serve to protect the financial autonomy of both the husband and wife, it can also negatively impact the care-dyad. In *Jesner v Jesner*⁶¹⁰ the matrimonial home (in joint names) had been purchased through the breadwinner's (the husband's) assets which had been held on trust for him and was therefore held to be an exception to equal sharing. This was even though Mrs Jesner, as a result of being the homemaker, was in a far weaker financial position and would be left in a far more precarious situation without a limited share in the matrimonial home. Consequently, there is a very real possibility that it may disadvantage the care-giving or homemaking spouse.

S10(6)(d) provides that the courts can look at the use of the matrimonial property and so can consider the impact that dividing it will have on the parties. For example, if a home is being

⁶⁰⁷ See for example *Inglis v Inglis* [1999] SLT (Sh Ct) 59, 70

⁶⁰⁸ J Thompson, *Family Law in Scotland* (4th edn, Butterworths Lexis Nexis 2002) 16

⁶⁰⁹ However, this does not include it being bought by one party's income or efforts during the marriage.

⁶¹⁰ *Jesner v Jesner* [1992] SLT 999

used by the breadwinner as a business and to share it equally would have huge repercussions on the viability of the business, the courts may depart from strict equal sharing and instead grant another award such as a capital sum allowance through a second mortgage. In contrast, the courts may also depart on the grounds that the children need a home especially where couples have limited assets. For example, in *Peacock v Peacock*⁶¹¹ the wife received the family home to provide a house for her children, but the courts rebalanced this by relinquishing her interest in a small life insurance policy; the overall financial aspect of equality is still achieved, but not necessarily through the matrimonial property. Thus, the courts recognise the importance of not compromising the financial autonomy of one party in one context, and at the same time appreciate Fineman's care-dyad, providing housing where necessary to recognise the needs of the children where the claimants' resources are unable to meet needs.⁶¹² This arguably does not compromise Deech's position either, as she recognises that in situations (only) where there are young children the care-giver may require further (short-lived) support.⁶¹³

Generally, these 'special circumstances' which alter the composition of matrimonial property are weighted in favour of the breadwinning or property-owning partner. While these provisions can alter the form of the property that is being divided to provide relief from both Fineman and Deech's positions, they cannot be used to increase the value of the property pool subject to equal division for the financially weaker spouse. Yet, at the same time these provisions can significantly reduce the amount of matrimonial property available and consequently s10 exceptions to equal sharing embody Deech's values of encouraging and protecting financial autonomy and property. However, the most concerning element of these provisions is the enforceability of pre-nuptial agreements as, particularly given their lack of formal requirements, they could overlook the fact that many financially vulnerable partners are in a weaker bargaining position.

Nevertheless, it is important to note that these exceptions are intended for minimal use⁶¹⁴ and in fact just because these special circumstances may arise does not necessarily mean that the courts will automatically depart from equality;⁶¹⁵ they must first establish if it is justifiable to depart from equality.⁶¹⁶ Furthermore, anything considered non-matrimonial and not subject to equal division is not completely removed from the court's consideration; this property still

⁶¹¹ *Peacock v Peacock* [1994] SLT 40

⁶¹² See for example in *Adams v Adams (No 1)* [1997] SLT 144 where Lord Ordinary Gill would not transfer the large house to the wife who would be the primary care-giver on account of the fact that she could not afford to run it as it was too big. Thus, there is a limit on how far the courts are willing to go financially speaking for the homemaker.

⁶¹³ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1145

⁶¹⁴ Scottish Law Commission, *Aliment and Financial Provision* (Scot Law Com No 67, 1981) para 3.83

⁶¹⁵ *Jaques v Jaques* (1997) SC (HL) [20] (Lord Clyde)

⁶¹⁶ *Sweeney v Sweeney* (No2) [2006] SC 82 [18] (Lord Hamilton)

counts as a resource of the party⁶¹⁷ that the courts can use when adjusting shares under the other s9 principles. Thus it seems that in actuality a balance has been achieved here between autonomy and protection. While this tries to ensure that financial assets are not subject to 'gold-digging', at the same time it does not then serve to place a cap on the financially weaker party. Yet, it still means that the court follows financial rather than domestic contributions at the outset; the care-dyad is not central, but is more protected than within New Zealand.

4.2.2 Section 9(1)(b): Economic Advantage and Economic Disadvantage

This section is intended to add an additional share to 50% and is frequently described as the most important of the provisions⁶¹⁸ (particularly for the homemaker where there is little matrimonial property) as it involves a fair account of any economic advantages or disadvantages⁶¹⁹ that stem from the parties' contributions (which can be financial and non-financial). This can only be awarded through capital sums or property transfers. Section 11(2) expands on the factors to be considered:⁶²⁰

- a. Whether *'the economic advantages or disadvantages sustained by either party have been balanced by [those]...sustained by the other party'* and
- b. Whether *'any resulting imbalance has been or will be corrected by a sharing of the value of the matrimonial property or otherwise.'*

Section 9(1)(b) is essentially a compensatory provision similar to New Zealand's 'economic disparity' provision, although Scotland's approach is arguably broader as it does not require the nexus between the division of relationship roles and the economic disparity.⁶²¹ Instead, the thrust of s9(1)(b) is to weigh up one party's economic advantages and disadvantages against the other's and where there is an imbalance an award can be made. Therefore, there is a direct comparison between the financial positions of the parties at the end of the relationship. Any disadvantage must have been suffered in the interests of either the family or the other party and it must not have been redressed through the previous s9(1)(a) equality provision. Compared with New Zealand, this broader approach makes the provision more accessible, easier to prove (although the onus is on the applicant)⁶²² and recognises to a greater degree the effect of care-giving.

⁶¹⁷ S8(2) FL(S)A 1985

⁶¹⁸ See for example J Thompson, 'Financial Provision on Divorce – the Current State of Play' (1990) *Scots Law Times* 17 – 20 and 33 - 38

⁶¹⁹ Perhaps this is the justification behind the use of economic advantage/disadvantage in Scotland's provision for cohabitation. See discussion at 4.5 below.

⁶²⁰ S11(2)

⁶²¹ See New Zealand's S15(1) P(R)A 1976 inserted by s17 P(R)AA 2001. See Chapter 3 at section 3.4.2.4 which provides 'where the division of relationship responsibilities has resulted in one party being significantly better off than the other'.

⁶²² E.g. *Welsh v Welsh* [1994] SLT 828

Yet, in terms of application, there are some difficulties quantifying the parties' economic advantages and disadvantages, particularly regarding career sacrifices. In *Welsh v Welsh*⁶²³ the wife, who had given up employment to raise their family and support her husband, had been seeking a division above equality using principle 9(1)(b). Lord Osborne held that

*...while it is plain that the pursuer herself suffered an economic disadvantage in the interests of the defender and her children, insofar as she gave up quite well paid employment to look after her family, it appears to me to be equally plain that she enjoyed certain associated economic advantages in the same situation, in respect that she was subsequently maintained exclusively from the earnings of the defender during the period in which she had no employment.*⁶²⁴

He continued,

*it appears to me also that, in consequence of the pursuer giving up her paid employment, the defender himself sustained an economic disadvantage, in respect that he was thus rendered the sole breadwinner for the family, assuming the responsibility for maintaining, not only his children, but also the pursuer herself.*⁶²⁵

Consequently, this case was altered in the husband's favour on the grounds that the wife had an economic advantage by living in the house rent free. Furthermore, in *Coyle v Coyle*⁶²⁶ another case which tried to frame the homemaker's career sacrifices as an economic disadvantage that the breadwinner economically benefited from, Lady Smith emphasised:

*...it is important to recognise that Parliament did not in the 1985 Act provide that whenever a party divorce after marriage where one has been the breadwinner and the other been the homemaker, the latter must receive extra financial provision on divorce.*⁶²⁷

Frequently, the courts offset the economic disadvantage that the care-giving spouse has from their career sacrifice with the economic advantage they receive from being provided for by the financially stronger spouse. This echoes Deech's contention⁶²⁸ that compensation is artificial, as the only way that a woman could give up her career was if her partner's income provided enough for her to be able to do so and therefore the woman does so 'with a sigh of relief'.⁶²⁹ However, this tendency of the court to count the advantage of living in the home has, for Thompson,⁶³⁰ resulted in this provision failing at its initial aim to recognise the economic contributions made by the homemaker. Furthermore, it arguably overlooks the future

⁶²³ *Welsh v Welsh* [1994] SLT 828

⁶²⁴ *Welsh v Welsh* [1994] SLT 828 [83] (Lord Osborne)

⁶²⁵ *Welsh v Welsh* [1994] SLT 828 [84] (Lord Osborne)

⁶²⁶ *Coyle v Coyle* [2004] SFLR

⁶²⁷ *Coyle v Coyle* [2004] SFLR [37] (Lady Smith)

⁶²⁸ See Chapter 3, section 3.4.2.3's discussion of s15 P(R)A 1975 in New Zealand

⁶²⁹ R Deech, 'The Principles Against Maintenance' (1977) 7 *Family Law* 229, 231

⁶³⁰ J Thompson, *Family Law in Scotland* (5th edn, Butterworths Lexis Nexis 2007) 173. See *Ali v Ali* (No 3) [2003] SLT 641 where the wife had also given up work to support the running of the family and to assist her husband on the farm argued economic disadvantage on this ground, but the court held this argument to be unsuccessful due to her advantage of living on the farm. Also see *Coyle v Coyle* [2004] SFLR [4]

difficulties⁶³¹ that occur from being out of employment and instead views this disadvantage as having been offset by benefitting from their partner's ability to provide. This ignores the fact that the economic disadvantage, particularly where there are children is accepted in the interests of the family and as part of that relationship.

Yet, this provision has also been used to recognise career sacrifices where the economic disadvantage has not been outweighed by the economic advantage. For example in *McCormick v McCormick*,⁶³² the courts held that the wife was at a disadvantage in that it would be difficult for her to gain employment at her age in her former profession. Furthermore, the courts appear to have adopted a wide definition of 'career sacrifice' taking it to mean not just the specific loss of earnings associated with giving up a set career path, but also to include the less specific general impact that not working has on the likelihood of employability. For example, in *Loudon v Loudon*⁶³³ equal sharing was altered as the homemaker was untrained and there was a great disparity in assets:

*The defender is now well launched on a business career where he can command a high salary...The pursuer, on the other hand, requires to retrain in order to get back, as she put it, on the employment ladder...The difference between her earning potential now and what she would probably have been earning but for her marriage to the defender cannot be calculated with any accuracy but I think it reasonable to conclude that the pursuer has suffered a material economic disadvantage in this connection.*⁶³⁴

If the economic disadvantage is seen as extensive enough, the courts may even award the homemaker the whole property such as in *Cunniff v Cunniff*⁶³⁵ where the wife had not worked for over 20 years, had nowhere near the earning power of her husband and would not have been able to afford alternative accommodation. Thus, there is some attention given to the loss of financial autonomy which seems to meet both Fineman's and Deech's positions; it recognises vulnerability and dependency that Fineman identifies as the result of care-giving that are often accompanied by an inability to enter employment, and Deech even recognises that limited provision may be needed for those who are incapable of gaining employment due to age or illness.⁶³⁶

While this seems to provide more effective compensation for the homemaker than any of the provisions in New Zealand, it seems that s9(1)(b) is biased in the application of this provision and the asset pool size. It is much more likely in big asset cases for the economic advantages

⁶³¹ *Dougan v Dougan* [1998] SLT (Sh Ct)

⁶³² *McCormack v McCormack* (1987) GWD 9-287 [10]

⁶³³ *Loudon v Loudon* [1994] SLT p 385C

⁶³⁴ *Loudon v Loudon* [1994] SLT p 385C (Lord Milligan)

⁶³⁵ *Cunniff v Cunniff* [1999] SLT 992

⁶³⁶ R Deech, 'The Principles Against Maintenance' (1977) 7 *Family Law* 229, 231

and disadvantages to be balanced than it is in smaller asset cases. Furthermore, Lord Hope in *Miller*⁶³⁷ indicated that periodical payments cannot be awarded under this section and yet the courts are reluctant to award capital sums where there are small assets (although it can be made by instalments from the husband's future income). Fundamentally, this means that this provision may not adequately compensate the homemaker in small asset cases even though these are the relationships for which this provision was designed. Therefore, it is questionable how far s9(1)(b) goes to realising the compensatory function that this was meant to have for homemakers.⁶³⁸ Instead, the courts appear to have circumvented this limitation, as Thompson explains,⁶³⁹ by using s9(1)(e) to grant long term maintenance. Yet, that is contrary to the purpose of that maintenance section. Therefore, it seems that greater scope is needed for the orders to improve this situation and also it indicates that periodical payments are necessary for the effective application of a compensatory provision.

While this provision goes some steps further than New Zealand in addressing the position of the financially vulnerable, the danger of counting the economic advantage of having lived in the house as outweighing or significantly reducing the economic disadvantage suffered leaves the vulnerable homemaker in a precarious position. Section 9(1)(b) considers it an advantage even when it is a necessity to carry out the caring role, and arguably the economic focus of this section overtakes the original compensatory and partnership focus that it was meant to have as the current interpretation does not recognise that career sacrifice decisions are often joint and also benefit the other party (as it is made in the interests of the family). This seems particularly disadvantageous for homemakers in relationships with smaller asset pools.

Yet, this could be compensated under the section 9(1)(d) and (e) principles that deal with maintenance provision although given that this is considered to be the most important principle, it is questionable how far s9(1)(c)-(e) can improve this.

4.2.3 Section 9(1)(c): Economic Burden of Caring

This principle is specifically designed to ensure the economic burden of caring is fairly distributed between the couple through financial support in addition to principles 9(1)(a) and (b) by means of capital awards, property transfers or, as long as these awards are inappropriate, under s13(2) periodical allowances (until the child's 16th birthday). Such allowances can be made in respect of a child of the marriage, which includes children accepted as children of the marriage.⁶⁴⁰ This principle will only be used where s9(1)(a) and (b) are not

⁶³⁷ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186

⁶³⁸ E Clive, 'Financial provision in Divorce' (2006) 10 *Edinburgh Law Review* 413

⁶³⁹ J Thompson, *Family Law in Scotland* (5th edn, Butterworths Lexis Nexis 2007) 173

⁶⁴⁰ S27 FL(S)A 1985

enough to cover the economic burden of caring, and consequently not many cases will require an extra adjustment. This heightens the problem (particularly in small asset cases) that adjustments under s9(1)(b) cannot be awarded through periodical payments. Yet where s9(1)(c) is used it can extensively alter the award to protect the care-dyad. For example, in *Orr v Orr*⁶⁴¹ the wife had given up her work as a senior staff nurse to raise their two children under 12. On divorce it was held that a claim under principle 9(1)(c) would stand because she could not afford to purchase the house nor return to work fully due to school hours. She was awarded 60% of the matrimonial property and a periodical allowance of £600 for 12 months. Sheriff Stephen stated that given the circumstances, to not consider this principle would make 'nonsense of the aim of the legislation'.⁶⁴² This, for McGovern, represents a greater shift from the courts to award compensation to homemakers and depart quite dramatically from equal sharing.⁶⁴³

No provision like this exists in New Zealand, and arguably this gives greater recognition to the care-dyad as it recognises the direct financial consequences of the party who has to raise the children. Thus, while maintenance for the care of the children (rather than for the care-giver) must be a consideration for the proceedings, this section can take account of the fact that the care-giver may suffer economic disadvantages such as not being able to work fulltime or having to hire a nanny. Yet, the rarity with which s9(1)(c) is applied indicates that its effects are limited. Furthermore, the award is for the cost of raising the children rather than the effects of raising children and so reflects Deech's notion which requires single mothers to engage in the labour market.

4.2.4 Maintenance: Section 9(1)(d): Not More than Three Years and Section 9(1)(e) To Relieve Hardship Over a Reasonable Period

The provision of maintenance in Scotland is, like New Zealand, designed to be rehabilitative in accordance with Deech's beliefs about awarding maintenance. Yet, as has been discussed in Chapter 3,⁶⁴⁴ it once again represents the assumption that women should be engaged within the labour market, which ignores the gendered lives that are lived in the private sphere. This section is designed to be in addition to the above principles, and therefore will only be

⁶⁴¹ *Orr v Orr* [2006] (Edinburgh Sheriff Court) 31 July 2006

⁶⁴² *Orr v Orr* [2006] (Edinburgh Sheriff Court) 31 July 2006 taken from A McGovern (2006) 'Provision and prejudice: Consideration of a case which may indicate a greater willingness by the Scottish courts to compensate for future financial prejudice following divorce' (*The Journal of the Law Society of Scotland* 13 November 6) <<http://www.journalonline.co.uk/Magazine/51-11/1003588.aspx>> accessed 15 February 2011

⁶⁴³ *Orr v Orr* [2006] Edinburgh Sheriff Court, 31 July 2006 taken from A McGovern (2006) 'Provision and prejudice: Consideration of A Case Which May Indicate a Greater Willingness by the Scottish Courts to Compensate for Future Financial Prejudice Following Divorce' (*The Journal of the Law Society of Scotland* 13 November 6) <<http://www.journalonline.co.uk/Magazine/51-11/1003588.aspx>> accessed 15 February 2011

⁶⁴⁴ See Chapter 3, section 3.4.3

awarded if it is felt that the other principles do not cover this requirement already. However, the courts under s9(1)(d), unlike the previous sections, can award periodical payments although this is capped at a maximum period of three years. Section 11(4) sets out the factors that the court must have regard to when considering this principle.⁶⁴⁵ As Thompson points out,⁶⁴⁶ this provision is based on fairness and equity rather than entitlement; therefore behaviour will be taken into account when deciding whether it would be inequitable or not to make an award under this section.⁶⁴⁷ Furthermore, the award will hinge on whether the claiming party has found fulltime or even part-time employment.⁶⁴⁸ Therefore, the courts try to limit this section's interference with the principle of clean break by ensuring that the award is not a perpetual financial burden, that it will help to retrain the claimant and that it is only awarded where necessary. This three year cap consequently means that the scope for maintenance is much more limited than in New Zealand. While there is an option for a longer period of maintenance under s9(1)(e), the requirements are much stricter and thus the Scottish courts are unable to grant maintenance where necessary for a period of longer than three years. This, from Fineman's position, fails to disrupt forms of inequality and consequently protection is extremely limited and focused on ensuring women engage with the labour force to the detriment of care relationships.

Section 9(1)(e) allows for ongoing maintenance for a reasonable period. Under this principle the courts must have regard to factors⁶⁴⁹ and again, behaviour will be a consideration. This provision is specifically to grant ongoing support designed to deal with age or illness⁶⁵⁰ and therefore incapacity to work. Thompson⁶⁵¹ notes that use of this provision is extremely rare, although the courts have sometimes granted it to middle-aged women where they had not received a s9(1)(b) award and as a result, the courts were concerned with their ability to survive.⁶⁵² Moreover, s9(1)(e) requires severe hardship which is strictly interpreted.⁶⁵³ This strict interpretation and application of maintenance is exactly how Deech believes it should be awarded. Yet, as discussed above, from Fineman's perspective, it indicates a severe limitation on protecting and recognising the operation of dependents within the private sphere and the impact that this may have long-term on those who are characterised by dependency.

⁶⁴⁵ Listed in Appendix N

⁶⁴⁶ J Thompson, *Family Law in Scotland* (4th edn, Butterworths Lexis Nexis 2002) 163

⁶⁴⁷ FL(S)A 1985, s11(7)(b)

⁶⁴⁸ *Sheret v Sheret* [1990] SCLR 799

⁶⁴⁹ S11(5) listed in Appendix N

⁶⁵⁰ *Johnstone v Johnstone* (1990) SCLR 358

⁶⁵¹ J Thompson, *Family Law in Scotland* (4th edn, Butterworths Lexis Nexis 2002), 965

⁶⁵² E.g. *McConnell v McConnell* [1995] GWD 3-145 and *Stott v Stott* (1987) GWD 17-645

⁶⁵³ *Barclay v Barclay* [1991] SCLR 205

Thus it seems that in fact financial provision for married couples is weighted towards Deech's position and does not go far enough to protect Fineman's care-dyad. So how is this approached in the cohabitation context?

4.3 Cohabitation

The Family Law (Scotland) Act 2006 brought in a regime regulating their rights and responsibilities⁶⁵⁴ for cohabiting couples and which was intended to be different from married couples:

*The Scottish Ministers do not intend to create a new legal status for cohabitants. It is not the intention that marriage-equivalent legal rights should accrue to cohabiting couples, nor is it the intention to undermine the freedom of those who have deliberately opted out of marriage or of civil partnership. The Scottish Ministers consider it vital to balance the rights of adults to live unfettered by financial obligations towards partners against the need to protect the vulnerable.*⁶⁵⁵

While having this in mind, s28 has sought to protect the financially vulnerable⁶⁵⁶ yet it also followed the earlier Scottish Law Commission's 1992 recommendations which wanted neither equal sharing (designed to respect people's choice not to marry)⁶⁵⁷ nor a needs-based approach (due to the fact that these relationships did not have a formal commitment).⁶⁵⁸ Instead the cohabitation scheme seeks to offset any economic advantages or disadvantages as well as sharing the economic burden of childcare: similar provisions to s9(1)(b) and (c) of the FL(S)A.

This desire to balance a right to privacy versus protection essentially deals with balancing Deech's and Fineman's positions. As addressed in Chapter 3, Deech is strongly opposed to a scheme that is unwittingly placed on cohabiting couples who she believes have not made that choice to marry and therefore have decided to not have legal obligations imposed on their private lives.⁶⁵⁹ Yet Fineman's position seeks to protect the mother/child care-dyad regardless of sexual relationships or relationship status. How far has Scotland achieved this given that this scheme for cohabiting couples is intended to be narrower and less protective than in the marriage context?

⁶⁵⁴ The Scottish Executive (2005b) *The Family Law (Scotland) Bill* Explanatory notes (and other accompanying documents), Edinburgh: Scottish Executive, <<http://www.scottish.parliament.uk/business/bills/36-familyLaw/b36s2-introd-en.pdf>> para 97 accessed 8 February 2011

⁶⁵⁵ The Scottish Executive (2005a) *The Family Law (Scotland) Bill Policy memorandum*, Edinburgh: Scottish Executive, <www.scottish.parliament.uk/business/bills/36-familyLaw/b36s2-introd.pm.pdf> para 65

⁶⁵⁶ T Guthrie and H Hiram, 'Property and Cohabitation: Understanding the Family Law (Scotland Act 2006)' (2007) 11 *Edinburgh Law Review* 208, 218

⁶⁵⁷ Scottish Law Commission, *Report on Family Law* (Scot Law Com No 135, 1992) para 16.15

⁶⁵⁸ Scottish Law Commission, *Report on Family Law* (Scot Law Com No 135, 1992) para 16.15

⁶⁵⁹ R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 42 - 43

4.3.1 Defining the Scottish Cohabitant

Section 25 defines a cohabiting couple as a couple who are/were living together as a married couple or civil partners⁶⁶⁰ and in fact this legislation was designed to remove any discrimination between the same and different-sex cohabiting couples.⁶⁶¹ To determine whether a couple are cohabiting for the purpose of the Act, the courts are to consider the relationship's length,⁶⁶² nature,⁶⁶³ and any financial arrangements.⁶⁶⁴ This is a much shorter list than New Zealand's factors for consideration and most notably does not contain the three-year limitation period for a remedy that New Zealand has, as the Scottish Law Commission felt that the extent of economic advantages/disadvantages would be limited by their own nature in a short relationship.⁶⁶⁵ This potentially brings a greater range of claimants who can be protected under the Act as it does not necessarily exclude those who have been severely disadvantaged in a short space of time. Yet, a greater range of respondents potentially means that the scheme, from Deech's position, may unjustly bring people under the Act from day one of a relationship, as there is no opt-out provision.

4.3.2 The Cohabitation Scheme

Under s28, the courts are able to make capital sum payments and orders relating to the economic burden of caring if they can establish

- (a) whether (and, if so, to what extent) the defender has derived economic advantage from contributions made by the applicant; and*
- (b) whether (and, if so, to what extent) the applicant has suffered economic disadvantage in the interests of*
 - i) the defender; or*
 - ii) any relevant child.⁶⁶⁶*

Here contributions include financial and non-financial ones. This is strikingly similar to s9(1)(b) and (c) of the FL(S)A, however, as Norrie⁶⁶⁷ points out, s28 has a far narrower interpretation and s28(9) specifically limits economic advantages and disadvantages to gains/losses in capital and income and earning capacity. Subsequently, these provisions do not consider or provide for future losses⁶⁶⁸ despite this being, as Guthrie and Hiram identify, one of the main

⁶⁶⁰ S25(1) (a) and (b) FL(S)A 2006

⁶⁶¹ S Harvie-Clark, *Family Law (Scotland) Bill: Cohabitation (updated)*

<<http://www.scottish.parliament.uk/business/research/briefings-05/sb05-11.pdf>> SPICE briefing accessed 3 March 2005, page 5

⁶⁶² S25(2)(a) FL(S)A 2006

⁶⁶³ S25(2)(b) FL(S)A 2006

⁶⁶⁴ S25(2)(c) FL(S)A 2006

⁶⁶⁵ Scottish Law Commission, *Report on Family Law* (Scot Law Com No 135, 1992) para 16.14

⁶⁶⁶ S28(3) FL(S)A 2006

⁶⁶⁷ K Norrie, *The Family Law (Scotland) Act 2006: Text and Commentary* (Dundee University Press 2006)

⁶⁶⁸ T Guthrie and H Hiram, 'Property and Cohabitation: Understanding the Family Law (Scotland Act 2006)' (2007) 11 *Edinburgh Law Review* 208, 219

contributors of financial vulnerability.⁶⁶⁹ Consequently, s28 does not fully recognise the economic impact that caring or homemaking can have on the position of primary care-givers and thus at the outset this scheme appears insufficient for protecting Fineman's care-dyad. However, *CM v STS*⁶⁷⁰ indicates that the courts can look at the effect that an economic disadvantage will have on an individual's participation in the labour market. Nevertheless s28 presents a narrower consideration for cohabiting homemakers compared to married homemakers. For Miles et al. this provision is in fact unnecessarily cumbersome in contrast to section 9(1)(b) of the 1985 Act, particularly when the starting point in the marriage context of section 9(1)(a) will have gone some way to redress an imbalance.⁶⁷¹

While s28 seems to be very similarly worded to s9(1)(b), it does not permit the comparison between both parties' economic advantages and disadvantages that is possible in the matrimonial context. Instead, the applicant must demonstrate that their economic disadvantage has not been outweighed by their own economic advantage which, as discussed below, can include being supported by the defendant. McCarthy describes this as follows:

*...the defender's benefit must be set off against his disadvantage. The applicant's disadvantage must be set off against her benefit. The legislation does not, however, direct the defender's benefit to be offset against the applicant's benefit.*⁶⁷²

Yet, there is a great deal of confusion (owing to the newness of this legislation) over how this provision should then be interpreted in the cohabitation context; how should it differ in practice from the matrimonial context? McCarthy argues that the absence of an explicitly stated underlying redistributive rationale in the legislation (other than the general aim of protecting the economically vulnerable and to achieve clarity and certainty) is the reason for this lack of direction.⁶⁷³ Consequently, he argues that the courts are using three rationales to redistribute assets in cohabitation cases: the partnership approach (that the relationship is a socio-economic partnership similar to the Australian context),⁶⁷⁴ the compensation approach (to repair damage that the relationship has caused and to return the parties to the position that they were in before the relationship),⁶⁷⁵ and the restitutionary approach (or unjust enrichment approach where one party essentially earns a share in the other's property as a result of their contributions to the acquisition of that asset⁶⁷⁶).⁶⁷⁷ This confusion over how to

⁶⁶⁹ T Guthrie and H Hiram, 'Property and Cohabitation: Understanding the Family Law (Scotland Act 2006)' (2007) 11 *Edinburgh Law Review* 208, 219-220

⁶⁷⁰ *CM v STS* (2008) CSOH 124, 2008 SLT 871

⁶⁷¹ J Miles, E Mordaunt, and F Wasoff, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (Nuffield Foundation 2010) 130 - 134

⁶⁷² F McCarthy, 'Cohabitation: Lessons from North of the Border?', (2011) 23(3) *Child and Family Law Quarterly* 277, 280

⁶⁷³ (A socio and economic partnership) F McCarthy, 'Cohabitation: Lessons from North of the Border?' (2011) 23(3) *Child and Family Law Quarterly* 277, 285

⁶⁷⁴ See Chapter 5 section 5.3.2

⁶⁷⁵ F McCarthy, 'Cohabitation: Lessons from North of the Border?' (2011) 23(3) *Child and Family Law Quarterly* 277, 285

⁶⁷⁶ F McCarthy, 'Cohabitation: Lessons from North of the Border?' (2011) 23(3) *Child and Family Law Quarterly* 277, 285

apply s28, McCarthy states, has led to a number of inconsistent and ‘bewildering’ outcomes⁶⁷⁸ although, since the Supreme Court’s decision in *Gow v Grant* (2012), the courts appear to have established a clearer rationale pertaining to section 28.⁶⁷⁹

In *CM v STS*,⁶⁸⁰ an early case (although it is important to note that few cases have been brought to court as yet) concerning an eight year cohabitation with two children the courts followed a similar interpretation to s9(1)(b). This, McCarthy believes, displays the partnership rationale to property division.⁶⁸¹ However, subsequent case law has indicated that the courts are reluctant to use the same interpretation of this provision as in the marriage context⁶⁸² and, most recently, the Supreme Court in *Gow v Grant* emphasised that:

*...it would not be right to adopt the same approach to the application of [section 28] as would be appropriate if the exercise was being conducted under section 9 of the 1985 Act. The starting points are different.*⁶⁸³

Despite emphasising a distinction between s28 and s9(1)(b), the Supreme Court’s decision marked a much broader approach to section 28 than had been developing within the lower courts. In the prior hearing of *Gow v Grant* (2011)⁶⁸⁴ the Second Division had adopted a narrower formulation of section 28. Here, the Second Division emphasised that s9(1)(b) and s28 were different, requiring an alternative approach where the economic disadvantage had to be ‘in the interests’ of the other party: had Mrs Gow suffered a disadvantage in the interests of Mr Grant, that is to say, ‘in a manner intended to benefit the defender’? Here the respondent encouraged the applicant to sell her house (her only capital asset) and the proceeds were used to pay off debts, loan her son money and to contribute to the couple’s extravagant lifestyles. The lower court held that the money was used primarily for Mrs Gow’s own purposes rather than in the interests of the defender and the money that she had contributed towards joint living expenses were not enough for Mrs Gow to establish an economic disadvantage as Mr Grant had contributed more to the general finances. The court viewed this payment ‘to be more in the nature of compensation’.⁶⁸⁵ The court therefore adopted a ‘compensatory’ approach, interpreting the aim of the Act to be to restore any imbalance between the parties that resulted from the cohabitation. Furthermore, the Second Division emphasised that, rather than balancing economic advantages and disadvantages between parties as in the marriage

⁶⁷⁷ F McCarthy, ‘Cohabitation: Lessons from North of the Border?’ (2011) 23(3) *Child and Family Law Quarterly* 277, 285

⁶⁷⁸ F McCarthy, ‘Cohabitation: Lessons from North of the Border?’ (2011) 23(3) *Child and Family Law Quarterly* 277, 296

⁶⁷⁹ *Gow v Grant* [2012] UKSC 29

⁶⁸⁰ *CM v STS* (2008) CSOH 124, 2008 SLT 871

⁶⁸¹ F McCarthy, ‘Cohabitation: Lessons from North of the Border?’ (2011) 23(3) *Child and Family Law Quarterly* 277

⁶⁸² *Gow v Grant* [2010] FamLR 21. This approach has also been followed in *Lindsay v Murphy* [2010] Fam LR 156 and *Selkirk v Chisholm* [2010] Scot SC 11 (25 November 2010)

⁶⁸³ *Gow v Grant* [2012] UKSC 29 [35] (Lord Hope)

⁶⁸⁴ *Gow v Grant* [2010] FamLR 21

⁶⁸⁵ *Gow v Grant* [2012] UKSC 29 [35] (Lord Hope)

context, the courts are to assess them individually. This decision was subsequently overturned by the Supreme Court.

While the Supreme Court also confirmed that s28 and s9(1)(b) were different, Lord Hope also recognised that ‘the underlying principle [of section 28] is fairness’⁶⁸⁶ and while this did not mean that the court was able ‘to correct any clear and quantifiable economic imbalance’,⁶⁸⁷ he stated that s28 was designed to achieve the same effect as s9(1)(b); fair compensation.⁶⁸⁸ Therefore, he concluded, it may be useful to refer to s9(1)(b) cases when the courts are considering s28 factors.⁶⁸⁹ Furthermore, the Supreme Court critiqued the Second Division’s interpretation of the phrase ‘in the interests of the defender’. While Lord Hope agreed that ‘in the interests of the defender’ could mean ‘in a manner intended to benefit the defender’, he argued that this was not the only interpretation. Rather the phrase was to be given its natural meaning which ‘is directed to the effect of the transaction rather than the intention with which it was entered into.’⁶⁹⁰ Consequently, the Supreme Court argued that the Second Division had not given effect to the true meaning of s28. Applying this wider interpretation of the section, the Supreme Court found that Mrs Gow had suffered an economic disadvantage and accordingly awarded her £39,500. In doing so, the court’s rationale appears to have now settled somewhere in between McCarthy’s classifications of ‘partnership’ and ‘compensation’. On the one hand, the court’s rationale recognises that cohabitation is a committed relationship and accordingly cohabitation property disputes require a fair remedy. On the other hand, the court also recognises that cohabiting relationships are ‘a less formal, less structured and more flexible form of relationship than either marriage or civil partnership’ and therefore cohabiting couples are not entitled to marital-like rights.⁶⁹¹ Is it possible that this represents a middle ground between Deech’s and Fineman’s positions where fairness and difference are both incorporated into a rationale? Or, by enabling s9(1)(b) cases to be used in relation to s28, has the Supreme Court irreversibly blurred the boundaries between the cohabitation and marital regimes?

The final model for property redistribution that McCarthy identifies is the restitutionary model. Prior to *Gow v Grant* (2012),⁶⁹² this model had seemingly become the most favoured one (out of the small body of cases that existed) and had also been used in cases such as *Selkirk v*

⁶⁸⁶ *Gow v Grant* [2012] UKSC 29 [35] (Lord Hope)

⁶⁸⁷ *Gow v Grant* [2012] UKSC 29 [36] (Lord Hope)

⁶⁸⁸ *Gow v Grant* [2012] UKSC 29 [36] (Lord Hope)

⁶⁸⁹ *Gow v Grant* [2012] UKSC 29 [36] (Lord Hope)

⁶⁹⁰ *Gow v Grant* [2012] UKSC 29 [38] (Lord Hope)

⁶⁹¹ *Gow v Grant* [2012] UKSC 29 [35] (Lord Hope)

⁶⁹² *Gow v Grant* [2012] UKSC 29

Chisholm,⁶⁹³ *F v D*⁶⁹⁴ and *Jamieson v Rodhouse*.⁶⁹⁵ In *Lindsay v Murphy*,⁶⁹⁶ (six year cohabitation with three children) the parties had bought a plot of land from the defender's brother on which to build a house. To fund this venture the applicant contributed £84,500 from the sale of her former residence (in which they had both cohabited) and gifts from her mother. The defender contributed £5,000. Both parties made non-financial contributions to the project. The applicant was essentially responsible for project management and the defender used his contacts to get cheap labour and materials. The applicant was also the primary carer for their children. Here, the court affirmed that the economic advantage/disadvantage provisions in the cohabitation context were to apply differently in comparison to the married context; the approach to property settlement under the 1985 Act 'is one of entitlement, whereas the basis of the 2006 Act is discretion.'⁶⁹⁷ While the court found the Second Division's decision in *Gow v Grant* (2011)⁶⁹⁸ useful for the discussion over how to approach s28, the court rejected the idea that awards under this section should be compensatory in their nature.⁶⁹⁹ Rather, the court preferred a more restitutionary approach⁷⁰⁰ which grants an award where there is an economic disadvantage that arises as a result of the parties' contributions. This is a far narrower application of s28 than the compensatory model and essentially entails a much closer look at the contributions that the parties have made. Unlike the compensatory model, there is absolutely no room to compare the financial positions of the parties at the end of the relationship nor is there any room to consider things such as the loss of earnings that may arise from sacrificing a career to raise any children of the relationship.⁷⁰¹ Yet, this rationale sits more closely with Deech's position as it prevents extensive 'gold-digging' claims that the compensatory or partnership model may enable. As discussed below, this focus on contributions may severely disadvantage the homemaker as the courts appear to place far greater weight on financial contributions.

Before the Supreme Court's decision in *Gow v Grant* (2012),⁷⁰² the rationale for s28 was not yet established and thus these three models (partnership, compensation and restitution) represented the potential approaches that the courts could use, all of which could produce vastly different outcomes.⁷⁰³ Not only did this mean that there was a lack of clarity concerning

⁶⁹³ *Selkirk v Chisholm* [2010] Scot SC 11 (25 November 2010)

⁶⁹⁴ *F v D* [2009] FamLR 111

⁶⁹⁵ *Jamieson v Rodhouse* [2009] FamLR 34. This was the first substantive claim.

⁶⁹⁶ *Lindsay v Murphy* [2010] Fam LR 156

⁶⁹⁷ *Lindsay v Murphy* [2010] Fam LR 156 [62] (Sheriff Miller)

⁶⁹⁸ *Gow v Grant* [2010] FamLR 21

⁶⁹⁹ *Lindsay v Murphy* [2010] Fam LR 156 [62] (Sheriff Miller)

⁷⁰⁰ F McCarthy, 'Cohabitation: Lessons from North of the Border?' (2011) 23(3) *Child and Family Law Quarterly* 277, 298

⁷⁰¹ Although, these may be considered under the economic burden of child care.

⁷⁰² *Gow v Grant* [2012] UKSC 29

⁷⁰³ See McCarthy's discussion on the difference of impact that these approaches may have: F McCarthy, 'Cohabitation: Lessons from North of the Border?' (2011) 23(3) *Child and Family Law Quarterly* 277, 286-287

how this section would be interpreted, but Miles et al.'s (2010) study found that practitioners viewed this uncertainty to be a fundamental problem as it potentially stopped cases progressing.⁷⁰⁴ However, it was felt that these concerns would dissipate over time as case law developed⁷⁰⁵ and indeed it seems that *Gow v Grant* (2012) has settled this ambiguity in a manner that appears most preferential from Fineman's perspective and at the same time can be seen to be a disappointing development from Deech's standpoint. Through Deech's lens, the restitutionary rationale would have been the most satisfactory interpretation of s28.

Nevertheless, it remains clear from this growing body of decisions, that the application of the economic advantage and disadvantage provision in the cohabitation context (while the underlying rationale is not yet clear) is intended to be narrower than in the matrimonial context. For cohabiting couples, there is a need to establish a direct link between the economic disadvantage suffered and the *interest of the defender* whereas the married applicant needs only to show that they have suffered a disadvantage *in the interests of the family*. Subsequently, this limits the cohabiting applicant's ability to redress general financial imbalances that exist at the end of the relationship as the primary care-giver must prove that their contributions in the private sphere have directly caused their partner's success in the public sphere (although it is questionable how different this will be in light of the Supreme Court's decision in *Gow v Grant*). This requirement to establish a link between domestic contributions and success in the public sphere is (as demonstrated in the feminist critique of New Zealand⁷⁰⁶) a difficult task for the claimant to carry out successfully. From Deech's perspective, this bar protects the financial autonomy of the breadwinner and prevents 'gold-digging' claims made through tenuous connections to one party's financial success. Given that it seems that only much, much smaller awards are possible, this seemingly fails to protect the dependency intrinsic to the mother/child care-dyad, and instead promotes the expectation to be self-sufficient which Fineman has criticised for neutering the mother as it disregards gendered dependency within the private sphere.

Section 28(9) states that indirect or non-financial contributions for looking after the house or child classify as contributions that the courts can consider in a bid to protect the financially vulnerable who usually find themselves in this role. Yet, the courts in practice seem to have a narrow application of this section and (thus far) these contributions alone have not led to

⁷⁰⁴ J Miles, E Mordaunt, and F Wasoff, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (Nuffield Foundation 2010) 130

⁷⁰⁵ J Miles, E Mordaunt, and F Wasoff, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (Nuffield Foundation 2010) 130 and 143 - 144 and also the Scottish Executive (2005a) *The Family Law (Scotland) Bill Policy Memorandum, Edinburgh: Scottish Executive* <<http://www.scottish.parliament.uk/business/bills/36-familyLaw/b36s2-introd.pm.pdf>> para 68

⁷⁰⁶ See the discussion regarding New Zealand's s15 *Economic Disparity P(R)A 1976* at section 3.4.2.3

successful claims. It seems that the courts are adopting a ‘water under the bridge’ approach⁷⁰⁷ when considering homemaking contributions; offsetting these against the advantage of receiving the defendant’s economic support. For example in *Jamieson v Rodhouse*⁷⁰⁸ (30-year cohabitation and a ‘relevant’ child of the family) both parties worked fulltime, the house was in his name and he paid the bills and mortgage, she paid for her child, household items and did all the housework. It was determined that the position was economically neutral, that advantages and disadvantages offset each other so no award was met. Similarly, in *Selkirk v Chisholm*⁷⁰⁹ (nine-year cohabitation with no children) the house was in his name and he paid for all the bills. Both worked fulltime, and he, later, as self-employed. Both paid for furnishings and redecoration and shared domestic chores. He did outdoor jobs, she cleaned and washed clothes and paid for food and telephone calls. It was held she had no advantage or disadvantage; she would have paid those bills anyway.⁷¹⁰

The courts are therefore in practice not awarding for indirect contributions or domestic contributions as they are outweighed by the benefit of economic support. In fact, in the *Selkirk* case above, the judge himself emphasised ‘it is significant that in none of these cases was any award made solely on the basis of contributions towards household bills.’⁷¹¹ This potentially means that the homemaker is entirely vulnerable as these contributions are not enough on their own to substantiate a claim. The homemaker’s vulnerability is intensified under this scheme, given that there is also no real potential to consider future losses and that economic advantages and disadvantages are based on an individual rather than a relationship assessment. In fact, where awards have been granted, the contributions are combined with a financial one such as in *F v D*⁷¹² above, *Gow v Grant*⁷¹³ or in *Lindsay v Murphy*⁷¹⁴ where her contributions of helping to design a house (where both parties were unemployed) were held to be an economic disadvantage. Consequently, it seems that these provisions have not achieved their original design to delicately balance financial vulnerability and financial autonomy. Instead they fail to protect the financially vulnerable and arguably require some greater recognition of needs that arise from the care-giving dyad.

⁷⁰⁷ J Miles, E Mordaunt, and F Wasoff, *Legal Practitioners’ Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (Nuffield Foundation 2010) 130 - 134

⁷⁰⁸ *Jamieson v Rodhouse* [2009] FamLR 34. This was the first substantive claim.

⁷⁰⁹ *Selkirk v Chisholm* [2010] Scot SC 11 (25 November 2010)

⁷¹⁰ See also *CM v STS* [2008] CSOH 124, 2008 SLT 871 and *F v D* [2009] FamLR 111

⁷¹¹ *Selkirk v Chisholm* [2010] Scot SC 11 (25 November 2010) [105] (Sheriff Hammond)

⁷¹² *F v D* [2009] FamLR 111

⁷¹³ *Gow v Grant* [2012] UKSC 29

⁷¹⁴ *Lindsay v Murphy* [2010] Fam LR 156

The courts under s28(2)(b) can also make awards based on the economic burden of caring, and this is used more frequently than economic advantage/disadvantage for those with children: in *CM v STS*⁷¹⁵ they altered the settlement based on income and residency, in *F v D*⁷¹⁶ they halved the economic burden of caring, and in *Lindsay v Murphy*⁷¹⁷ she received just over £8,000. Generally, these awards have been considered modest and to have not considered the full extent of the primary care-giver's limited financial resources.⁷¹⁸ Furthermore, the awards that the courts can offer here are limited to lump sums, although these can be awarded in instalments,⁷¹⁹ which espouse the principle of clean break. However, it also means that ongoing support is removed from the primary care-giver which ignores dependency. Miles et al.⁷²⁰ found this concern was echoed by the practitioners who felt that the range of orders available is too limited. For Deech's standpoint, this narrow approach for s28(b) encourages women to be self-sufficient and assume equal financial responsibility for their children. Yet from Fineman's position, this is in complete conflict with the way that women lead their lives characterised by the care-dyad and thus their dependency.

4.3.3 Cohabitation Agreements

While all these provisions are unsatisfactory to Deech, as they interfere with the private sphere (despite their clear emphasis on autonomy), cohabitation agreements are the way in which she believes cohabitants should be able to sort out their legal status. Yet, this is an uncertain area as the Act itself does not contain a provision prohibiting such agreements, but nor does it state that they are enforceable. Miles et al. believe that, given the strong background of autonomy in Scots Law, these agreements would probably be enforceable as the law already recognises agreements that regulate the parties' property in the married context from which spouses are free to opt out.⁷²¹ It would be illogical to think that cohabitants could not use such agreements as well, however this remains to be seen in future cases. This lack of certainty may be a concern for those espousing Deech's view, but the general feeling appears to be that there is no reason why cohabitation agreements would be automatically considered void.

4.4 Doctrinal and Feminist Analysis: Conclusion

⁷¹⁵ *CM v STS* [2008] CSOH 124, 2008 SLT 871

⁷¹⁶ *F v D* [2009] FamLR 111

⁷¹⁷ *Lindsay v Murphy* [2010] Fam LR 156

⁷¹⁸ Here they had to pay a lump sum; J Miles, E Mordaunt, and F Wasoff, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (Nuffield Foundation 2010) 196. The lawyers recognised that this lack of consideration of resources left the defender in difficulty

⁷¹⁹ Section 28(7) Family Law (Scotland) Act 2006

⁷²⁰ J Miles, E Mordaunt, and F Wasoff, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (Nuffield Foundation 2010)

⁷²¹ J Miles, E Mordaunt, and F Wasoff, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (Nuffield Foundation 2010) 34

While the provisions in Scotland go some way towards balancing Deech's and Fineman's positions particularly in comparison with New Zealand, Scotland's approach also seems to be too weighted towards autonomy; the impact of care-giving is not recognised and there perhaps needs to be a greater general consideration of the impact of care-giving ability. Furthermore, s9(1)(b) seems to be limited in its application given that it is not possible to grant periodical payments for this section. Consequently, Scotland's approach in the married context is too restrictive and ignores the holistic effect that homemaking can have on a party's financial ability. In the cohabiting context this seems to be even more limited because of the scheme's focus on financial contributions and the apparent lack of recognition of domestic contributions. While *Gow v Grant* (2012)⁷²² offers a wider interpretation of section 28, overall the cohabitation scheme still offers too little protection from Fineman's perspective, and unwarrantedly interferes with a couple's autonomy from Deech's position. This next section looks at the practical implications of the schemes from the position of those lawyers who operate within Scotland's system.

4.5 Empirical Analysis

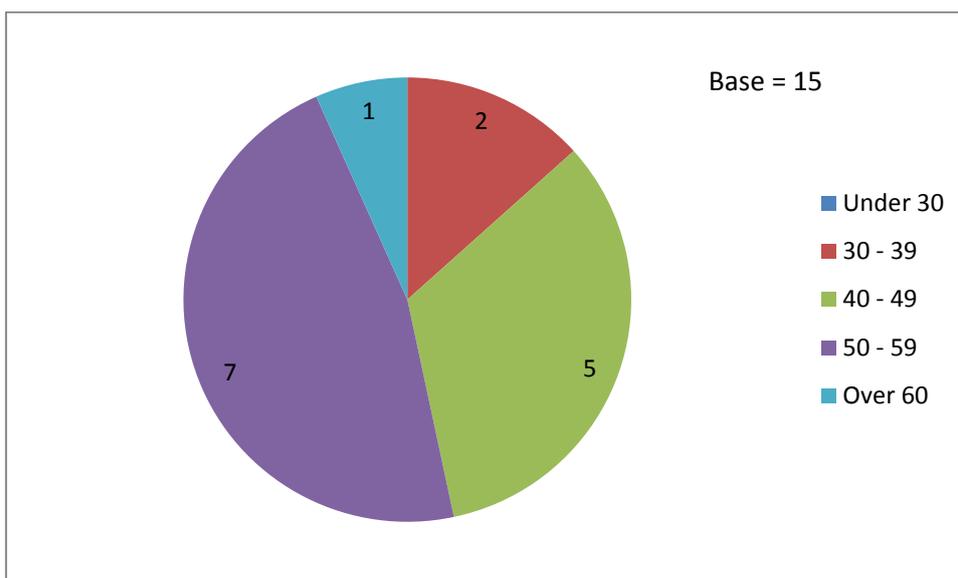
After having addressed the doctrinal and feminist analysis of Scotland's framework, this chapter shall now look at the empirical findings from the interviews with practitioners in Scotland. This section shall first of all address the socio-demographics of those who took part and then go on to outline the responses in the married, cohabiting and same-sex context to determine how an approach which is similar to New Zealand's but closer to Fineman's position serves the interests of women from the practitioners' perspective.

4.5.1 Socio-Demographics of the Interviewees

A total of 16 practitioners from Scotland took part in this research project, of which an equal number were male and female. The largest number of respondents (see Table 4.1) were in the 50 – 59 age bracket, a slightly younger demographic than New Zealand, although on the whole there was a similar age spread in both jurisdictions. Only three were aged 39 and younger. Most practitioners had practised in the area for a length of 11–20 years and 21–30 years. Four had practised between 31-40 years, thus the lawyers on average had been practicing for a lesser amount of time than the New Zealand practitioners.

⁷²² *Gow v Grant* [2012] UKSC 29

Table 4.1: Ages of the respondents in Scotland



4.5.2 Responses in the Marriage Context

Table 4.2 Scotland's themes in the marriage context

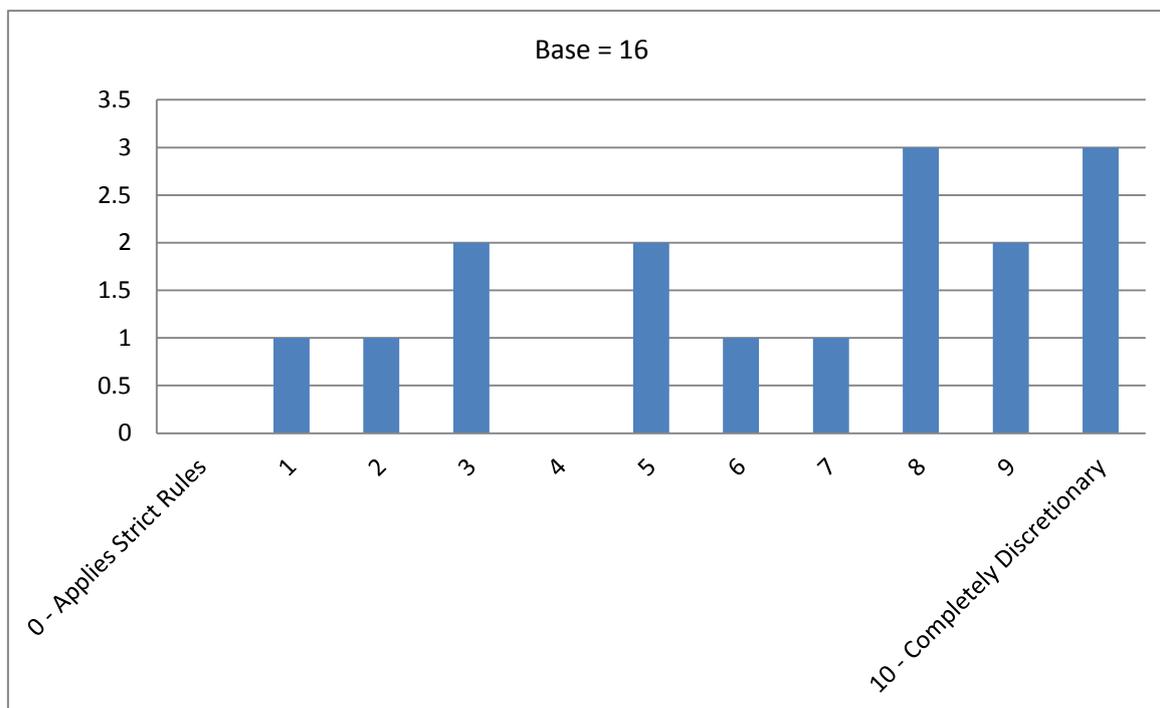
Overarching Themes	Themes	Sub-Themes
Deech-centric	Equality dominates	Clarity Certainty Consistency Partnership
	Avoid evaluation	Choice Practicality Financial autonomy and clean break
The marginalised vulnerable	Infrequent vulnerability	'Limited' autonomy myth
	Insufficient support	The courts' approach Restricted matrimonial property Inadequate maintenance

The themes that emerged from the qualitative analysis conducted in Scotland essentially divided into two core categories as shown in Table 4.2. Firstly, the lawyers' responses were very Deech-centric. That is to say, the practitioners embraced the core features of Deech's arguments and, consequently, a number of themes emerged from the Scottish data that were similar to those in New Zealand although the themes in Scotland were arguably voiced with less fervour. Nevertheless, the extent of this similarity was surprising given that Scotland's system had a higher level of discretion in comparison with New Zealand. The second overarching theme reflected the lawyers' strong concerns over the support that was offered in Scotland to those who were economically vulnerable on relationship breakdown.

4.5.2.1 Deech-Centric Views

Out of the list of principles⁷²³ that the lawyers were asked to rank in order of importance within Scotland, the majority listed fairness as most important followed by 'equal sharing' and clean break. This reflected the diluted application of equality that Scotland has in comparison to New Zealand.

Table 4.3 How rigid/discretionary the lawyers believe Scotland to be.



As Table 4.3 above demonstrates, on a scale of one to 10⁷²⁴ half of the lawyers strongly felt that their system has complete discretion and the majority selected a number above five indicating that discretion was more prevalent than the application of strict rules. Consequently, Scotland has a higher amount of discretion within its system which arguably conflicts with the principles that Deech epitomises.

However, despite the higher level of discretion, the analysis revealed that Deech's core values were maintained rather than weakened. Therefore, the qualitative analysis reflected New Zealand's analysis to a greater degree than expected; the lawyers emphasised that having a rule-based system which has equality as its starting point meant that certainty and clarity were at the heart of the system. The most celebrated benefit of this was the low level of litigation that it produced, and which therefore reduces both personal and court costs.

⁷²³ See Appendix A

⁷²⁴ The lawyers were asked how rigid they felt their jurisdiction was on a scale of zero to ten. See Appendix A, 0 being completely rigid (applies strict rules) and 10 being completely discretionary

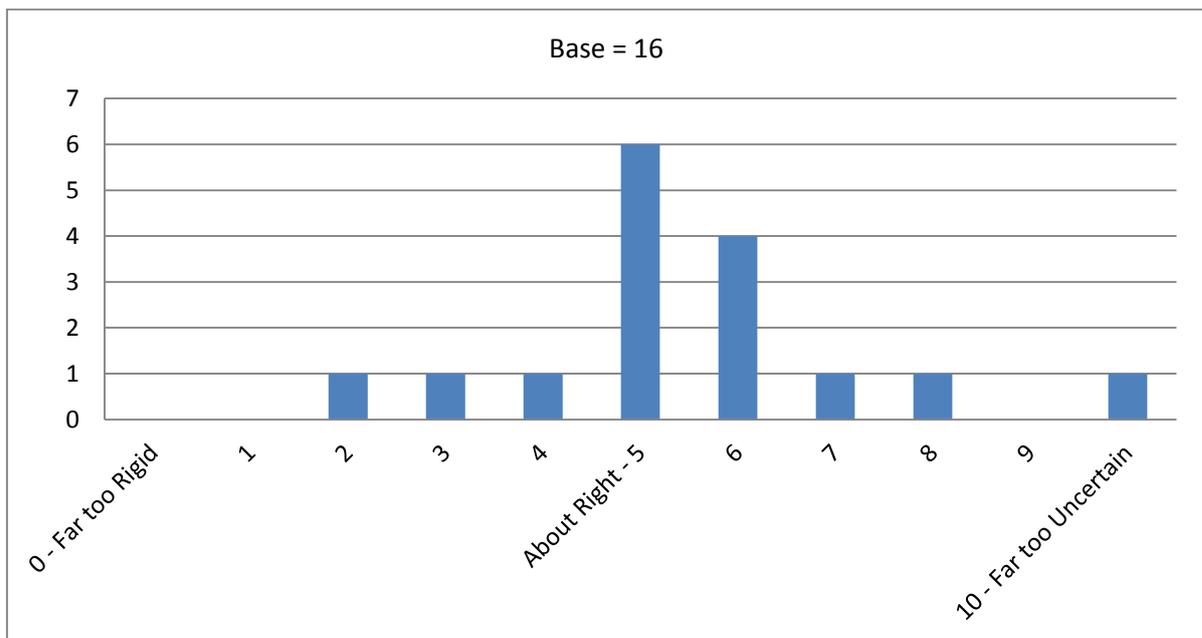
...the Scots have sacrificed some equity in favour of certainty and the benefit to parties is they don't spend so much on legal expenses. (ScotLaw3)

One lawyer specifically indicated that there had been a drop in cases since the 1985 Act was introduced:

I think what I would say now is that 20 years plus on from the 1985 Act, I find myself as a specialist Family Law solicitor specialising in financial provision as opposed to children, I would find myself in court very rarely. (Scotlaw14)

Thus it seems that having equality as a starting point (even with a greater level of discretion) protects Deech's core values. The participants were generally satisfied with the mixture of rules and discretion within their system. In Table 4.4 below, six respondents felt that the mixture of rules and discretion was about right, although seven respondents felt that it was too uncertain.

Table 4.4 Lawyers' opinions on how rigid/discretionary Scotland is.



Similarly, the qualitative analysis demonstrated that most lawyers felt that the right balance between rules and discretion had been achieved. There is an 'exercise of discretion within a clear structure'⁷²⁵ where equality under s9(1)(a) provides certainty, clarity and consistency and the following s9(1)(b)-(e) provisions provide the courts with greater discretion to alter the award. Yet how is it possible that Deech's principles have not been undermined by this level of discretion? It seems that the answer lies in the lawyers' perceptions that cases involving a consideration of s9(1)(b)-(e) are uncommon:

⁷²⁵ Scotlaw3 although note the criticism below at section 4.5.2.2

...there are so few cases that hinge on economic disadvantage it's difficult to form an overall impression. (ScotLaw3)

The theme 'infrequent vulnerability' accompanied this perception (this shall be developed further below at section 4.5.2.2), that is to say that the need to use these sections was infrequent and therefore equality dominates. Consequently, despite the greater space for discretion, in reality it is infrequently used which perhaps explains why those themes of clarity, certainty and consistency have not been extinguished by the 'side effects' of discretion. Unsurprisingly, the lawyers were wary of a system that embraced too much discretion and there was specific criticism over the amount present in England's jurisdiction:

The analogy I would normally draw is that if you can imagine the Forth Bridge, a beautiful strong standing structure, that's Scots Family Law. English law is the swirling murky water that lies beneath. (ScotLaw9)

The participants, therefore, championed the starting point of equality. Part of the lawyers' satisfaction was closely linked to the theme of partnership as equality 'doesn't give preference to husbands or to wives.'⁷²⁶ Rather, equal division of matrimonial property recognises that the marriage has been a joint partnership. This theme was most evident when the participants were asked to consider dual earner relationships where one party had made an 'additional contribution', or where one party has a 'dual burden.'⁷²⁷ Instead of attributing an additional value to those additional contributions, the participants wanted to 'avoid evaluation' and thus equality was still the preferred choice of property division. 'Autonomy' and 'choice' were strong themes that appeared to justify this response:

...it's how people live their lives and who does the washing and ironing is really up to them to sort out amongst themselves. (ScotLaw6)

Interestingly, there was a presumption that any additional burden would balance out the partnership. A few of the lawyers presumed that (as in Australia) the person carrying out the additional burden would not be in an equal financial position to their partner. Consequently, the respondents in Scotland thought that recognising an additional contribution would both ignore the economic advantage that the primary care-giver has received from their high earning partner and also it would ignore the amount of effort or strain in the breadwinner's job. Consequently the lawyers presumed that this additional role is offset by the breadwinner's role⁷²⁸ (a fear that Miles had recognised):⁷²⁹

⁷²⁶ ScotLaw9

⁷²⁷ Namely a dual earner couple with an additional role, see Appendix A

⁷²⁸ ScotLaw1,2,9

⁷²⁹ J Miles, E Mordaunt, and F Wasoff, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (Nuffield Foundation 2010)

You may well find that one party could be in a high pressured job earning a lot more money, whereas the other party might be working fulltime in a less stressful job and have more time available. So say for example an accountant and a teacher. (ScotLaw2)

Two other themes of 'practicality' and 'financial autonomy' also emerged as justifications for not recognising an additional contribution. Nearly all the lawyers indicated that it was impractical to value domestic contributions and so it should be avoided where possible:

I think that...one of the main difficulties in quantifying domestic contributions is that there are so many different ways of doing it and you know on the one hand you might have someone saying if you had to employ a housekeeper, nanny, cleaner and so on, this is what it would have cost you over the course of the marriage...that's one way of doing it (ScotLaw16)

If you're going to ask who made what sort of contribution you're going to have endless proof, you have to bear in mind that Scots law in process is very focused on oral evidence and one of the reasons we have the system we do in principle is it means you are spared days and days and days in court of people trawling through 'well I made the teas, I did the ironing (laughs)' that would be...that would be just awful for everybody. Judges just wouldn't want to do it. ScotLaw3)

For those who referred to financial autonomy, it was because there was a lack of need to recognise the additional contribution. Both parties had some degree of financial autonomy, and therefore this should be recognised by the courts:

...because if you have both fulltime earners they can both go off and earn; they're both economically able and independent. (ScotLaw3)

This Deech-centric theme of 'avoiding evaluation' also tied into the lawyers' general preference for allowing the couple to financially move on as soon as possible post-separation. For a large proportion of the lawyers, clean break was the most appropriate approach at the end of the relationship. There was a strong perception that having ongoing financial relationships hinders the parties' ability to move on,⁷³⁰ particularly for the party who has to continue paying maintenance. Some also believed that there should be an emphasis on self-sufficiency, a principle that Deech espouses and (as in New Zealand) there was a strong consensus that any maintenance should be rehabilitative:

...the law should provide for some balancing of either assets or maintenance to help them get back on their feet or become independent. (ScotLaw4)

4.5.2.2 The Marginalised Vulnerable

Overall, the respondents were satisfied with having equal sharing as the dominant approach in Scotland. There was a general consensus from the majority of the participants that (just as in

⁷³⁰ Scotlaw5,6,12,15

New Zealand) the one-size-fits-all approach worked in most circumstances and that while it might not produce the best outcome for individual clients, it works best for society:

I'm satisfied because if you look at the population as a whole, it probably works reasonably well and at least people know what's going to happen with their lives.
(ScotLaw3)

Subsequently this led to the theme of 'infrequent dependency' which means that either dependency itself is infrequent at the end of a relationship, or at least dependency that is not satisfied by the equal sharing principle is infrequent. Only in rare situations would the discretionary principles be used. Yet, the participants recognised elements of Fineman's autonomy myth in limited circumstances and identified scenarios that would require a broader consideration of s9(1)(b)–(e). Most notably, the lawyers indicated that having children would increase the claimant's needs. This was attributed to the cost of having children through a career sacrifice which inevitably had an economic impact on the primary child-carer. Similarly some felt children reduced the ability of the spouses to make independent choices:

...you simply can't compare a situation where somebody's got childcare obligations and has dedicated a life to doing that as opposed to...you know perhaps enjoying a slightly more luxurious lifestyle (laughs) so it's a slightly different take on things.
(Scotlaw16)

Correspondingly, the presumption was that those without children had a much greater capacity to be autonomous:

*...where there are no children, people should be independent, but that's subject to the length of the marriage and the possibilities of being independent.*⁷³¹

However, there were other situations that the lawyers recognised would lead to greater financial vulnerability such as where a career had been sacrificed (although this was usually associated with childcare); the age of the spouses; the length of the marriage and the ability of the spouse to return to work. Nevertheless, the presumption by the lawyers was that dependency was infrequent.

Yet, where there was a need to move beyond the equal sharing principle, the themes raised were generally negative, and the lawyers criticised the Scottish approach for providing 'insufficient support' where it was necessary. There were three areas of dissatisfaction: equality, compensation and maintenance. Equality was felt to be insufficient because it ignored homemaking contributions and therefore it was only fair in certain situations, for example, only where there is enough property classified as matrimonial property or if the homemaker was in employment already:

⁷³¹ ScotLaw3

...if they're in some sort of employment and continued employment, then yes it's fair that everything accumulated in the marriage is split between them. But that might leave the homemaker in a vulnerable position in the sense that they may have no job, no sort of ongoing pension or income... (ScotLaw13)

Consequently, the 'one-size-fits-all' approach falls short where the partners are not in equal financial positions at the end of the relationship.

Compensation, or principle s9(1)(b) received the largest amount of criticism from the lawyers, particularly relating to the full-time/part-time relationship model. Only one lawyer⁷³² felt that this principle adequately rebalanced economic advantages and disadvantages. Half the respondents felt that it failed to compensate the economic impact that the homemaking role had and consequently that the homemaking partner was financially vulnerable post-separation. All the participants agreed that the disadvantage is a gendered one:

.. .because it's predominantly women who are the homemaker, with no earning capacity to speak of and sometimes a capital settlement isn't enough and she's left in a very financially vulnerable position, or a very much poorer position than her husband...because he's still got a career and income and she doesn't... (ScotLaw4)

For one lawyer, the extent of the disadvantage was contingent on the relationship's length:

It really depends on the length of the relationship but it doesn't usually take proper account of economic disadvantages resulting from being out of the labour market. So I think in a three-year relationship it may not have done that much damage but in a 20-year relationship... (ScotLaw16)

Yet, the reasons asserted for s9(1)(b)'s inadequacy were only in part related to the statutory scheme. Fundamentally, some lawyers felt that the statutory regime was too restrictive on two accounts: firstly, by excluding periodical payments from s9(1)(b):

...a part-time spouse is not going to get maintenance from her husband she's still got the costs of child care etc. (ScotLaw10)

Secondly that the definition of matrimonial property is too restrictive:

I mean there are difficulties...where the breadwinner's money or property is kept out of the pool of matrimonial property. (ScotLaw2)

...if there's no matrimonial property either because it's been inherited or for some other reason...then it's very difficult to value the homemaker contributions. Uh homemaker's tend to do badly. (ScotLaw3)

The most notable reason for s9(1)(b)'s failure was connected to the judicial application of this section. The lawyers felt that the statute provided ample protection for homemakers, but the judges' interpretation was too narrow:

⁷³² ScotLaw5

...in my view they are protected, it's just that the case law hasn't applied the protections in the statute law. (ScotLaw1)

...I don't think the judiciary has used the flexibility that's available to them and now we have precedents that are just backing up the legislation. (ScotLaw12)

This problem was also present in New Zealand. Perhaps the danger of having equal division as a starting point is that equality is so easy to award. Consequently, the simplicity of equally dividing assets means that the courts either are less acquainted with or wish to avoid the complex discretionary issues associated with s9(1)(b)-(e); the danger of certainty is that it is more appealing for the judges:

...it's because we're so focused on our first principle [equal division of matrimonial assets], that we find the second one so difficult. (ScotLaw3)

The general consensus was that greater recognition is needed of the economic impact and the extra effort that is required by the primary care-giver:

...I think the courts undervalue economic disadvantage that's caused by having to be at home to or be available to look after and rear children. (Scotlaw6)

The final sub-theme under 'inadequate support' is 'maintenance'. The results clearly demonstrated that maintenance provision under principles 9(1)(c)-(e) was rarely awarded and thus the majority of awards embraced clean break. For a large proportion of the lawyers, this was the most appropriate approach at the end of the relationship. However, there was consensus from almost all the participants that while it worked generally well, there were situations where it was inappropriate, namely where there was a greater level of financial enmeshing and dependency: those who were out of employment; those with children and also the age/length of the relationship. Six lawyers felt that the current provisions were too restrictive (again due to the courts' interpretation). This disadvantage was felt to be gendered and particularly for women who had been out of the workforce:

I suspect that the...way the legislation has been interpreted over the years is in a lot of cases probably too harsh for one party that has...given up the employment and it may well be a need to review that in terms of financial support for a greater period on divorce. (ScotLaw2)

In practice the focus on equality and the presumption that one-size-will-fit-all marginalises those who are financially vulnerable at the end of the relationship. Not only is their vulnerability 'invisible' within the application of equality, where the courts attempt to use discretion to provide support, the approach is often too narrow and inadequate. While the majority of lawyers felt that these circumstances were rare, it seems that this 'inadequate support' would appear to fail to meet Fineman's position in practice.

4.5.3 Responses in the Cohabitation Context⁷³³

Table 4.5 Scotland's themes in the cohabitation context

Themes	Sub-Themes
The Same as marriage	Function
Different from marriage	Choice Different institutions Expectation Abstract difference Practical difference
Cohabitation scheme	Uncertainty Court's application Too restrictive Poor drafting

As demonstrated in Table 4.5, the majority of the themes in this part of the analysis focused more on comparing cohabitants with married couples rather than on the substantive cohabitation regime.

Very few lawyers felt that cohabitation should be treated the same as marriage because they were functionally similar relationships. However, the majority of respondents strongly felt that cohabiting couples should be treated differently from married couples. One sub-theme that emerged as the lawyers justified this viewpoint was 'choice': cohabitation was viewed as a choice not to marry:

It's unfair but you make a conscious decision to marry or not to marry. There has to be a distinction between marriage and cohabitation. (ScotLaw10)

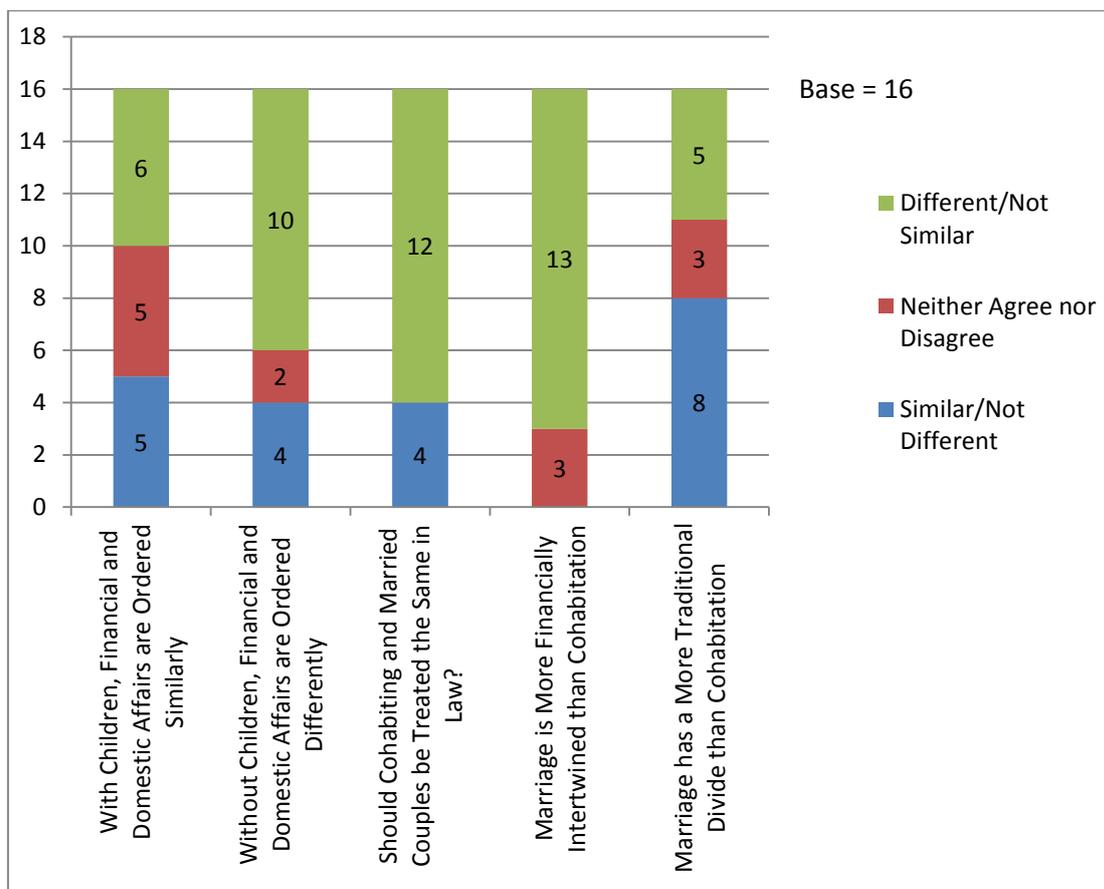
Secondly, the overwhelming majority of respondents believed that there was a great difference between cohabiting and married couples; cohabitation is a different institution, a completely different relationship. Therefore, the lawyers thought that the relationships should be treated differently:

I think there should be a huge difference there, because one is not a diluted version of the other, it's a different institution and the criteria should be different because you're not dividing assets which accrued over that period. I think that would give injustice. (ScotLaw9)

⁷³³ Note that the empirical work was prior to the Supreme Court's decision in *Gow Grant* [2012] UKSC 29. Consequently, the system had far more uncertainties and appeared to be favouring the restitutionary model as defined by McCarthy. See F McCarthy, 'Cohabitation: Lessons from North of the Border?' (2011) 23(3) *Child and Family Law Quarterly* 277 and the discussion at Section 4.3.2

As Table 4.6 demonstrates, 13 respondents believed that marriage is more financially intertwined than cohabitation, although only five agreed that marital unions organised their affairs more traditionally than cohabiting couples. Scotland, out of all the jurisdictions, had the highest number of respondents who agreed that cohabiting couples were different from married couples. Furthermore, whereas all the jurisdictions indicated there might be a greater level of similarity where there are children, Scotland most strongly indicated that, even with children, only five thought they were similar and 10 agreed that without children they were different.

Table 4.6: Attitudes towards cohabitation and marriage in Scotland



For others, the difference that lay in the expectation of rights which was linked to this was the perception that those who were married demonstrated a higher level of commitment than those who cohabited. Three participants felt that this was because cohabiting couples tended to drift into relationships:

I think that the commitment of marriage means they have an interdependence and reliance on one another which goes beyond cohabitation. (ScotLaw3)

Yet, the emphasis on difference between relationship styles tended to be ‘abstract differences’ rather than ‘practical differences’. Although most lawyers believed that

cohabitants should be treated differently to married couples, there was little discussion (especially where respondents were unhappy with the current Scottish regime) over what that difference should be in practice. Generally it was felt that the approach should be more restrictive; if cohabiting couples want more rights, then they should marry. Yet, only a couple of respondents felt like Deech that there should be no scheme whatsoever. Clearly the real issue at the forefront of the participants' minds was maintaining the distinction between married and cohabiting couples as it seems that little thought has been given as to just how this should be approached.

However, maintenance was one 'practical difference' that the respondents referred to where they argued that maintenance should be more restrictive for cohabiting couples. The majority felt that cohabiting couples should not have any access to maintenance on the grounds that they had different expectations to married couples:

...in Scotland we've adopted a clean break for cohabitation so all you can really get is a capital sum payment. I actually think, looking at it, that that's right. There can be no ongoing maintenance. (ScotLaw10)

The only exception raised to this was where there were children involved. In fact, most lawyers felt that children should make a difference to the way that cohabiting couples were treated. Some indicated that the care-dyad had greater needs because of the financial burden associated with primary care-giving. Others felt that having children required more effort from the care-giver and that couples without children were more indulgent:

...we do try to take account of a situation where there are children more favourably financially because obviously there's...recognition of the input that's required with children. (ScotLaw7)

On the whole it was clear that Scottish lawyers felt that children should make a difference for cohabiting couples. However, it was not clear whether the lawyers felt that the cohabitants with children should be treated in the same manner as married couples with children. Nevertheless, what was apparent was that where the lawyers indicated that maintenance should be available in situations where there were children, the maintenance should only be for the child, rather than for the primary care-giver.

4.5.3.1 The Scheme

The respondents were evidently uncertain about the actual operation of the cohabitation scheme. This was unsurprising given how recently the legislation was introduced. Yet, this uncertainty was also linked to the dominant theme of 'dissatisfaction' which related to the

drafting of the legislation. Just as Miles et al.⁷³⁴ found, the lawyers were highly critical of the statutory provisions contained within the 2006 Act. Half the lawyers argued that the legislation was poorly drafted which made it hard to advise clients. Nearly all the participants agreed that the legislation needed to be completely redrafted rather than just making amendments to the current scheme:

...the legislation we've got about cohabiting couples...needs to be repealed; the single thing you could do to improve it would be to repeal it. (ScotLaw6)

...it's really badly written. And we're all struggling to advise our clients and to advise the courts on the way to go. (ScotLaw1)

More substantively, the respondents indicated that the definitions of economic advantages and economic disadvantages were unclear and there was a lack of certainty over how much discretion the Act contained. For some the difficulty was down to the level of discretion within the scheme and for others the scheme was too rigid. Again the courts were criticised for interpreting the Act too narrowly, and therefore the respondents called for a greater level of guidance on how discretion was meant to operate:

I think that the court's interpretation of the statute has been unduly harsh... (ScotLaw15)

I don't think there's enough guidance given on...discretion and [how] it ought to be exercised and the circumstances it ought to be exercised in. (ScotLaw6)

Out of those who felt the scheme was too restrictive, some felt that there was not enough discretion to construe the economic disadvantage. ScotLaw9 emphasised the problem of offsetting raised by Miles et al.:⁷³⁵

It's very hard to prove the necessary advantage/disadvantage balance. It will be an unusual relationship in which there's not something to set off. Very unusual indeed. But it is quite difficult to prove that disadvantage. (ScotLaw9)

Furthermore, there was some indication that the regime was too narrow because there was no concept of cohabitation property:

'Because there's no concept of cohabitation property as there is in matrimonial property. So if it's a very long cohabitation the breadwinner only is going to get some compensatory payment rather than a fair share... (ScotLaw11)

⁷³⁴ J Miles, E Mordaunt, and F Wasoff, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (Nuffield Foundation 2010)

⁷³⁵ J Miles, E Mordaunt, and F Wasoff, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (Nuffield Foundation 2010)

Aside from being too restrictive, ScotLaw12 felt that the time limitations in place actually encouraged a greater level of litigation and there were indications that the range of options available was too limited:

...the difficulty with the legislation is as I say it's badly drafted, there's very limited time periods to make a claim which means we're needing to be more litigious than would otherwise be the case and the range of options to the court are limited. (ScotLaw12)

So it seems that overall the lawyers are unhappy with the framework in place in Scotland for cohabiting couples and the poor drafting has contributed to a large amount of uncertainty over how the scheme will operate in practice. Yet despite this dissatisfaction, the lawyers were unable to offer an alternative framework even though the overwhelming majority of those interviewed believed that cohabitants should be treated separately. The fundamental concern was maintaining the difference between relationship styles.

4.5.4 Same-Sex Relationships

Table 4.7 demonstrates how uncertain the respondents felt in the same-sex context, reflected in the fact that a high proportion of respondents selected 'neither agree nor disagree'.

Table 4.7: Attitudes towards same-sex relationships in Scotland

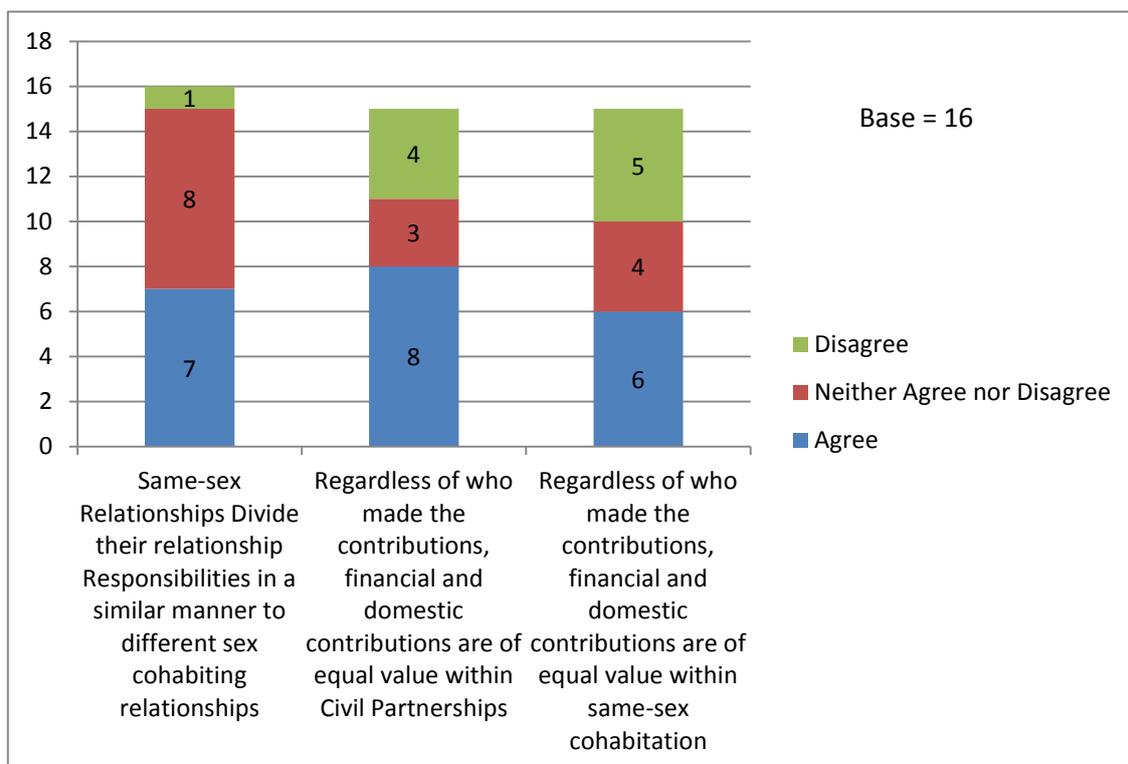


Table 4.8 Themes in the cohabitation context in Scotland

Themes	Sub-Themes
Uncertainty	Lack of experience
	Presumed similarity
	Children

The interviews also reflected this uncertainty in the thematic analysis (as Table 4.8 shows) as the lawyers lacked experience with same-sex couples in both the civil partner and cohabiting context.⁷³⁶ However, each lawyer who expressed this uncertainty presumed that the relationships would be treated the same as different-sex relationships:

That's an interesting one because in fact we don't have any case law in relation to same-sex couples...but I presume that they would. (ScotLaw1)

Generally, the lawyers felt that there was, and should be no difference when valuing domestic contributions between married couples/civil partners and different-sex/same-sex cohabitants. Consequently, throughout the interviews, the respondents gave the same answers in both the same-sex and different-sex contexts.

The only difference that was voiced was attributed to the fact that same-sex relationships were less likely to have children⁷³⁷ and one lawyer indicated that there may be a difference in relationship duration:

This is based on anecdotal evidence alone, but I gather that same-sex cohabitation has a rather shorter shelf-life than hetero-cohabitation. I know of no reason why this should be true. (ScotLaw9)

However, the rest of the participants indicated that there should be no difference between same- and different-sex relationships:

It's just the same. Marriage and civil partnerships are interchangeable and cohabitation, gay or straight is interchangeable. And that is how it should be. (ScotLaw9)

4.5.5 The Vignettes

As outlined in Chapter 2, there were two scenarios posed to the lawyers. Scenarios A and B outlined a set of circumstances based on *Burns*⁷³⁸ and *Miller*⁷³⁹ which also had a number of alternative variables.⁷⁴⁰

⁷³⁶ ScotLaw1,2,3,7,9,12,13,16

⁷³⁷ ScotLaw3

⁷³⁸ *Burns v Burns* (1986) Ch 317

⁷³⁹ *Miller v Miller* [2006] UKHL 24, [2006] 1 FLR 1186

⁷⁴⁰ Appendix A

4.5.5.1 Scenario A⁷⁴¹

Table 4.9: Attitudes to England and Wales' outcome in Scenario A

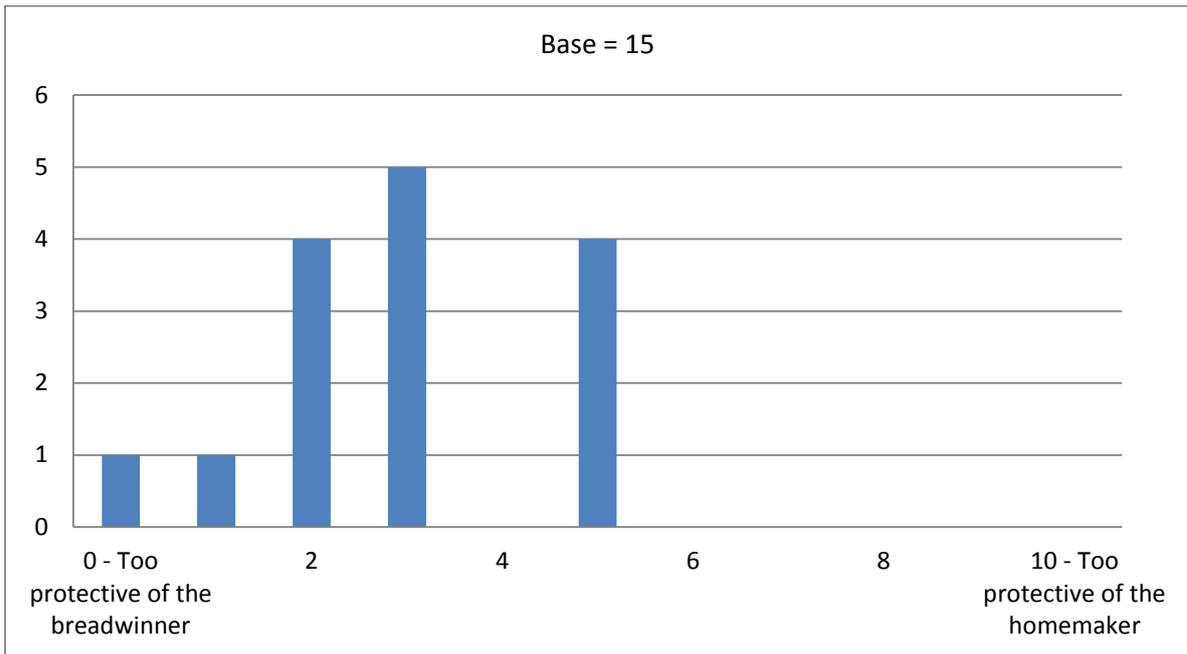
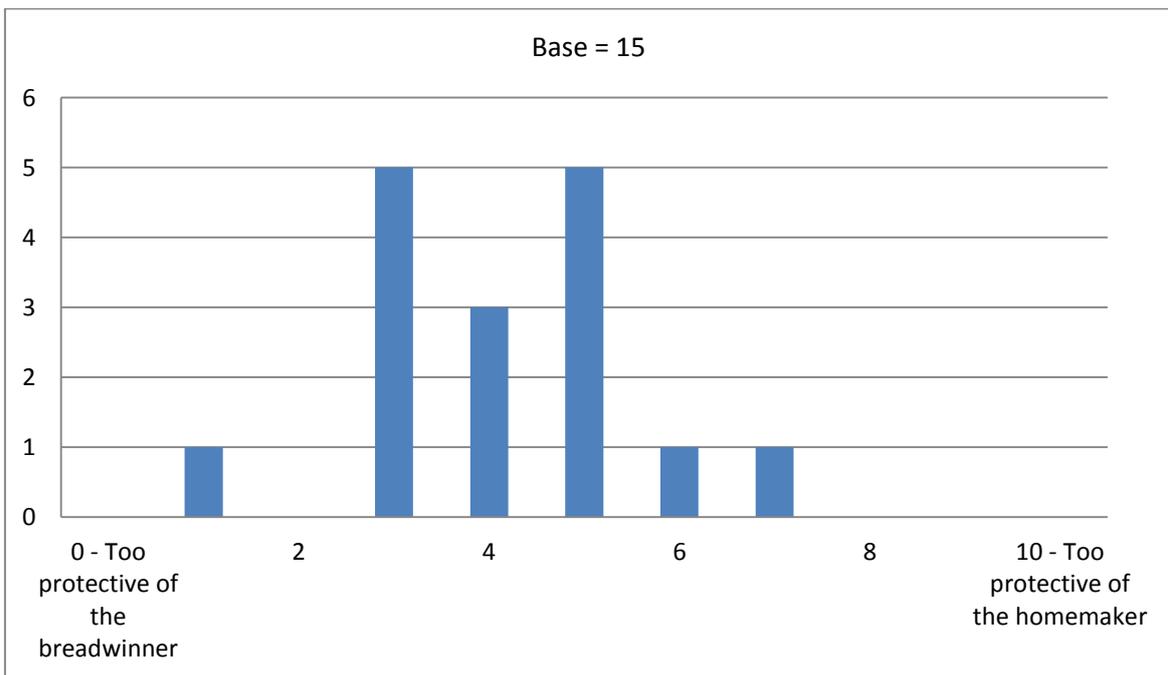


Table 4.10: Attitudes to Scotland's approach to Scenario A



When asked their opinions on the outcome of Scenario A in England and Wales, the Scottish lawyers' responses were not as fervent as the New Zealand lawyers'. While most felt that it was too protective of the breadwinner, the mode was '3' and four lawyers felt that it was about right (Table 4.9). When asked how Scotland would alter the award in comparison, 12

⁷⁴¹Appendix A (based on *Burns v Burns* (1984) Ch 317

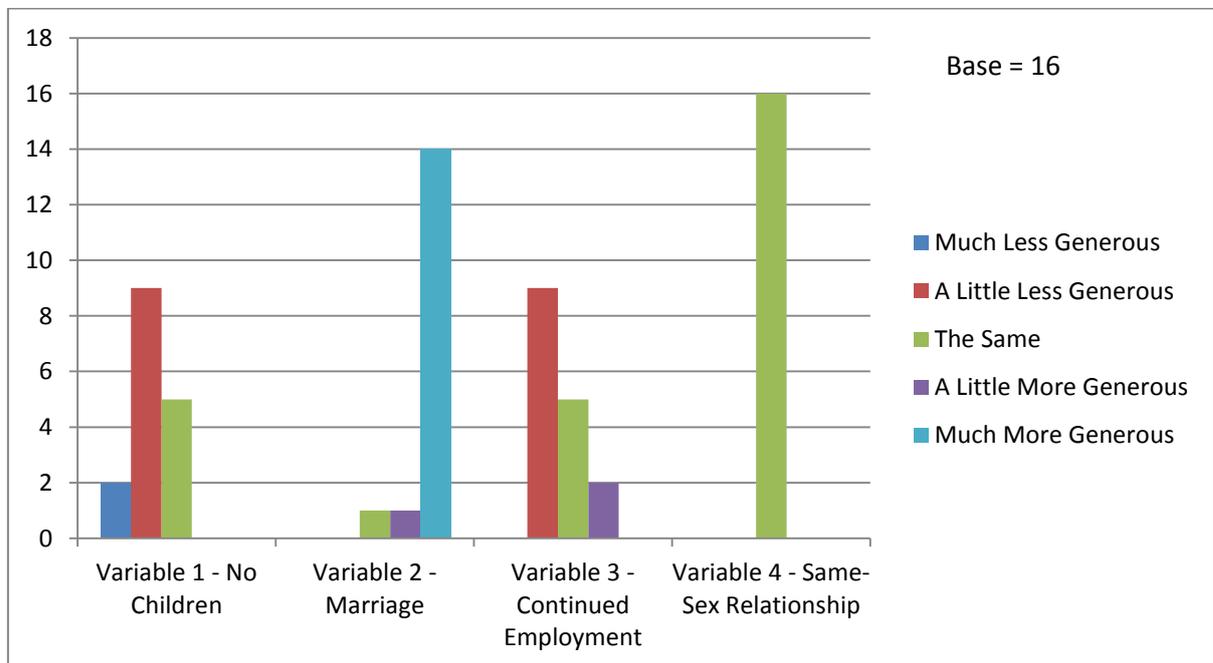
indicated it would be a little more generous by way of a capital lump sum based on her economic disadvantage on giving up her career. Yet, as Table 4.10 demonstrates this was only a little closer to '5' (about right) than the approach in England and Wales. Therefore six wanted Scotland's approach to be more generous.

4.5.5.1.1 Scenario A – The Variables

The lawyers were then asked about how the law in Scotland would alter its response for each of the four different variables.⁷⁴² As displayed in Table 4.11 all the lawyers felt that the award would be exactly the same if this was a same-sex relationship and 14 agreed that if Miss Jones had been married, the outcome would have been much more generous. Where Miss Jones remained in employment or where she had had no children, nine thought that both variables would result in an award that was a little less generous and five felt that the award would be the same.

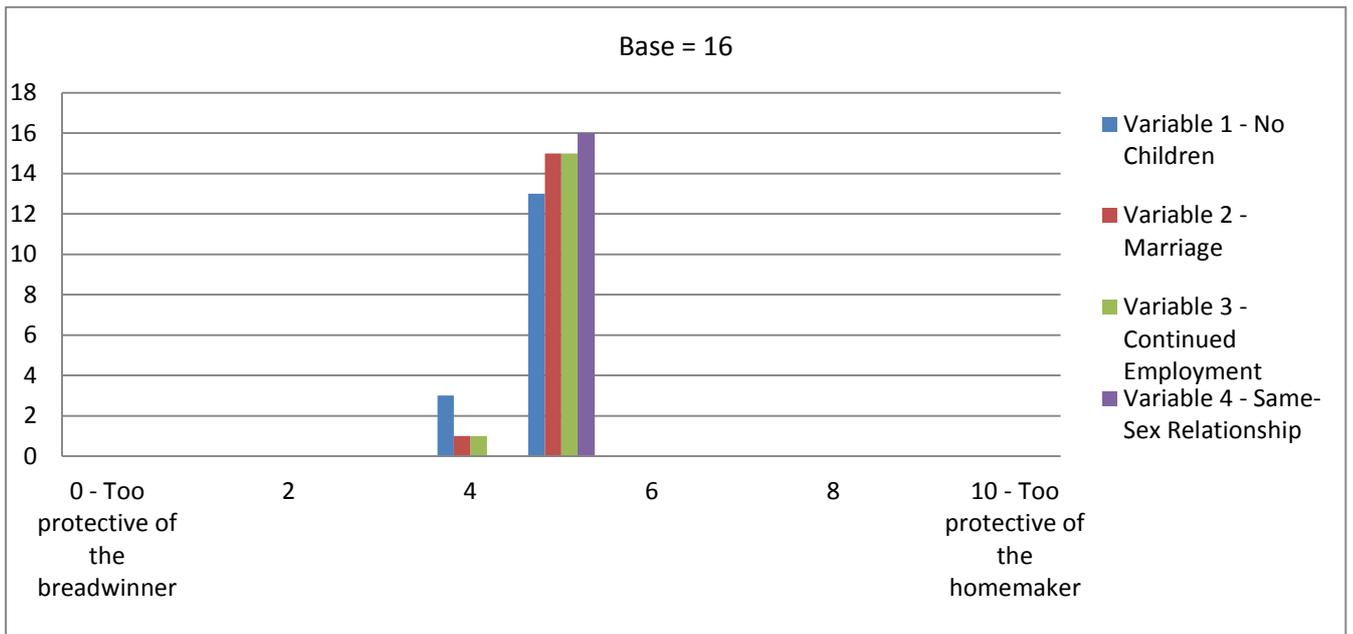
On the whole, as Table 4.12 shows, the respondents thought that Scotland's approach for each variable was about right and nearly all the lawyers indicated they would not alter Scotland's approach to these variables. However, three lawyers felt that it was slightly too protective of the breadwinner for variable 1 where there were no children.

Table 4.11: How Scenario A's outcome in Scotland would vary for each variable



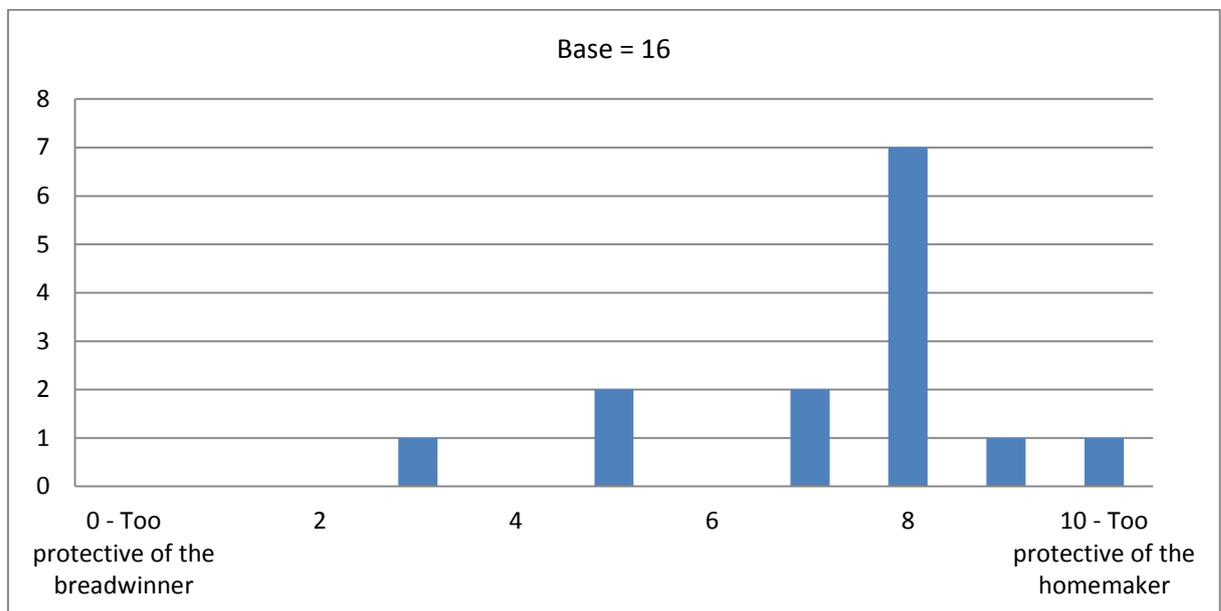
⁷⁴² See Appendix A or table in New Zealand chapter

Table 4.12: Attitudes towards Scotland's approach towards Scenario A's variables



4.5.5.2 Scenario B

Table 4.13: Attitudes towards England and Wales' outcome in Scenario B

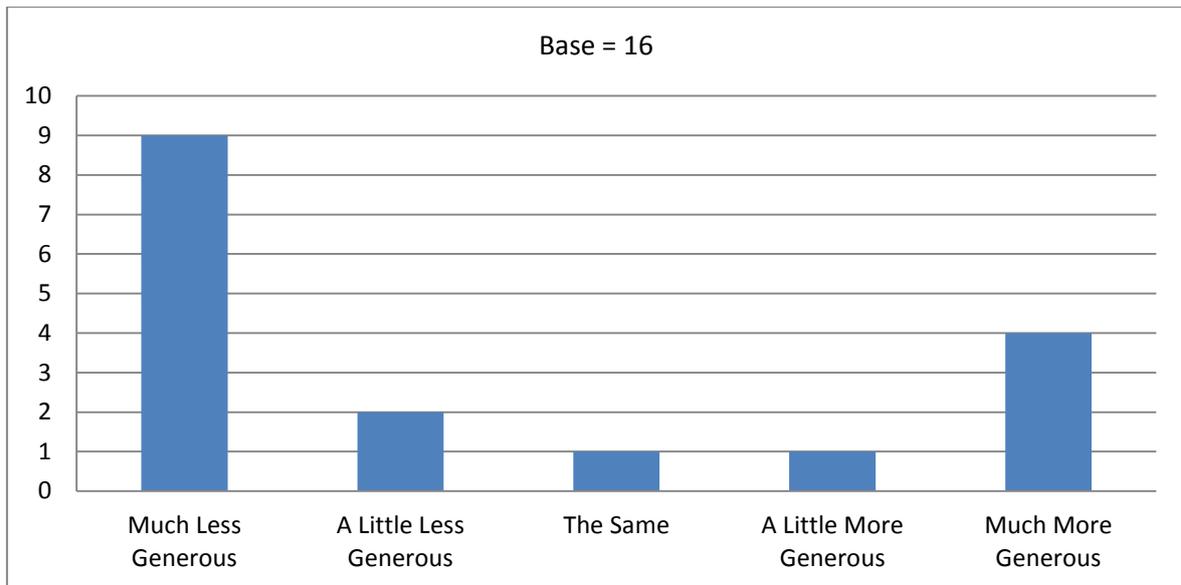


When asked their opinions on the outcome in England and Wales in Scenario B,⁷⁴³ the mode (7, as in New Zealand) selected '8', that it is too generous towards the homemaker (as demonstrated in Table 4.13 and as Table 4.14 shows, nine felt that the approach in Scotland

⁷⁴³ See the interview schedule in Appendix A Scenario B was based on *Miller v Miller* [2006] UKHL 24, [2006] 1 FLR 1186

would be much less generous. Answers varied on the size of the lump sum from 0.4 million,⁷⁴⁴ 0.8 million,⁷⁴⁵ 1.4 – 2 million⁷⁴⁶ and 3 million pounds⁷⁴⁷ and maybe some limited support.⁷⁴⁸ Most lawyers felt that the award would be much less generous in Scotland in comparison with England and Wales because of the ‘source of funds’ argument⁷⁴⁹ and a number indicated that Mrs Higgins would not be entitled to maintenance.⁷⁵⁰ 12 lawyers felt that this approach was about right.

Table 4.14: How the lawyers would alter Scotland’s approach to Scenario B



4.5.5.2.1 Scenario B – The Variables

The lawyers were then asked about how the law would alter its response for four different variables.⁷⁵¹ Consistently in Table 4.15, 11 thought having children would make it a little more generous, length would make it a lot more generous (11) and if this had been a civil partnership, 10 thought that it would be exactly the same. However, if Mrs Higgins had remained in employment six indicated she would have received a little less, although the majority thought that it would also stay the same. All lawyers thought that this was about right for the variables. Yet, when they were asked whether they would alter the approach the lawyers indicated in Table 4.16 that in a 20-year-long marriage, eight would make it a little less generous. Thus, the respondents appeared to be least satisfied with the treatment of long-term big money cases and, just as in the New Zealand scenario, it seems that the equal division of matrimonial property is considered to be too generous.

⁷⁴⁴ ScotLaw13

⁷⁴⁵ ScotLaw6

⁷⁴⁶ ScotLaw12

⁷⁴⁷ ScotLaw2

⁷⁴⁸ ScotLaw2

⁷⁴⁹ ScotLaw1,2,3,6,9,15

⁷⁵⁰ ScotLaw12,16

⁷⁵¹ Appendix A

Table 4.15: How Scenario B's outcome in Scotland would vary for each variable

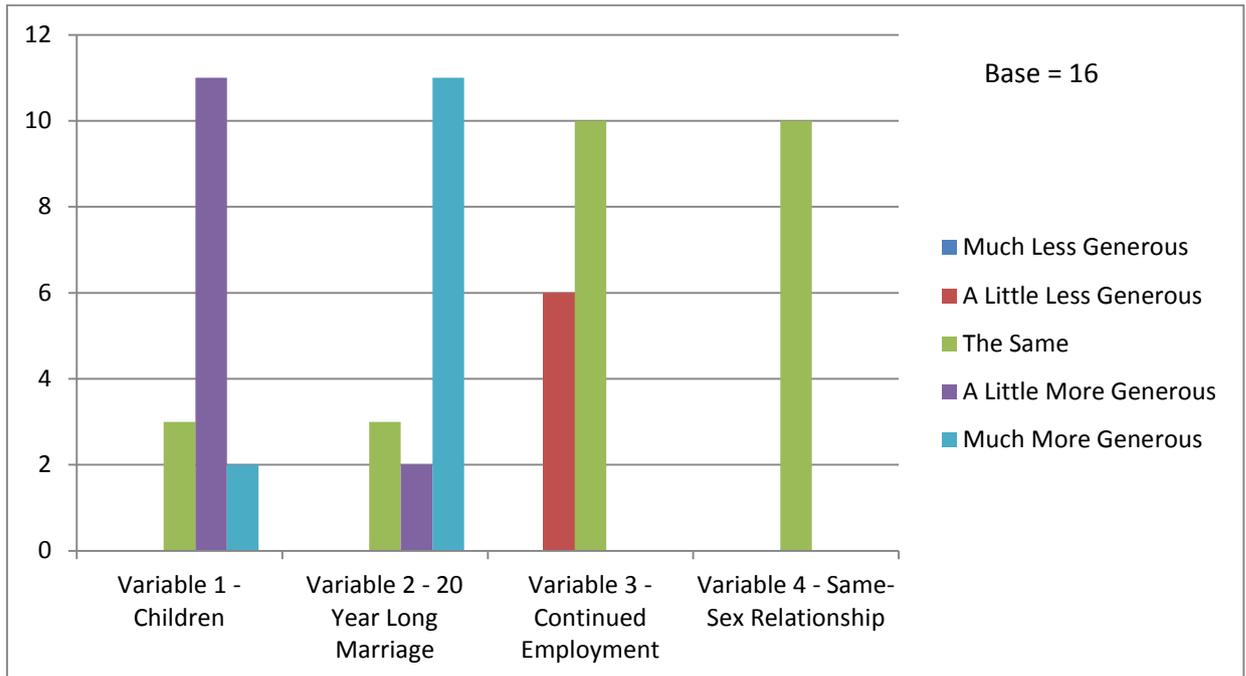
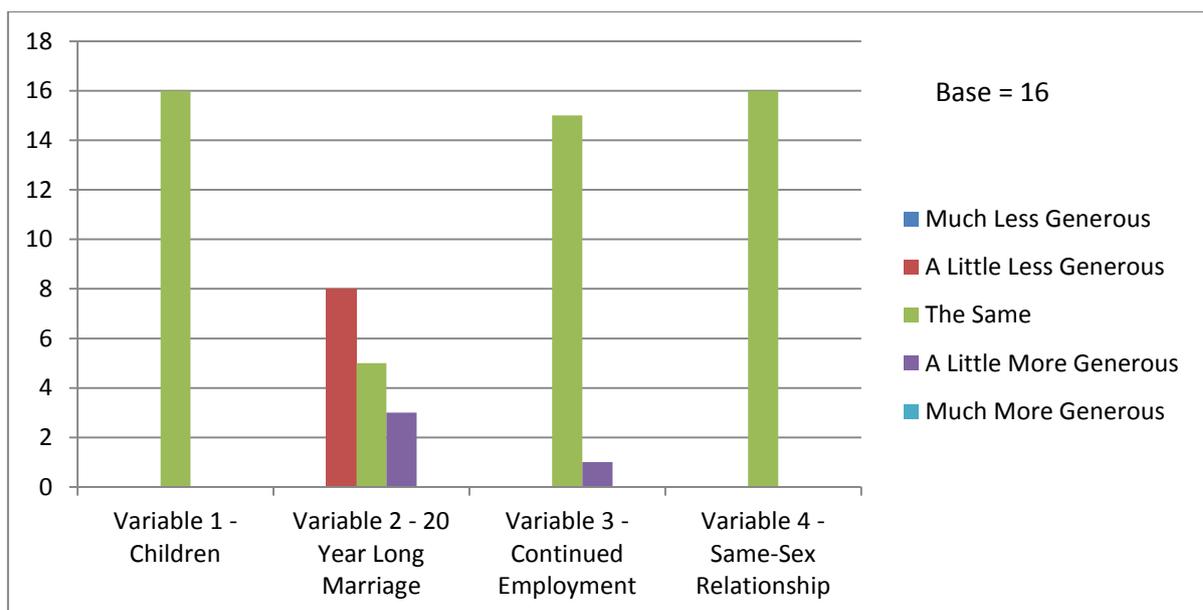


Table 4.16: How the lawyers would alter Scotland's approach to Scenario B



4.6 Scotland's System of Financial Provision: A Conclusion

Scotland's framework for financial provision on relationship breakdown (which uses equal division of matrimonial assets as a starting point) embodies Deech's principles of certainty, clarity and autonomy. However, this is to a lesser degree than New Zealand as Scotland

employs a greater level of discretion within its system. Where New Zealand clearly fell short of Fineman's position, Scotland offers a greater attempt to protect the care-dyad, as it has more discretion to alter awards where equality is not appropriate. This therefore moves Scotland (in comparison with New Zealand) closer towards Fineman's end of the spectrum. Consequently, it was anticipated that Scotland would offer a less restrictive approach and potentially achieve a greater balance between the two feminist positions.

Overall, the lawyers appeared to be satisfied with Scotland's approach and, although a little uncertain, they were generally happy that same-sex couples were treated exactly the same as different-sex couples. In the married/civil partnership context, the strengths from a formulaic system were evident, also supporting the findings from Chapter Three. The respondents embraced Deech-centric views and therefore saw equal sharing and clean break as the best possible approach because it offered certainty, clarity, simplicity and a more cost-effective system. While this satisfies Deech's position, the wider definition of matrimonial property allows for greater settlements to be made in the care-giver's interest in comparison with New Zealand. Moreover, Scotland appears to address both the breadwinner's and homemaker's interests. Section 9(1)(a)'s exceptions under s10(6) are designed to protect the breadwinner's proprietary interests and there is extraordinary weight placed on matrimonial agreements although this seems to have no regard for any inequalities that may exist between the parties. On the other hand, Scotland does not necessarily exclude these assets from division under the other s9(1) principles of economic advantage/disadvantage, economic burden of care and the maintenance provisions. Thus the additional provisions were designed to rebalance any economic inequality that was suffered by either party and consequently presented an opportunity for the courts to adopt a more holistic consideration of the economic impact that care-giving can have on one party's financial position.

Generally the respondents believed that one-size-fits-most and therefore cases which required the use of the courts' discretion under s9(1)(b)–(e) were in fact rare. Yet, where the discretion was used, the criticism was strong. It was evident that, as in New Zealand, the lawyers were concerned that the judges were too focused on formal equality and accordingly not using the discretion available under s9(1)(b)–(e). It seems that the firm principle of equality may have clouded the courts' attempts at implementing discretion due to the simplicity of equally dividing matrimonial assets. It seems that where there are firm principles of equality, equally detailed guidelines for discretion may be needed to ensure that the courts avoid being tempted by equality's simplicity.

Moreover, the economic focus of s9(1)(b)–(e) (rebalancing economic advantages and disadvantages, and sharing the economic burden of caring) demonstrates that care-giving relationships are not the focal point of this approach. Seemingly, this places the financially weaker party in a precarious position post-divorce and therefore those who are vulnerable at the end of a relationship appear to be marginalised. This vulnerability is accentuated by the fact that s9(1)(b) is measured in economic terms. Consequently, the primary care-giver's disadvantage from giving up a career is frequently offset by the perceived advantage from essentially 'being kept' by the other spouse. This is despite the fact that staying at home is often for the benefit of the family's welfare. The result is that compensation is modestly awarded and particularly given the court's inability to award periodical payments for this principle, s9(1)(b) therefore fails to rebalance relationship generated disadvantage. Furthermore, s9(1)(c) is not concerned with the long-term economic impact of caring, but instead it is concerned with the immediate cost of raising a child. Therefore, as the lawyers also identified, Scotland's approach tends to disadvantage couples with small asset pools and those who are enmeshed financially as a result of children or unemployment. Arguably this framework of financial provision is more suitable for those homemakers with big asset pools and children who are still at home, rather than those who have medium to small pools of assets and whose children have left home. The practitioners agreed that a greater level of support was therefore necessary where there are children or where the spouse has given up employment.

Thus, in the married context at least, Scotland's approach does go some way forward to balancing the feminist positions in comparison with New Zealand, but it seems that the focus of this jurisdiction is still too weighted towards autonomy. There perhaps needs to be a greater ability for periodical payments to be awarded under s9(1)(b) and greater recognition from the courts of the full economic impact of care-giving.

In contrast, in the cohabiting context the balance between Deech and Fineman appears even less satisfactory. For Deech, any Family Law-based remedy is an unwarranted intervention by the state and for Fineman, the Scottish cohabitation regime (despite *Gow v Grant* [2012]) offers little protection for the care-dyad as the provisions fail to accommodate domestic or indirect contributions. This dissatisfaction is reflected in the empirical analysis, where the lawyers thought that the statutory provisions were too limited and badly drafted and therefore too protective of the financial contributor. However, despite this extensive dissatisfaction, the lawyers did not suggest a way of improving the legislation. Rather, the predominant focus of the discussion was that a difference between cohabitation and married couples should remain. The respondents were clear that cohabitants and married couples

should be treated separately to respect the choice not to marry and to reflect the fact that these different relationships are completely different institutions. Therefore, cohabitants should have a more restrictive approach with limited maintenance for where there were children. More research is perhaps needed on how the lawyers would prefer their system to approach cohabiting couples.

Overall, it seems that on paper Scotland's approach would achieve a balance between Deech and Fineman. However, in reality, Scotland is too focused on financial autonomy. While Deech's position has huge benefits procedurally, enabling couples to settle outside the courts, this has the danger of disadvantaging care-givers/homemakers, as equal sharing and clean break only seem suitable for those couples where both spouses are in economically equal positions. Much greater recognition is therefore needed of the economic impact that care-giving has on Fineman's care-dyad. Thus, it seems that this system could benefit from a lesser obsession with equal sharing and instead a greater focus on the needs of care-givers particularly in small asset cases. Perhaps having Fineman's position rather than Deech's position (and therefore discretion rather than rules) as the heart of the legal framework would prevent the courts' tendency to apply discretion too narrowly. The next chapter looks at Australia which does just this. Australia's framework for financial provision at the end of a relationship embraces Fineman's principles as a starting point: namely discretion, protection, need and substantive equality. Yet it also embraces elements of Deech such as clean break and an emphasis on financial contributions. How much closer is Australia to balancing Deech's and Fineman's positions and has it eliminated the concerns that have arisen in Scotland?

CHAPTER 5: FINEMAN WITH ELEMENTS OF DEECH – AUSTRALIA

5.1 Introduction

The last two chapters have outlined the practical implications of schemes that have a Deech-like starting point, namely New Zealand's and Scotland's equal division of matrimonial assets. It was clear that while they both successfully achieved clarity, simplicity and certainty, this was often to the disadvantage of Fineman's care-dyad where awards were frequently too restrictive. In complete contrast with these jurisdictions, financial provision on divorce in Australia rather than embracing principles of equality and partnership has a discretionary, welfare-based approach which aims to implement 'just and equitable' orders. Thus, the approach embraces substantive equality which purports to protect the economically vulnerable⁷⁵² and there is a paternalistic approach to property division. It seeks to protect parties from adverse dealings in real property⁷⁵³ and to prevent potential hardships that arise as a result of marriage. This arguably protects the vulnerable homemaker from the reality of the financial consequences on divorce/relationship breakdown.⁷⁵⁴ Consequently, where provision for Fineman's care-dyad was inadequate in the previous two jurisdictions, Australia has firmly embedded the principles that are core to Fineman's position: discretion, protection, need and substantive equality, which place the care-dyad at the centre of financial awards.

The question here is whether this completely different starting point offers a better way of balancing Deech's and Fineman's polarised positions.⁷⁵⁵ At first glance, this system conflicts with Deech's position as it contradicts financial autonomy and certainty. Yet the strong influence of separate property during marriage⁷⁵⁶ means that the courts give greater weight to financial contributions. In fact there is no presumption of equal sharing⁷⁵⁷ between domestic and financial contributions, and so the courts evaluate contributions. Furthermore, the courts must have due regard to the clean break principle⁷⁵⁸ and thus strive to achieve settlements that avoid any ongoing financial obligations between the parties post-divorce. However, as seen in Scotland and New Zealand, the notions of clean break and financial autonomy

⁷⁵² Law Reform Commission, *Matrimonial Property* (1987) (ALRC No 39 1987) 15

⁷⁵³ Response of the Family Court of Australia to the Discussion Paper *'Property and Family law: Options for Change'* (Response of Discussion Paper AGPS 1999) Para 66, page 18

⁷⁵⁴ This, as shall be demonstrated in following chapters, differs completely from New Zealand and also Scotland.

⁷⁵⁵ Appendix I and Chapter 2, section 2.2.2.4

⁷⁵⁶ It operates a separate property regime for financial provision, where the property that either spouse acquires remains their own separate property during marriage

⁷⁵⁷ *Mallett v Mallett* (1984) 156 CLR 605

⁷⁵⁸ S81 Family Law Act (Cth)

potentially conflict with Fineman's position as they often limit the settlement that the caregiver can receive, especially in small asset cases, to the homemaker's disadvantage. Yet, the extensive discretion and particularly the focus on welfare, rather than entitlement, suggests that the courts have space to protect and to potentially consider future needs. Australia, therefore, provides an opportunity to explore the success of enmeshing these different feminist stances using a Fineman-like position as a starting point and may answer the question as to whether a greater balance can be achieved between the two.

Furthermore, examining the Australian jurisdiction will provide insight into how feasible it is to treat different relationship statuses in this manner. Recently, financial provision for married couples on relationship breakdown has been extended to different- and same-sex cohabiting couples⁷⁵⁹ (known as de facto couples in Australia). Thus, just as in New Zealand, cohabiting couples are treated synonymously with married couples although Australia uses a completely different framework in order to do so. Yet, this is the only jurisdiction where same-sex couples cannot enter some form of registered partnership under Australian federal law, although certain states have domestic partnerships registries⁷⁶⁰ and civil partnerships⁷⁶¹ available.

This chapter shall therefore measure how successfully Australia values domestic contributions by using Deech's and Fineman's stances to critique Australia's law of financial provision on relationship breakdown and by examining the legal practitioners' opinions of how the system treats homemaking contributions. Before this analysis, this chapter will firstly consider any differences that Australia has with England and Wales which require consideration when using it to guide reform in England and Wales.

Chapter Two emphasised some of the difficulties that arise when selecting other jurisdictions to compare. Therefore, it is important to begin this analysis with a comprehensive understanding of the cultural, legal and political similarities and differences between England and Wales, and Australia.

Australia is a federal democracy consisting of six states and ten territories. These States have powers to legislate over certain issues at state level, but any matters that relate to Australia's constitution or Commonwealth matters are dealt with by the Federal Government.⁷⁶² Under s51(xxi) of the Commonwealth of Australia Constitution Act 1900 (UK) marriage and divorce

⁷⁵⁹ 1st March 2009 and the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008

⁷⁶⁰ New South Wales, Tasmania and Victoria

⁷⁶¹ Australian Capital Territory

⁷⁶² The Commonwealth of Australia Constitution Act 1900 (UK), sets out the way in which power is to be distributed. Section 51 provides a list of what comes under federal powers, with anything outside of it to be at the individual State's discretion. Legislation relating to the s51 list is known as commonwealth legislation and commonwealth acts will be preceded by 'Commonwealth' or Cth.

are stated as being one item on the list which is to be dealt with by commonwealth legislation (principally the Family Law Act (Cth) 1975, henceforth FLA), and since 1 March 2009 (when the Family Law Amendment (De facto Financial Matters and Other Measures) Act 2008 came into force), different and same-sex cohabiting couple matters have also been transferred to the Federal Government. Consequently, any cases relating to these matters must go to the Family Court of Australia and the Federal Magistrates Court rather than the States' civil courts. However, cohabiting relationships that ended before 1 March 2009 must still rely on State law. Therefore, in this chapter, it is important to bear in mind that, in effect, two bodies of law (State level and Federal level) must be considered in the jurisdiction. Another important point to note is that Western Australia has different Family Law provisions compared to the rest of Australia and is not under examination here. It did not enter into an agreement on the Family Law Act Cth 1975 or the cohabiting couples 2009 amendments. Furthermore, while this Act extends to South Australia, the new cohabitation law also does not.

While there are key differences between England and Wales and Australia, there are also a number of similarities making Australia suitable for comparison. Australia's place in Britain's colonial history means that it shares common political and legal traditions with a Westminster style of government⁷⁶³ and a common law jurisdiction. Therefore, both systems are founded on concepts of the rule of law, justice and equality before the law, procedural fairness, judicial precedent, prospective legislation and the separation of powers.

Culturally, in the family context specifically, there are also similarities and Australia shares growing rates of cohabitation⁷⁶⁴ and declining rates of marriage.⁷⁶⁵ Similarly, men and women hold similar positions in society: women are generally on lower wages⁷⁶⁶ and are more inclined than men to be in part-time work⁷⁶⁷ or the homemaker, irrespective of working status.⁷⁶⁸

⁷⁶³ Australia's parliament consists of two houses, the Senate and the House of Representatives.

⁷⁶⁴ Australian Bureau of Statistics 1301.0 (*Year Book of Australia* 2004)

<<http://www.abs.gov.au/ausstats/abs@.nsf/0/62F9022555D5DE7ACA256DEA00053A15?opendocument>> accessed November 2010. The 2001 census had recorded that the numbers of cohabitants rose by 28% from 744,100 to 951,500. 14.8% in 2006 of couple families were recorded as de facto *Australian Social Trends* Cat 4102.0 'Family and Community' (December 2011)

<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/4102.0?opendocument#from-banner=LN>> accessed 16/12/2011

⁷⁶⁵ Australian Bureau of Statistics 1301.0 (*Year Book of Australia* 2004)

<<http://www.abs.gov.au/ausstats/abs@.nsf/0/62F9022555D5DE7ACA256DEA00053A15?opendocument>> accessed November 2010. The 2001 census indicated that the marriage rate was the lowest rate on record

⁷⁶⁶ Australian Bureau of Statistics 1301.0 (*Year Book of Australia* 2008)

<<http://www.abs.gov.au/ausstats/abs@.nsf/7d12b0f6763c78caca257061001cc588/0796FAC7CDEEA671CA2573D20010F2DD?opendocument>> accessed 1 November 2010. Women's weekly earnings were on average almost \$200 less than men (\$967.90 to \$1158.40)

⁷⁶⁷ 45.7% of women employed and 16.3% men *Australian Social Trends* 'Work' (December 2011)

<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/4102.0?opendocument#from-banner=LN>> accessed 16 December 2011

⁷⁶⁸ 72.5% of men are employed compared to 59% of women *Australian Social Trends* 'Work' 16 December

2011 <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/4102.0?opendocument#from-banner=LN>> accessed 16/12/2011 and *Australian Social Trends* 4102.0 (*Year Book of Australia*

2009) <<http://www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbytitle/7B7AF4BF75F4270CCA257583002A6139?OpenDocument>> accessed November 2010'. In 2006, 'women did two-thirds of all household work while men did two-thirds of paid work'.

Additionally, Australia has similar sources of law to England and Wales⁷⁶⁹ and the Family Law courts in both jurisdictions often refer to one another in cases with similar statutory regimes. In the English case *White*⁷⁷⁰ Lord Cooke referred to the Australian law for his preferred approach to the case.⁷⁷¹ Similarly, in Australian case law such as *Figgins v Figgins*⁷⁷² the courts have discussed Lord Nicholls' approach in *White* in their judgments. If we are referring to the Australian jurisdiction in our judgments, then surely some analysis needs to take place on the appropriateness of their approach to domestic contributions.

5.2 Financial Provision on Divorce: Married Couples

Property settlement is the fundamental way in which assets are distributed on relationship breakdown with property adjustment orders coming under s80 FLA which applies to *all* property owned by either spouse. Sections 79 and s79(2) provide a wide discretion for the courts in altering property interests, and s79(4)(a)–(g) and s75(2)⁷⁷³ provide a list of factors that must be taken into consideration. This is subject to the discretionary requirement for a just and equitable order and is in complete contrast to Scotland's and New Zealand's approach which are governed by much stricter rules on how to divide a much narrower definition of property.

*Hickey v Hickey*⁷⁷⁴ held that there is a four-step procedure for the analysis of interests in property settlement:

- 1) Identify the 'value of the property, liabilities and financial resources of the parties at the date of the hearing.'
- 2) Assess the parties' contributions to the property and to the welfare of the family (which considers s79(4)(a)–(c) factors)
- 3) Consider s79(4)(d)–(g) factors including (as s79(4)(e) stipulates) s75(2) factors
- 4) Consider s79(2)'s requirement for a 'just and equitable' order.

It is also possible under part VIIIA of the FLA ss90A–90L for couples to enter a binding financial agreement to regulate property and maintenance⁷⁷⁵ before,⁷⁷⁶ during⁷⁷⁷ and after⁷⁷⁸ the marriage. These, like New Zealand rather than Scotland, have formal requirements that need

⁷⁶⁹ Such as case law, statute, custom, subordinate legislation and international law

⁷⁷⁰ *White v White* [2000] 2 FLR 981

⁷⁷¹ Lord Cooke favoured the approach taken by the Australian courts in *Norbis v Norbis* (1984) FLC 91-543.

⁷⁷² *Figgins v Figgins* (2002) Fam CA 688

⁷⁷³ s75(2) factors have been incorporated by s79(4)(e) FLA(Cth) 1975 see appendix O and P

⁷⁷⁴ *Hickey v Hickey and the A-G for the Commonwealth of Australia (Intervener)* [2003] FLC 93-143

⁷⁷⁵ And also maintenance agreements see s86 and 87 of the Family Law Act (Cth) 1975

⁷⁷⁶ s90B Family Law Act (Cth) 1975

⁷⁷⁷ s90C Family Law Act (Cth) 1975

⁷⁷⁸ s90D Family Law Act (Cth) 1975

to be met: namely a separation declaration before the provisions can take effect⁷⁷⁹ and, where there are children, the agreements must state who will receive payments and how much they will receive.⁷⁸⁰ They must also meet set criteria: they must be signed by both parties, both parties must obtain independent legal advice on their rights and the advantages and disadvantages of entering into an agreement, there must be a signed statement of that advice by the lawyer and each party must retain a copy. In *Black v Black*⁷⁸¹ the courts adopted a strict interpretive approach that, if any of these requirements were not adhered to, the agreement could be set aside. In response, and in a bid to protect the binding nature of these agreements s90G(1A) was inserted⁷⁸² which provides that if one of these requirements is not complied with, the courts will not set aside the agreement if it would be unjust and inequitable to do so. This reflects New Zealand's approach in the face of incomplete formal requirements and reinforces the financial autonomy and the parties' ability to self-regulate. The popularity of these agreements is growing in Australia with 14% of couples entering into them before marriage.⁷⁸³

Yet, while in New Zealand these orders can only be set aside if they are seriously unjust from the outset or over time as the result of changes, Australia has a slightly wider list of occasions: if they are obtained by fraud; are impracticable; if some change in circumstance has occurred (relating to the care, welfare and development of the child) thus a party will suffer a hardship;⁷⁸⁴ or if they are void, voidable or unenforceable. While the provisions can exclude maintenance provisions, the courts can still make maintenance orders where the party (at the time of the agreement) could not support themselves without any state provision.⁷⁸⁵

From Deech's stance, this promotes financial autonomy and responsibility although to a lesser degree than New Zealand and even more so than Scotland. It protects those with an imbalance in resources (namely the financially stronger party) and recognises that women are as equally rational as men and fully capable of understanding the implications of entering such agreements. Furthermore, if the full extent of both parties' financial positions has not been revealed (limiting how much 'independent advice' will protect women), such an agreement

⁷⁷⁹ S90DA Family Law Act (Cth) 1975

⁷⁸⁰ S90E Family Law Act (Cth) 1975

⁷⁸¹ *Black v Black* [2008] Fam CAFC 7, (2008) FLC 93-357

⁷⁸² Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008 schedule 5

⁷⁸³ A McClintock, 'Prudent Pre-Nups have More Strings Attached' (*The Sunday Morning Herald*, 10 January 2010). This reported that theknot.com.au found that 14 per cent of engaged couples signed pre-nuptial agreements, which are considered binding financial agreements under Australian law. Read more: <<http://www.smh.com.au/lifestyle/celebrity/prudent-prenups-have-more-strings-attached-20100109-lzvc.html#ixzz1bGJMNsWr>> accessed 1 November 2010

⁷⁸⁴ S90K(1)(d) Family Law Act (Cth) 1975

⁷⁸⁵ S90F(1A) Family Law Act (Cth) 1975

could contribute to relationship-generated disadvantage.⁷⁸⁶ In fact, the Women's Legal Service argued before the recognition of such agreements in 2000, that pre-nuptial agreements serve to reward the main breadwinner and consequently these agreements conflict with s79's objectives (which aim to make provision for women's non-financial contributions)⁷⁸⁷ by privileging men and reducing the financial status of women.

Yet, given that the courts may still enforce these agreements if the criteria are not met, it could mean that inequality of bargaining power is ignored if full independent legal advice has not been considered: it reduces the safeguards available. However, the wider set of circumstances that can set these agreements aside combined with the courts' ability to still award maintenance perhaps balances Fineman's care-dyad and Deech's autonomy to a greater degree than the other jurisdictions. Nevertheless, for those without agreements or where the agreement has been set aside, they must rely on the property settlement within FLA 1975.

5.2.1 Defining Relationship Property

Property is broadly interpreted by the Australian courts as 'indicative and descriptive of every possible interest which the party can have'⁷⁸⁸ and is valued at the date of the hearing. Accordingly, there is a much wider interpretation of property than in New Zealand and Scotland: everything can be divided in any way instead of an equal division of defined matrimonial assets. This broad interpretation of property means that there is an unrestricted amount of resources (depending on the case) that the courts can use to remunerate the homemaker; they are not restricted to a predefined 'marital' property and thus there is no statutory cap in place on potential awards. Consequently, there is little protection for the breadwinner's assets and for Deech this may potentially encourage 'gold-digging' and 'meal ticket for life' attitudes that discourage women from being financially autonomous. The danger of this is reduced as generally future income and 'career' assets and consequently sacrifices made by one spouse to further the career of another are not compensated for by the courts. This absence of career assets seems to conflict with the other jurisdictions' approaches which encompass an element of compensation within their systems. Therefore, it potentially ignores the extent of the relationship-generated disadvantage that may arise from the sacrifices made by one party to support the career of another. For Fineman, this wide definition of relationship

⁷⁸⁶ For example, see National Network of Women's Legal Services *Submission to Senate Legal and Constitutional Legislation Committee: Family Law Amendment Bill 1999* (1 November 1999) <<http://www.nwjc.org.au/wlsn/flamendbill.html>> accessed 12 December 2010

⁷⁸⁷ For example, see National Network of Women's Legal Services *Submission to Senate Legal and Constitutional Legislation Committee: Family Law Amendment Bill 1999* (1 November 1999) <<http://www.nwjc.org.au/wlsn/flamendbill.html>> accessed 12 December 2010

⁷⁸⁸ *Duff v Duff* [1977] FLC 90 – 217

property is a much better starting point in comparison to the previous jurisdictions, although the lack of compensation is somewhat limiting.

5.2.2 Property Settlement: Step 2 - Valuing Contributions

Whereas New Zealand and Scotland have the principle of equality at their heart and have clear principles for dividing property, one differentiating feature is that in Australia no core guiding principle exists and no presumption of equality between the parties exists either.⁷⁸⁹ Consequently, none of the s79 factors supersede one another; it is for the court to judge the relevant factors to achieve a just and equitable outcome. Yet again, there is no clear statutory or other guidance as to what a 'just and equitable' outcome should entail; just that it should enshrine the clean break principle and therefore maintenance is rarely used. Consequently, the court's primary concern on financial provision is to reward the parties for their past contributions; needs and compensation are merely secondary considerations which completely contrast with England and Wales' focus.

Instead, Step 2 (which considers financial⁷⁹⁰ and non-financial⁷⁹¹ contributions to the property as well as contributions to the welfare of the family)⁷⁹² is pivotal in determining how the courts should divide property on relationship breakdown by stating a percentage based on the value or weight given to their contributions. Step 3 considers any additional factors which include future needs and requirements of the parties, yet for the majority of financial awards, Step 2 makes the decisive proportion of property division. Therefore, the emphasis of the courts lies on ascertaining a retrospective value of financial and non-financial contributions which completely differs from Scotland and New Zealand, who both avoid placing any value on contributions.

Nevertheless, this lack of an overarching principle has caused a mixture of approaches to develop within the courts. Fehlberg defines them as the evaluative approach (where the courts evaluate asset-by-asset) and the partnership approach (where the courts will use global accounting).⁷⁹³ These two approaches, as this chapter shall explore, have conflicting rationales. The former is an individualistic ideal, aligning more with Deech's contentions, which calculates the entitlement of a party by directly comparing their respective financial and non-financial

⁷⁸⁹ *Mallett v Mallett* [1984] 156 CLR 605

⁷⁹⁰ S79(4)(a)

⁷⁹¹ S79(4)(b)

⁷⁹² S79(4)(c)

⁷⁹³ B Fehlberg, "With All My Worldly Goods I Thee Endow?": The Partnership Theme in Australian Matrimonial Property Law' (2005) 19 *International Journal of Law, Policy and the Family* 176, 180 - 181

contributions. The latter approach, on the other hand, adopts a vision of marriage as a socio-economic partnership between equals⁷⁹⁴ which will look at the overall contributions made within marriage, and view breadwinning and homemaking as reciprocal arrangements.⁷⁹⁵ The courts look at the collective contributions and assume that both parties have contributed more or less equally, thus justice and equity demands an equal division of the assets. Yet how does a system work with two different approaches that conflict in their philosophical position when either can be used in part or in whole depending on the case facts?⁷⁹⁶

5.2.2.1 *The Evaluation Theme*

There are two core features to this theme. Firstly, it recognises special contributions (similar to stellar contributions in the English context and extraordinary contributions in New Zealand's context) and secondly it adopts an asset-by-asset approach, where the courts essentially evaluate the contributions that the parties have made to each asset although this is not a mathematical exercise. This approach tends to be applied in (although not limited to) shorter marriages without children:

*In a marriage of four years, with no dependent children being involved on either side, it ought to have been apparent to the parties' legal advisers that each party's actual financial contribution to the marriage was the primary issue.*⁷⁹⁷

This seems to fit with Deech's belief that short marriages without children should be treated differently to longer ones. Here the courts have two steps: (i) to evaluate the contributions and (ii) to establish a nexus, or a strong link between the contributions and the property.⁷⁹⁸

(i) Special Contributions

When evaluating the contributions made within marriage, the courts will pay attention to any extraordinary contribution or special skill 'outside the normal range' of contributions that has been made by either party. This approach is not limited to short marriages. The courts have easily defined 'special skill' in terms of financial contributions to a relationship. For example they have consistently established that 'special skill' can refer to business acumen and entrepreneurial skills.⁷⁹⁹ Thus, where such aptitudes have produced great assets of over \$10 million (or even medium assets over \$1 million) these sorts of contributions will warrant a property settlement made in favour of the breadwinner. Yet, difficulties arise where domestic contributions are concerned.

⁷⁹⁴ *Ferraro v Ferraro* [1992] 16 Fam LR 1, 40

⁷⁹⁵ B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (Oxford University Press 2008) 453

⁷⁹⁶ *Norbis v Norbis* [1986] p. 534-5 (Wilson & Dawson JJ)

⁷⁹⁷ *Busby v Bushby* [1988] FLC 91-919

⁷⁹⁸ B Fehlberg, "'With All My Worldly Goods I Thee Endow?": The Partnership Theme in Australian Matrimonial Property Law' (2005) 19 *International Journal of Law, Policy and the Family* 176, 180 - 181

⁷⁹⁹ *Ferraro v Ferraro* [1993] FLC 92 -335; *McLay v McLay* [1996] FLC 92- 67 *JEL v DDF* [2000] 28 Fam LR 1, 12

In *Ferraro v Ferraro*,⁸⁰⁰ the court supposed that the doctrine could apply to both homemaking and breadwinning contributions. The Court argued:

...in relation to the homemaker role the evidence may demonstrate the carrying out of responsibilities well beyond the norm as, for example, where the homemaker has the responsibility for the home and children entirely or almost entirely without assistance from the other party for long periods or cases such as the care of a handicapped or special needs child. On the other hand, in the breadwinner role the facts may demonstrate an outstanding application of time and energy to producing income and the application of what some of the cases have referred to as 'special skills'.⁸⁰¹

This also demonstrates that the courts seem to have set the bar incredibly high to establish domestic contributions as a 'special skill', essentially requiring a hardship to accompany the homemaker's role. In *Ferraro*, a 27-year marriage with a \$12 million asset pool, the husband was the breadwinner whose time consuming career meant that Mrs Ferraro raised their three children almost entirely on her own. Even though the courts described her contributions as outstanding, it still was not enough to be identified by the court as a special skill. Once again, the difficulties that measuring contributions pose in the homemaker context are apparent as they were in New Zealand⁸⁰² and Scotland.⁸⁰³ that the homemaker's contribution must be 'beyond the norm'; but what else does outstanding mean if not an exceptional contribution? Instead, the courts (as in New Zealand and Scotland) are looking for the homemaker to have endured hardship and in a sense suffered while the breadwinner must show that they have flourished. Consequently, there is only one reported federal case where the homemaker's contributions have been considered to be a special contribution and this was where the husband's imprisonment meant that he had literally not been able to make any contributions at all.⁸⁰⁴ It seems that for domestic contributions to be deemed as a 'special skill' the courts are holding out for a 'superwoman'.⁸⁰⁵ Even the Australian courts in *Figgins v Figgins*⁸⁰⁶ suggested that it is 'invidious for a judge in effect to give marks to a husband or wife' and did not want to engage in a qualitative analysis; the courts seem to want to evaluate financial contributions, but not domestic ones.

This lesser value of domestic contributions is reflected in the case of dual earners; homemaking carried out by breadwinners is seen as a greater contribution than breadwinning carried out by homemakers. For example in *JEL v DDF*⁸⁰⁷ (a 19year-long marriage), the wife's

⁸⁰⁰ *Ferraro v Ferraro* [1993] FLC 92 -335

⁸⁰¹ *Ferraro v Ferraro* [1993] FLC 92 -335, held at FLC 79, 572

⁸⁰² See Chapter 3, section 3.4.2.1

⁸⁰³ See Chapter 4, section 4.3.2

⁸⁰⁴ *Johnson v Cooper* [2004] FMCAfam 363

⁸⁰⁵ A Ross, 'Figgins – A New Direction Or Just Rhetoric' (2003) 16(3) *Australian Family Lawyer* 34, 45

⁸⁰⁶ *Figgins v Figgins* (2002) Fam CA 688 [57] (Nicholson CJ and Buckley J)

⁸⁰⁷ *JEL v DD* (2000) 28 Fam LR 1, 12

illness hindered her ability to care for their four children. The husband had earned assets of \$36.5 million and carried out domestic contributions equal to his wife due to her illness. He received 72.5% on account of his special contribution. In contrast in *Phillips v Phillips*⁸⁰⁸ (a 31-year marriage) the wife had raised their children while working which enabled Mr Phillips to move to self-employment and earn a \$26 million asset pool. Mrs Phillips' role was valued at 32.5% even though the courts acknowledged that he could not have made his substantial financial contribution without Mrs Phillips' steady income. Consequently, this approach does not seem to consider the actual physical exertion of balancing care-giving responsibilities alongside employment. Rather, there is an inconsistent approach to valuing domestic contributions where the focus remains on the 'quality' or the fiscal value of the financial contributions. While this reflects the principle that equality is not the starting point, as established in *Mallet v Mallet*,⁸⁰⁹ Lewers et al. believe that evaluation seemingly reinforces the conception that domestic contributions are less taxing and less valuable beside those made by the breadwinner.⁸¹⁰ This approach therefore places financial contributions rather than the care-dyad at the heart of this step and accordingly, from Fineman's position, fails to recognise the importance of care-giving work.

For Deech, this approach is preferable as it underplays domestic contributions and thus will reduce patriarchal financial dependence at the end of a relationship and encourage women to become financially autonomous. Furthermore, only recognising 'special skill' for financial contributions goes some way to protecting the individual's rights and talents from an unwarranted gain by the other partner. This is particularly evident in shorter marriages with big money pools such as *GBT and BJT*⁸¹¹ a six year marriage without children, with assets of \$1.4 million to which the wife only contributed \$100,000; she was given 6.5%. Therefore, this doctrine protects the breadwinner against 'gold-diggers' and potentially 'lazy wives' by upholding a level of financial independence and thus encouraging financial responsibility. However, given that the majority of these cases involve assets of over \$10 million,⁸¹² small percentages still involve large sums of money which could promote 'gold-digging' and a meal ticket for life attitude; it still may encourage, as Deech fears, young women to abandon their financial responsibility.

⁸⁰⁸ (1998) FamCA 1551

⁸⁰⁹ *Mallett v Mallett* [1984] 156 CLR 605

⁸¹⁰ N Lewers, H Rhoades and S Swain 'Judicial And Couple Approaches To Contributions And Property: The Dominance And Difficulties Of A Reciprocity Model' (2007) 21 *Australian Journal of Family Law* 123

⁸¹¹ *GBT v JBT* [2005] FamCA 683

⁸¹² See for example *JEL v DDF* (2000) 28 Fam LR 1 where the wife received \$12 million and *Ferraro v Ferraro* [1993] FLC 92 -335 where Mrs Ferraro achieved over \$5 million

Yet, for Fineman, particularly in longer marriages (as the evaluative approach is not solely used in shorter marriages), the doctrine of special contributions essentially places a cap on the value of domestic contributions beside financial contributions which results in a gendered disadvantage given that women habitually are responsible for the homemaking contributions in both the homemaker/breadwinner and the dual earner relationship models. Instead, by directly evaluating domestic contributions to be less significant than financial contributions, this step suggests that women are not workers and that non-financial contributions are less demanding and worthless beside those of financial ones. Consequently, this undermines the societal importance of the care-giving role and, furthermore, fails to appreciate the support that often the principal homemaker gives which leads to the financial success of the principal breadwinner.

(ii) Nexus

Not only are the contributions evaluated, but there must be a strong nexus between these and the asset; no nexus, no award. This nexus is not an entitlement but must be established and therefore is a more complicated task for the homemaker in comparison to the breadwinner. However, where there is a large financial contribution, the courts may use the erosion principle to establish that the other party's non-financial contributions have offset this initial sum. This potentially means that the homemaker's role is not completely overlooked by the courts.

Yet, there is uncertainty with how this principle should apply. Cases such as *Lee Steere v Lee Steere*⁸¹³ (an eight-year marriage with three children where the homemaker received 20 per cent of the farm, and a further five per cent on account of the s75(2) factors) suggested that the longer the marriage, the more the importance of the initial financial contribution (for example land) would diminish. This, the court held, was not due to time, but rather due to the 'offsetting of the other spouse's contributions'; essentially, echoing New Zealand's perceptions⁸¹⁴ that the non-financial contributions would gain more weight over time. The rationale appeared to be that one day of housework was without value, but a lifetime of domestic contributions could be considered of equal worth to the initial financial one.

However, cases such as *Pierce v Pierce*⁸¹⁵ and *Bremner v Bremner*⁸¹⁶ suggest that the erosion principle:

⁸¹³ *Lee Steere v Lee Steere* (1985) FLC 91-626

⁸¹⁴ See Chapter 3, section 3.4.2.2

⁸¹⁵ *Pierce v Pierce* [1999] FLC 92-84

⁸¹⁶ *Bremner v Bremner* [1994] FamCA 116; (1995) FLC 92-560

...simply reflects the circumstance that the respective contributions of the parties over a long period of marriage may 'offset' the significance which might otherwise be attached to a greater initial contribution by one party.⁸¹⁷

Consequently, rather than the domestic contributions gaining weight over time, the initial financial contribution loses its importance throughout the relationship's duration. This interpretation of the erosion principle suggests that the longer the relationship is the more likely the courts will view the relationship as a socio-economic partnership.

The erosion principle for Fineman seems unsatisfactory as neither approach recognises care-giving for its own value. The burden instead is placed on the primary care-giver or homemaker to establish that the breadwinner's contribution has been eroded. Yet, the 'quantity' or 'duration' approach allows for greater recognition of the homemaker's contributions. For example, in *Bremner*⁸¹⁸ (a 22-year marriage) the husband contributed land at the start of the relationship which made 61% of the total assets. Mrs Bremner raised the children while in employment and contributed to the land's upkeep by paying for its water bills. At the end of the relationship the land had been unimproved but its value had increased from \$125,000 to \$220,000 and it was divided 50:50. Many commentators noted⁸¹⁹ that such an award would not have been made under the *Lee Steere*⁸²⁰ approach and consequently, this subtle nuance in justification of the erosion principle hinging on length rather than the amount of domestic contributions may greatly affect the outcome in the homemaker's favour especially in shorter marriages. Furthermore, it also enables greater awards to be made in longer marriages as demonstrated in *Bremner*.⁸²¹

Yet the 'duration' approach to the erosion principle is harder to use where the substantial financial contribution has been gained later in the relationship as 'the other party cannot be regarded as contributing significantly to an inheritance received very late in the relationship and certainly not after it has terminated, except in very unusual circumstances.'⁸²² Consequently, the perception that the relationship is a partnership is therefore limited to individual assets. Thus, a fundamental disparity exists between the evaluation of financial and domestic contributions that arguably leaves the homemaker in a financially disadvantaged

⁸¹⁷ *Pierce v Pierce* [1999] FLC 92-884 [28] (Ellis, Baker and O'Ryan JJ)

⁸¹⁸ *Bremner v Bremner* [1994] FamCA 116; (1995) FLC 92-560

⁸¹⁹ For example, see P Parkinson, 'Quantifying the Homemaker Contributions in Family Property Law' (2003) 31(1) *Federal Law Review* 1

⁸²⁰ *Lee Steere v Lee Steere* (1985) FLC 91-626. A simple way is to work out the percentage which the rates and other outgoings in any given year bear to the overall value of the land, accumulating that contribution over 22 years and dividing it in two. Another, more complex way of calculating the extent of the erosion is to take the actual figures expended each year on rates and the provision element of water rates, and to estimate the capital sum which would have accrued if that money had instead been invested in a manner which is as safe as an investment in land. This sum could then be divided in half to calculate the wife's share of the investment

⁸²¹ *Bremner v Bremner* [1994] FamCA 116; (1995) FLC 92-560

⁸²² *Bonnici v Bonnici* [1991] 15 Fam LR 138

position. It suggests that financial contributions are 'inherently more difficult and valuable than unwaged work in the home.'⁸²³ Clearly, financial autonomy is placed at the centre of this approach and, therefore it 'places [the homemaker's] withdrawal from the workforce rather than her homemaking contributions [as] the issue.'⁸²⁴

In contrast, the erosion principle (particularly relating to duration) from Deech's perspective may undermine financial autonomy of the parties as it enables the homemaking spouse to essentially establish a claim in the other party's asset. Therefore, the absence of any 'valuation' of the contributions that the parties make may lead to larger more unjustifiable awards. While this may impinge on the breadwinner's financial autonomy, it also may discourage women from engaging with the public sphere if they believe that they will be entitled to the other party's financial assets. Furthermore, this additional element adds a dimension of uncertainty and lack of clarity over which method of valuation will be used which conflicts with Deech's position that a financial provision should embody certainty, and financial autonomy.

In conclusion, it seems that this approach and the evaluation theme more generally may still be too generous and uncertain from Deech's position and is definitely far too limiting and unobservant of the care relationship for Fineman's. However, while this stringent approach to the homemaker's contribution has been dominant in Australian courts, what is apparent is that over recent years, another theme for dividing property has developed within Australian case law, known by commentators as the partnership theme.

5.2.2.2 *The Partnership Theme*

This theme has become much more common within the courts and

*...instead of asking what are the parties' contributions to the property and financial circumstances of each...the Court now tends to ask about the parties' contributions to the marriage without this inquiry being tied into the question of responsibility for the property and the financial circumstances of the parties.*⁸²⁵

It consists of two approaches: (i) the 'global' approach where the courts look at the overall contributions made by the parties when coming to their decision and (ii) the 'balancing' approach where the courts balance the contributions against one another rather than requiring a nexus between them and the assets. Thus, the source of the assets and

⁸²³ N Lewers, H Rhoades and S Swain, 'Judicial And Couple Approaches To Contributions And Property: The Dominance And Difficulties Of A Reciprocity Model' (2007) 21 *Australian Journal of Family Law* 123

⁸²⁴ P Parkinson, 'Quantifying the Homemaker Contributions in Family Property Law' (2003) 31(1) *Federal Law Review* 1

⁸²⁵ P Parkinson, 'Quantifying the Homemaker Contributions in Family Property Law' (2003) 31(1) *Federal Law Review* 1, 34

contributions are considerations rather than overriding reasons for the reallocation of property.

The partnership theme is most frequently applied in longer marriages and it allows the courts to consider all the circumstances of the individual case including s75(2) factors⁸²⁶ although this does not give the courts complete discretion.⁸²⁷ The development of this approach indicates the growing recognition within the courts that marriage is a partnership and cases like *Ferraro*⁸²⁸ and *Waters v Jurek*⁸²⁹ both use this concept of partnership as the justification behind their awards.⁸³⁰ This theme therefore 'approaches the issue of property alteration in terms of a commitment to equality and to sharing implicit in the notion of marriage as a joining of lives.'⁸³¹ Accordingly, as Fehlberg notes,⁸³² it largely concerns the justification of bestowing a more favourable financial award on the homemaker and recognises a collective approach of the couple: that although they may make different contributions, they are equally valuable.

Consequently, this means that unlike the evaluation approach it does not matter when the contributions are made in the relationship. In *Aleksovski v Aleksovski*,⁸³³ Kay J gave the analogy that if a party enters a marriage with a gold bar and for 20 years they strive for mutual support, at the end of the 20 years they have the gold bar. Moreover, it should matter little when this gold bar enters the relationship and so if a party inherits the gold bar on the last day of their relationship they still will be seen to have the gold bar. This therefore means that the court uses a far more holistic approach to Step 2 which recognises that the parties' efforts are joint and consequently that 'the economic fruits of the marriage...should be divided between them.'⁸³⁴ Therefore, the development of this approach represents a move away from a method which evaluates individual efforts towards the recognition that marriage is a joint partnership. Using this partnership theme instead of the evaluative theme could accordingly make an advantageous difference to the size of awards for the homemaker especially in large asset cases. The court in *Lane v Wharton*⁸³⁵ demonstrated this where it observed that the wife in this five-year relationship including two years of marriage (with \$1.7 million assets) would receive 80% by using the global approach compared to 76.6% under the evaluation approach.⁸³⁶

⁸²⁶ Set out in Appendix Q

⁸²⁷ *Lenehan and Lenehan* [1987] FamCA 8; (1987) FLC 91-814 [148]

⁸²⁸ *Ferraro v Ferraro* [1993] FLC 92 -335

⁸²⁹ *Waters v Jurek* [1995] FamCA 101

⁸³⁰ While equality was not used here on account of Mr Ferraro's special skill, the award made to Mrs Ferraro was based on this.

⁸³¹ P Parkinson, 'Quantifying the Homemaker Contributions in Family Property Law' (2003) 31(1) *Federal Law Review* 1, 8

⁸³² B Fehlberg, 'With All My Worldly Goods I Thee Endow?': The Partnership Theme in Australian Matrimonial Property Law' (2005) 19 *International Journal of Law, Policy and the Family* 176, 180

⁸³³ *Aleksovski and Aleksovski* [1996] FamCA 111

⁸³⁴ *Ferraro v Ferraro* [1992] 16 Fam LR 1

⁸³⁵ *Lane v Wharton* (2010) FamCA 18

⁸³⁶ *Lane v Wharton* (2010) FamCA 18, she received 77.6% due to an alteration under step 3.

Consequently, as both parties' efforts are being viewed as joint in a partnership under this theme, the homemaking and care-giving role is given greater value as it is being treated as reciprocal to breadwinning. Therefore, this theme recognises to a greater extent the importance of care-giving and arguably introduces the idea that homemaking is equally valuable to breadwinning. For Deech, greater intervention is a greater interference in the private sphere by the state and the concept of a partnership in marriage (in her analysis of the England and Wales context) 'rests on the picture of the male earner and the wife as housekeeper and child-rearer.'⁸³⁷

However partnership in Australia does not correspond with equality⁸³⁸ and the courts have clearly indicated equality is *not* to be the starting point.⁸³⁹ Consequently, there seems to be an increasing number of situations where the 'nexus' approach creeps into the partnership approach and limits the award on account of how the property is acquired. For example, in *Farmer v Bramley*⁸⁴⁰ a marriage of 12 years, the wife had been the primary carer for their children as well as nursing her husband through a heroin addiction. There was no property and 18 months after separation the husband won \$5 million in a lottery. Although the majority said that a nexus was not needed, she only received 15% on account of the way the property was acquired. Yet, no conceptual basis exists as to why she only was granted this amount and this appears contrary to *Aleksovski's* gold bar analogy⁸⁴¹ where Kay J indicated that it should not matter when the gold bar is acquired. Furthermore, in *Figgins*⁸⁴² (a short marriage of three years, with seven years previous cohabitation with one child), the wife was the homemaker and two weeks after the marriage, the husband inherited \$22.5 million. Rather than viewing this to be a special contribution, the courts considered the inheritance to be a windfall and granted her \$2.5 million (10%) on account of the duration of the marriage and the way in which the property was acquired. This indicated a nexus requirement to this property even though the Court acknowledged that she deserved more.

The absence of equality as a starting point under the partnership theme means that the doctrine of 'special skill' also obscures outcomes. In *Ferraro*,⁸⁴³ even though the court declared that marriage was a partnership, the court granted a 37.5/62.5 split in favour of the husband on account of the husband's special skill. Therefore, in reality the partnership theme does not

⁸³⁷ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1142

⁸³⁸ B Fehlberg, "'With All My Worldly Goods I Thee Endow?": The Partnership Theme in Australian Matrimonial Property Law' (2005) 19 *International Journal of Law, Policy and the Family* 176, 184 - 186

⁸³⁹ *Mallett v Mallett* (1984) 156 CLR 605

⁸⁴⁰ *Farmer and Bramley* [2000] FamCA 1615; (2000) FLC 93-060

⁸⁴¹ *Aleksovski v Aleksovski* (1996) FamCA 111

⁸⁴² *Figgins v Figgins* (2002) Fam CA 688

⁸⁴³ *Ferraro v Ferraro* [1992] 16 Fam LR 1

result in any form of entitlement to equal sharing as it does in New Zealand and Scotland as in the large majority of circumstances equality is not achieved. In essence it means that the contributions are still being assessed and consequently it could be argued that the majority of awards are only reflecting financial contributions and therefore financial success!⁸⁴⁴ Accordingly financial contributions are at the centre of this step and consequently there is little acknowledgement of the contributions and sacrifices that are made within the private sphere. While the partnership theme is a positive step towards protecting Fineman's care-dyad, the absence of a starting point of equality has caused the evaluation theme to take dominance.

Parkinson argues that this approach demonstrates a lack of any 'coherent principles about how to value the homemaker contribution'⁸⁴⁵ and frequently the courts do not articulate how they have quantified the award under this theme except for stating that they have used the partnership approach.⁸⁴⁶ Consequently, there is further uncertainty over how and when this theme applies to longer marriages; the reason for the decision does not have to be articulated. This uncertainty is something Deech disapproves of as it increases the chance of litigation and limits self-regulation.⁸⁴⁷ Yet, valuing financial contributions more highly than non-financial ones may also protect the assets and contributions made by the owning spouse.

5.2.2.3 *Step 2: Conclusion*

Overall, it seems that these two approaches to dividing assets are philosophically opposed and thus it is confusing that they exist alongside each other and it is unclear how they are approached and when they will arise. At Step 2, both approaches make no attempt to protect those who are vulnerable or lead lives characterised by dependency. Where the partnership theme goes some way further to offering greater financial support to Fineman's care-dyad it seems in reality to fall short as the private sphere is overlooked. In fact, Golder et al.⁸⁴⁸ identify that the law rarely puts those who have been economically dependent throughout the marriage in a position of economic independence. Yet how far does Step 3 remedy the position of the economically weaker spouse?

5.2.3 Property Settlement: Step 3 – Other Factors

⁸⁴⁴ P Parkinson, 'Quantifying the Homemaker Contributions in Family Property Law' (2003) 31(1) *Federal Law Review* 1, 53

⁸⁴⁵ P Parkinson, 'Quantifying the Homemaker Contributions in Family Property Law' (2003) 31(1) *Federal Law Review* 1, 34

⁸⁴⁶ For example in *Figgins v Figgins* (2002) Fam CA 688

⁸⁴⁷ See the discussion on pre-marital agreements above at section 5.3.

⁸⁴⁸ This, they argue, discourages married women from leaving abusive partners. H Golder, R Hunter and D Kirby, 'When Married Women Litigate: Issues from Divorce and Property Disputes in Colonial and Contemporary Australia', in W Prest and S Anleu (eds), *Litigation: Past and Present* (UNSW Press 2004) 91

Step 3 of property settlement in Australia allows adjustments based on s79(4)(d)–(g) factors⁸⁴⁹ including s75(2) factors,⁸⁵⁰ which essentially enables the courts to consider the future needs of the parties if it is just and equitable to do so. The factors considered are mostly financial issues such as the age and health of the parties, the length of the marriage (and its impact on the earning capacity of parties), employment prospects, financial resources and post-separation child-care responsibilities. These considerations are in no specific order, rather it is for the courts to decide how much weight (if any) should be attributed to each factor and therefore what resultant adjustments are required at this step. Essentially the court is concerned with two issues: firstly, who has primary responsibility for any children of the relationship post-separation and secondly, the extent of any income disparity between the spouses. Accordingly (and also taking into account the partiality that Step 2 displays towards the breadwinner), while Step 3 is often the most contentious step, it is also the most important stage for the homemaker as the courts use it to redress the economic disadvantages that arise from the division of roles in relationships.

Early case law adopted a needs-based approach to this step and the alterations made for the financially weaker party were very strict as a result. However, the courts began to recognise that this approach alone did not acknowledge the full extent of the economic impact that the homemaking role could have. In *Best v Best*⁸⁵¹ (a 30-year marriage with four children), the court, while considering Step 3 factors, remarkably referred to research from the Australian Institute of Family Studies (AIFS) which discussed the economic consequences of divorce and the ‘feminisation of poverty’.⁸⁵² Here, the couple had met at university and by the time of separation the husband was the partner of a Law firm. Conversely, the wife had given up a career in nursing almost 25 years earlier to assume a homemaking role and raise the couple’s children. In view of the vastly disparate earning capacities between the parties and the AIFS research, the court held that a needs-based award would not produce a sufficient adjustment for the wife. Instead the courts adopted a more holistic approach which looked at the wife’s ability to recover financially, post-separation. Consequently the court awarded Mrs Best 100% of the net assets stating that:

...while in ordinary circumstances it might be thought to be unusual to make an order which leaves one of the parties without any significant share of assets to which both have made contributions over the years and leaves that party with many of the liabilities that appears to be entirely justified in this case. In our view there is little point in attempting to divide in percentage terms such a small quantum of net assets against

⁸⁴⁹ Appendix O

⁸⁵⁰ Appendix P

⁸⁵¹ *Best v Best* [1993] FLC 92-418

⁸⁵² *Best v Best* [1993] FLC 92-418 [121]

*a background where one party has no income and the other party has a very substantial income and, as far as one can judge, an assured professional future.*⁸⁵³

Similarly in *Mitchell v Mitchell*⁸⁵⁴ the wife also received 100% on account of her husband's significant income and in *Figgins*⁸⁵⁵ the court supported Lord Nicholl's statement in the English case *White*⁸⁵⁶ and concluded that a needs-based approach was inappropriate.⁸⁵⁷

*I can see nothing, either in the statutory provisions or in the underlying objective of securing fair financial arrangements, to lead me to suppose that the available assets of the respondent become immaterial once the claimant wife's financial needs are satisfied.*⁸⁵⁸

The court granted Mrs Figgins 10% (\$2.5 million) on the grounds of maintaining a standard of living, the fact that there was a huge disparity in resources and because she had to care for the children.

Consequently, while this step aims to meet any financial need, it also attempts to compensate the detrimental impact that homemaking and care-giving can have on a spouse's ability to be financially self-sufficient. This 'compensatory' approach appears to be more extensively applied than the compensation provisions in both New Zealand⁸⁵⁹ and Scotland⁸⁶⁰ which is perhaps attributable to the fact that in Australia both needs and compensation are considered simultaneously. Consequently, in comparison with these jurisdictions, the Australian system is much closer to achieving Fineman's 'equality of resources' between spouses at the end of a relationship and therefore goes much further to protect the care-dyad:

*...it should not be forgotten that the payment of child support in no way compensates the custodial parent for the loss of career opportunities, lack of employment, mobility and the restriction upon the independent lifestyle that the obligation to care for children usually entails.*⁸⁶¹

However, the extent to which 'equality of resources' can be achieved is limited by the fact that the courts' aim (as stressed in *Mallet v Mallet*)⁸⁶² is not 'to equalise the financial strengths of the parties. It is to empower the Court...to effect a re-distribution of the property of the parties if it be just and equitable to do so...'⁸⁶³ *Dickson v Dickson* emphasised that this means that 'the mere existence of disparity of wealth ought not of itself justify a settlement of

⁸⁵³ *Best v Best* [1993] FLC 92-418 [123]

⁸⁵⁴ *Mitchell v Mitchell* [1995] FLC 92-601

⁸⁵⁵ *Figgins v Figgins* (2002) Fam CA 688

⁸⁵⁶ *White v White* [2000] 2 FLR 981 [12] (Lord Nicholls)

⁸⁵⁷ Tim North SC, 'Recent Cases & Emerging Law & Principles' (2005) A paper delivered at the Family Law Residential Conference which considered the effect of the 2005 amendments to the Bankruptcy and Family Law Legislation Amendment Act 2005 and the Family Law Amendment Act 2005

⁸⁵⁸ *White v White* [2000] 2 FLR 981 [12] (Lord Nicholls)

⁸⁵⁹ S15 Property (Relationship) Act 1976

⁸⁶⁰ S10(1)(b) Family Law (Scotland) Act 1985

⁸⁶¹ *Clauson v Clauson* [1995] FLC 92-595

⁸⁶² *Mallet v Mallet* [1984] HCA 21; (1984) FLC 91-507

⁸⁶³ *Mallet v Mallet* [1984] HCA 21; (1984) FLC 91-507 [79] (Wilson J)

property to one party at the expense of the other.⁸⁶⁴ This is similar to the approach in Scotland towards rebalancing economic advantages and disadvantages,⁸⁶⁵ an economic disparity does not automatically warrant redistribution. In Australia, achieving equality is not the goal and therefore Step 3 does not automatically redress an imbalance in resources that exists between the spouses. Yet, given that Step 2 places greater value on financial contributions in comparison to domestic contributions, it is highly likely (especially in large asset cases) that there will be an imbalance in resources where there is a homemaker/breadwinner division of roles. It therefore seems that Step 3 in practice may not offer enough protection for the care-dyad to rebalance the disadvantage suffered by the homemaker at Step 2. This can be seen in *Lee Steere*⁸⁶⁶ where at Step 3 the courts only adjusted the wife's award by an additional 5% which failed to cover the cost of a house for her or her children.

Furthermore, this imbalance between homemaker and breadwinner is particularly apparent in big money cases. The full court in *Clauson*⁸⁶⁷ emphasised that the adjustment made under this step is not about the percentage, but rather '*it is the real impact in money terms which is ultimately the critical issue*'.⁸⁶⁸ Consequently, the size of the asset pool can have a substantial impact on the size of the adjustment and generally the percentage awarded at this step is much higher in small asset cases. A 10% adjustment in an asset pool of \$200,000 would equate to \$20,000, whereas in a large asset pool of \$5,000,000 it would equate to \$500,000. Therefore a variation can be seen between smaller asset cases like *Best*⁸⁶⁹ and *Mitchell*⁸⁷⁰ (where 100% of the assets were awarded to both wives) and big money cases like *Pastern v Pastern*⁸⁷¹ (a 29-year marriage with three children and assets over \$3 million). Here the wife was awarded a 1.5% adjustment even though she had minimal employment prospects in comparison to her husband (he was a veterinary surgeon while she only worked casually from time to time). Furthermore, this percentage adjustment does not necessarily reflect the extent required by the homemaker as the courts must take into account the impact that this will have on the respondent. *Phipson v Phipson*⁸⁷² emphasised that as the disparity is measured in money terms, where the homemaker is seen as requiring a 10% alteration on account of Step 3, she will receive 5% (as it includes the 5% taken from the other party). This monetary-based

⁸⁶⁴ *Dickson v Dickson* [1999] FamCA 278; (1999) FLC 92-843 [85]

⁸⁶⁵ S9(1)(b) of the Family Law (Scotland) Act seeks to rebalance economic advantages and economic disadvantages. See the discussion in section 4.3.2

⁸⁶⁶ *Lee Steere v Lee Steere* (1985) FLC 91-626

⁸⁶⁷ *Clauson v Clauson* [1995] FLC 92-595

⁸⁶⁸ The Full Court in *Clauson v Clauson* [1995] FLC 92-595[81]

⁸⁶⁹ *Best v Best* [1993] FLC 92-418

⁸⁷⁰ *Mitchell v Mitchell* [1995] FLC 92-601

⁸⁷¹ *Pastern v Pastern* 2008 FamCA 620

⁸⁷² *Phipson v Phipson* [2009] FamCA FC 28 (4 March 2009) [39]

rather than percentage-based approach in the large asset cases clearly reaffirms the principle that the courts are not trying to equalise any economic disparity between the couple. At the same time, it also reinforces the implicit assumption in Australian property settlement that homemaking is less valuable than breadwinning. Considering that at Step 2 it is much harder for the homemaker to demonstrate that their contributions are equal to that of the breadwinner's and at the same time Step 3's monetary-based approach typically results in nominal adjustments in large asset cases, it seems that in reality there is a glass-ceiling on the monetary value of the award that a homemaker can achieve.

While this step appears limited in relation to how much protection it can provide for Fineman's care-dyad, it also seems incompatible with Deech's position. For Deech, Step 3 allows the courts to excessively interfere within the private sphere. The approach adopted by the courts, which extends beyond needs to include compensation, interferes with the breadwinner's financial autonomy and promulgates a gendered division of roles and the notion of female dependency by reinforcing a 'meal ticket for life' attitude. Consequently, this step ignores the fact that it is the woman's independent choice to remain within the private sphere and to sacrifice her career. Rather this compensatory approach removes any responsibility for this choice and does so to a far greater degree than in the previous two jurisdictions.

Yet, there are difficulties with Deech's argument based around choice and corresponding responsibility given that the homemaker's decision to remain in the home can also be seen as a joint choice where the breadwinner is also agreeing to support the homemaker. The court in *Waters v Jurek* recognised this, stating that the roles chosen within a relationship:

*...[were] the joint decision of the parties that that be the way in which they would conduct their affairs, and where that decision was made in the expectation of the relationship continuing.*⁸⁷³

In recognition of this fact and as the husband earned \$170,000 per annum, the court awarded the wife \$50,000 of relationship property. This was despite the fact that she earned \$75,000 and thus was able to provide for herself. This recognition of a mutual responsibility for the parties' financial position at the end of a relationship therefore aligns more closely with Fineman's position than with Deech's.

Overall, this stage of property settlement does go some way to redress need and to compensate any financial imbalance between spouses (more so than either Scotland or New Zealand) and therefore it seems to correspond to a greater extent with Fineman's position

⁸⁷³ *Waters v Jurek* (1995) FLC 92 [83]

than with Deech's. However, as the end goal is not substantive equality, Step 3 appears limited in relation to how much protection it can provide for Fineman's care-dyad. It seems that the full financial impact of the homemaking/care-giving role does not appear to be recognised. As a result, it reinforces the implicit assumption present in Australian property settlement that homemaking and care-giving does not appear to be as valued as breadwinning activities. This is particularly worrying when women and men have different 'life-course investments'.⁸⁷⁴

5.2.4 Spousal Maintenance

In Australia, the courts have the discretion to grant spousal maintenance where they feel it proper to do so⁸⁷⁵ and can make urgent,⁸⁷⁶ interim and final⁸⁷⁷ orders. If an application is being made at the same time as a property settlement, the property settlement will be considered first as it sets the background to the parties' financial resources as they may already be able to support themselves after the property settlement. This (unfavoured) award can either be by way of a lump sum, periodical instalments⁸⁷⁸ or property transfer (although the courts in *Vautin v Vautin*⁸⁷⁹ warned about the difficulties in making financial predictions when ordering lump sums) and will terminate (bar exceptional circumstances) on death or remarriage. Maintenance applications have to be made within 12 months of separation (reinforcing the concept of clean break) and, to be applicable, the claiming party must prove firstly that they are unable to support themselves (as a result of caring for a child under 18, age or health resulting in an incapacity for employment or any other reason),⁸⁸⁰ secondly, that the other party can reasonably pay maintenance and thirdly, when considering an award, the courts must have regard to the s75(2) factors. The courts are keen to emphasise the difference in interpretation of s75(2) here in comparison to property settlements; in *Clauson v Clauson*⁸⁸¹ the court emphasised that s75(2) in regards to maintenance is to be considered *after* s75(2) consideration at Step 3; it is to become effectively the fourth step.

Maintenance here, as in New Zealand and Scotland, is rarely awarded, with the courts preferring a 'clean break'.⁸⁸² Where it was awarded, the early rationale behind maintenance in Australia⁸⁸³ echoed the rehabilitative rationale preferred by Deech⁸⁸⁴ (and also by New

⁸⁷⁴ P Parkinson, 'Quantifying the Homemaker Contributions in Family Property Law' (2003) 31(1) *Federal Law Review* 1, 2

⁸⁷⁵ S74 Family Law Act (Cth) 1975

⁸⁷⁶ S77 Family Law Act (Cth) 1975

⁸⁷⁷ Ss 72, 74, 75(2) and 80(1)(h) Family Law Act (Cth) 1975

⁸⁷⁸ S80 Family Law Act (Cth) 1975

⁸⁷⁹ *Vautin v Vautin* [1998] FLC 92-827

⁸⁸⁰ S72(1)(a)-(c) Family Law Act (Cth) 1975

⁸⁸¹ *Clauson v Clauson* [1995] FLC 92-595

⁸⁸² J Behrens and B Smyth, *Spousal Support in Australia: A Study of Incidence and Attitudes* (Working Paper 16, Australian Institute of Family Studies, Melbourne, February 1999) 8 available via the Institute's website: <www.aifs.org.au/>. This study recorded that 7% of cases resulted in periodical payments in comparison to 10% of cases receiving a property transfer award.

⁸⁸³ B Fehlberg, 'Spousal Maintenance in Australia' (2004) 18(1) *International Journal of Law, Policy and the Family* 1, 5

Zealand⁸⁸⁵ and Scotland⁸⁸⁶). Here the courts were essentially concerned with the claimant's ability to support themselves adequately. For example, in *Hope v Hope*⁸⁸⁷ (a 22-year marriage) the homemaker wife received maintenance for the duration of a two-year training course. Yet, as Fehlberg notes, the courts have adopted a more compensatory approach over the last 15 years. *Bevan v Bevan*⁸⁸⁸ indicated that spousal maintenance was not limited to need and in the aforementioned *Mitchell*⁸⁸⁹ (and also *Best*)⁸⁹⁰ the courts emphasised that 'adequately' was to be determined by reference to s75(2) factors. Through this wider approach, the courts are attempting to redress the feminisation of poverty and to recognise the full financial impact that homemaking and child-rearing has on the primary care-giver's ability to enter the labour market.⁸⁹¹ This shift in approach recognises the unequal distribution of the burden of child-care and the case of *Kiesinger v Paget*⁸⁹² indicates that the courts recognise the impact that the length of a relationship may have on the financial vulnerability of a homemaker. However, for Fehlberg this does not go as far as supporting a compensatory model of maintenance.⁸⁹³

In addition, the courts are more restrictive in looking at the respondent's ability to pay maintenance than in the property context. In *DJM v JLM*⁸⁹⁴ (where the husband reduced his income to avoid paying maintenance) the courts would not look at his earning potential, finding it unreasonable to expect a spouse to work more to pay maintenance even though the wife, the homemaker, had four (of five) children under 18 to look after: demonstrating a restrictive rehabilitative approach.

The limited approach towards maintenance reflects Deech's position that it should be rehabilitative in its nature and that clean break should be the courts' goal. While there has been some move towards a more needs-based approach which arguably may conflict with Deech's position, the frequency with which maintenance is awarded suggests that it rarely prolongs female dependency post-separation. Where maintenance is awarded, the courts adopt an approach which recognises the impact that caring can have on the ability to be self-sufficient. Yet the infrequency of the award suggests that Fineman's care-dyad is left in a financially vulnerable position post-separation.

⁸⁸⁴ R Deech, 'The Principles Against Maintenance' (1977) 7 *Family Law* 229, 232-233

⁸⁸⁵ See Chapter 3, section 3.5.2

⁸⁸⁶ See Chapter 4, section 4.3.4

⁸⁸⁷ *Hope v Hope* (1977) FLC 90-294

⁸⁸⁸ *Bevan v Bevan* (1995) FLC 92-600

⁸⁸⁹ *Mitchell v Mitchell* [1995] FLC 92-601

⁸⁹⁰ *Best v Best* [1993] FLC 92-418

⁸⁹¹ B Fehlberg, 'Spousal Maintenance in Australia' (2004) 18(1) *International Journal of Law, Policy and the Family* 1, 5

⁸⁹² *Kiesinger and Paget* [2008] Fam CAFC 23

⁸⁹³ B Fehlberg, 'Spousal Maintenance in Australia' (2004) 18(1) *International Journal of Law, Policy and the Family* 1, 10

⁸⁹⁴ *DJM v JLM* [1998] FLC 92-816

5.3 Financial Provision on Relationship Breakdown: Cohabiting Couples

Since 1 March 2009 the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 introduced provisions giving same-sex and different-sex cohabiting couples (or de facto couples in Australia) the same rights as married couples which apply to all States in Australia except South Australia and Western Australia.⁸⁹⁵ This is with the exception of relationships ending before this date, which will have to revert to State provisions.

Now the FLA Part VIIIAB deals with cohabitants and s4AA defines them as having ‘a relationship as a couple living together on a genuine domestic basis’⁸⁹⁶ which can exist even if the person or persons are married or in a de facto relationship with someone else. To determine whether parties are cohabiting for the purpose of this Act, the courts can regard all circumstances including (but not limited to) the same list of provisions found within the New Zealand jurisdiction.⁸⁹⁷ Now, cohabiting relationships have the same rights as married couples reflected (and interpreted) in the mirror provisions in Part VIIIAB including maintenance. Accordingly, the same substantive difficulties that have been discussed in the marriage context will extend to the cohabitation context.

However, there is a time-bar in place of two (rather than New Zealand’s three) years meaning that cohabiting relationships of this length will not fall under the Act’s jurisdiction unless (similarly to New Zealand) there is a child of the relationship, or the claiming party has made a substantial contribution (monetary or to the welfare of the family) and the failure to make an order would result in serious injustice.⁸⁹⁸ Since the Act came into force, only one case, *Miller v Trent*,⁸⁹⁹ has dealt with the definitions of ‘substantial contribution’ and ‘serious injustice’. Here, the male cohabitant was seeking 15% of a \$3.5 million asset pool where Ms Trent had brought in 91% of the assets. Here, Federal Magistrate Coates determined that ‘substantial contribution’ was to follow the definition laid out in the Western Australian case *V v K*⁹⁰⁰ and that serious injustice was to be given its ordinary meaning:

...the applicant has to produce evidence to satisfy the test of having made substantial contributions, described as ‘more than usual or ordinary’...or ‘exceptional circumstances where serious injustice may be caused. [85] (Coates FM)

⁸⁹⁵ See Appendix V for a table demonstrating the similarities and differences.

⁸⁹⁶ s4AA(1)(c) Family Law Act (Cth) 1975

⁸⁹⁷ See Appendix R

⁸⁹⁸ s90SB(a)(d) Family Law Act (Cth) 1975

⁸⁹⁹ See *Miller v Trent* [2011] FMCAfam 324

⁹⁰⁰ *V v K* [2005] FCWA 80. This was a case from Western Australia, which has been settling de facto property disputes since 2000. Coates here felt that he could draw on the definition as the provisions set out in the *Family Law Act 1997* (WA), ss.205X, 205ZG were of a similar wording to s90SB and 90SM of the FLA. See Paragraphs 53 - 57

The court held that Mr Miller's contributions which consisted of 'personal suggestions [to improve the property], interventions, building works, training of horses, and assistance to the welfare of the family' were not substantial. Consequently, it seems unlikely at this early phase that ordinary domestic contributions would be considered enough to qualify:

*I am of the view that contribution to domestic duties in circumstances...where there are no dependent children and over a short period of time ought not to be substantial.*⁹⁰¹

Yet, where a short relationship meets these exceptions to the time-bar, the relationship will be treated the same as all married relationships whereas in New Zealand, if they fall under the exemptions, they are treated as a marriage of short duration. From Fineman's position, this smaller time-bar means that Australia is closer to having a scheme based on function rather than form in comparison with New Zealand, especially considering that Australia's framework allows concurrent relationships to be protected at the same time (frequently referred to as the 'mistress provisions'). As discussed in earlier chapters, the presence of cohabitation legislation which is opt-out rather than opt-in presents a degree of difficulty for Deech. Furthermore, Australia's 'mistress provisions' from Deech's position may encourage 'gold-digging' claims made by a mistress that will undermine the institution of marriage. Nevertheless, this provision ensures that dependency and vulnerability are protected regardless of the monogamous marital status in that it does not necessarily exclude a claim, and arguably goes some way to putting care-dyads more at the focal point of this area. Moreover, the 2009 amendments allow cohabiting couples to enter into financial agreements pre-,⁹⁰² during⁹⁰³ and post-separation,⁹⁰⁴ as long as it does not defeat the interests of those already married/in a de facto arrangement. This goes some way to reflect and strengthen concepts of autonomy promoted by Deech.

5.3.1 Same-Sex Couples

These amendments were also designed to remove any discrimination between same-sex and different-sex couples, changing up to 85 different laws to do so, thus the cohabiting legislation also extends to same-sex couples.⁹⁰⁵ However, unlike the other jurisdictions, federal law does not extend to same-sex registered partnerships and consequently, there is no equivalent relationship status to marriage unless provided at state level. Yet registered partnerships only

⁹⁰¹ *V v K* [2005] FCWA 8 definition as followed in *Miller v Trent* [2011] FMCAfam 324

⁹⁰² S90UB Part VIIIAB Family Law Act 1975 (Cth)

⁹⁰³ S90UC Family Law Act 1975 (Cth)

⁹⁰⁴ S90UD Family Law Act 1975 (Cth)

⁹⁰⁵ This was done through the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Act 2008* which received assent on 4 December 2008 and the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008*

exist in Tasmania, Victoria, The Australian Capital Territory and New South Wales⁹⁰⁶ and a number of bills proposing same-sex marriage have been rejected by the federal Senate.⁹⁰⁷ This means that, given the two year time-bar, there is scope for discrimination against same-sex relationships that are unable to qualify for any protection under the FLA.

5.4 Doctrinal And Feminist Conclusion

Overall, Australia offers a greater opportunity to take into account domestic contributions than the previous jurisdictions of Scotland and New Zealand by evaluating past contributions. Yet, it seems that the task of weighing contributions is fraught with difficulties (as glimpsed in New Zealand) and leads to a strong presumption of financial contributions as carrying more weight, especially through the doctrine of special skills. Valuing domestic contributions offered the opportunity to avoid the negative impact that a blanket application of equality has, but in actual fact the courts have failed to give domestic contributions any significant weight and any attempt to do so is met with a slow retreat back to an approach that focuses on 'nexus' and financial contributions. While the partnership approach is a greater step towards recognising non-financial contributions, the concept of partnership is limited, given that the courts have emphasised that equality is not the starting point. Furthermore, Step 3 of property settlement offers an important opportunity to redress some of the economic imbalance suffered by the primary care-giver. However, this also seems to be limited by the fact that equality is not the objective of the courts. Consequently, the approach does not adequately address the impact that care-giving can have on a primary care-giver's economic position (although this may be covered in Australia's more extensive child maintenance legislation). Maintenance is also rarely awarded and when it is the focus is on self-sufficiency. Thus, where it is awarded, it is limited and clean break encourages a greater use of lump sum awards. Therefore, it seems that valuing past contributions, disadvantages the homemaker and does not go far enough to protect the care-dyad.

The actual complicated task of actually valuing such different contributions has also resulted in a complex and confusing application of not one, but two conflicting philosophical principles that potentially encourage litigation and make it difficult to predict the outcome of a judgment. As a result, this uncertainty is unsatisfactory from both Fineman's and Deech's perspectives. While this system allows for greater financial autonomy, the complexity of the

⁹⁰⁶ E.g. Australian Capital Territory and Tasmania. Tasmania even recognises overseas same-sex couples. New South Wales and Victoria have a civil union scheme without an official ceremony and South Australia has same-sex marriage proposed.

⁹⁰⁷ E.g. *Marriage Equality Amendment Bill 2009* rejected by the Senate on 25 February 2010

system and lack of justification when using the partnership theme may provoke litigation and undermine the value of caregiving by placing more importance on financial contributions.

In the cohabitation context, the synonymous treatment of cohabitation and marriage presents an opportunity to protect a greater number of care-dyads, although this is still limited by sexual relations as the focal point of the jurisdiction; and registering relationships is perhaps a way of extending rights that would align better with Deech's views. Still, there is concern that the lack of a relationship status similar to marriage for same-sex relationships may mean that there is a level of discrimination between different and same-sex relationships of short duration. Yet what are the implications of this scheme in practice?

5.5 Empirical Analysis

Building on the above doctrinal and feminist analysis of the Australian jurisdiction, this section now outlines and discusses the results from the interviews in order to develop a three-dimensional impression of how effectively the scheme values domestic contributions. To do so, after outlining the socio-demographics of those interviewed, this section addresses the results in four parts: the responses in the married, cohabiting and same-sex context and finally the results relating to the vignettes.

5.5.1 Socio – Demographics of the Interviewees

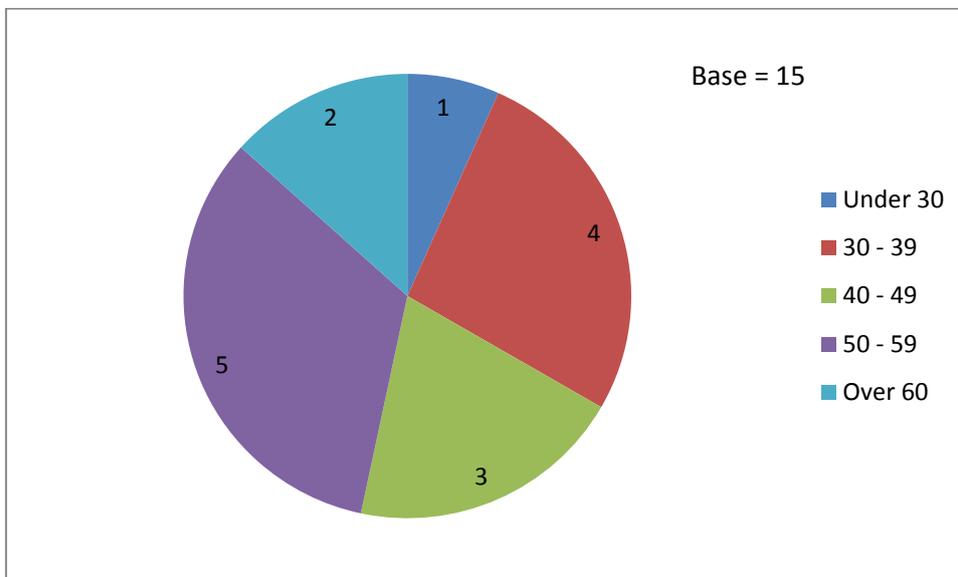
15 lawyers took part in the study, eight male and seven female. There was a much greater spread of ages here and the sample was generally much younger than in Scotland and New Zealand with a third under 40.

Following from this, the Australian lawyers had not been practising for as long as those in Scotland and New Zealand and while six had practised for between 11 – 20 years making this the mode (as in Scotland), five had practised for 10 years and under, making these participants less experienced in their jurisdictions. These respondents had been selected from Queensland, Australia in an effort to gain greater insight into how the new cohabitation provisions brought in under the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 would operate in practice. Prior to 2009 (when this Act was enacted), Queensland had had its own state provisions under the Property Law Act 1974 (Qld) that had been modelled on the marriage provisions contained within the FLA (1975).⁹⁰⁸

⁹⁰⁸ See Appendix V

While the new Federal regime extends the marriage provisions to cohabiting relationships over two years in length, Queensland’s state provisions had been modelled on Australia’s marital regime.

Figure 5.1: Ages of the respondents in Australia



5.5.2. Responses in the Marriage Context

Table 5.1 Themes in the marriage context

Overarching Themes	Themes	Sub-Themes
Procedural justice v. individual justice	Procedural difficulties	Inconsistency Evidence Advising clients Unpredictable Greater litigation and cost
	Benefits of discretion	Flexibility Fairness Satisfaction
Equality	Partnership	N/A
	Practicality	N/A
	Limited suitability	Children Assets Length
The burden of caring	Children make a difference	Greater work Financial autonomy
	Impact of caring	Needs Maintenance provision
	Additional burden	Disbelief Partnership

As Table 5.1 shows, Australia’s themes in the marriage context are dominated by the overarching themes of ‘procedural justice vs. individual justice’, ‘equality’ and also ‘the burden

of caring'. While the first overarching theme reflects the operation of the system, the latter two themes reveal the substantive 'fairness' of the system in practice.

5.5.2.1 Procedural Justice vs. Individual Justice

It was evident from Table 5.2 that seven lawyers thought that their system was completely discretionary and from Table 5.3 that this was too discretionary.

Table 5.2: How rigid/discretionary the lawyers believe Australia to be.

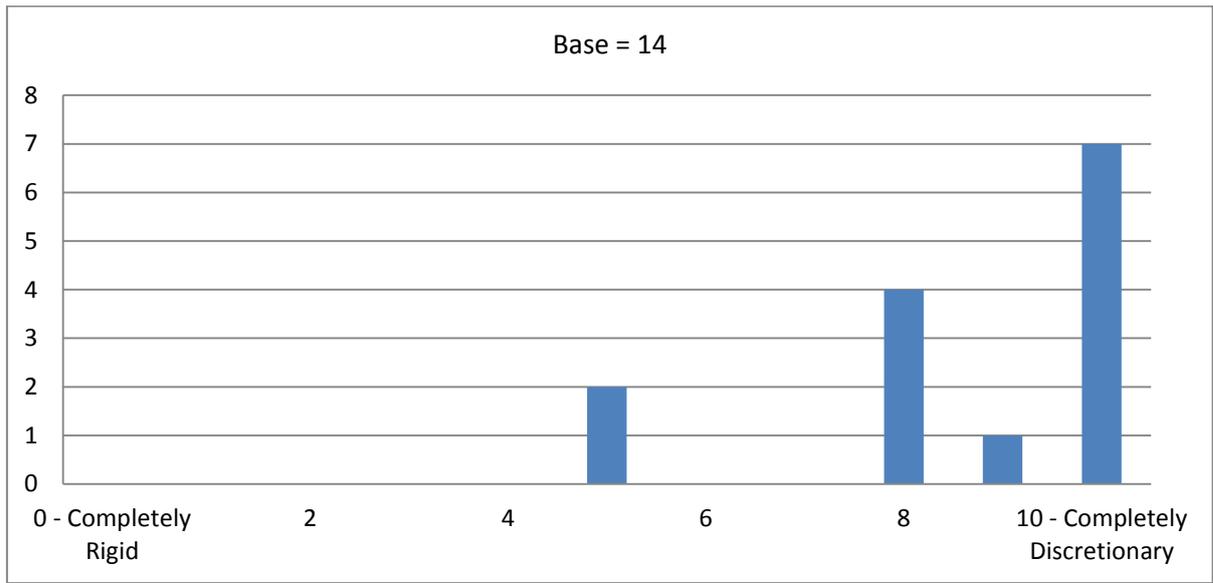
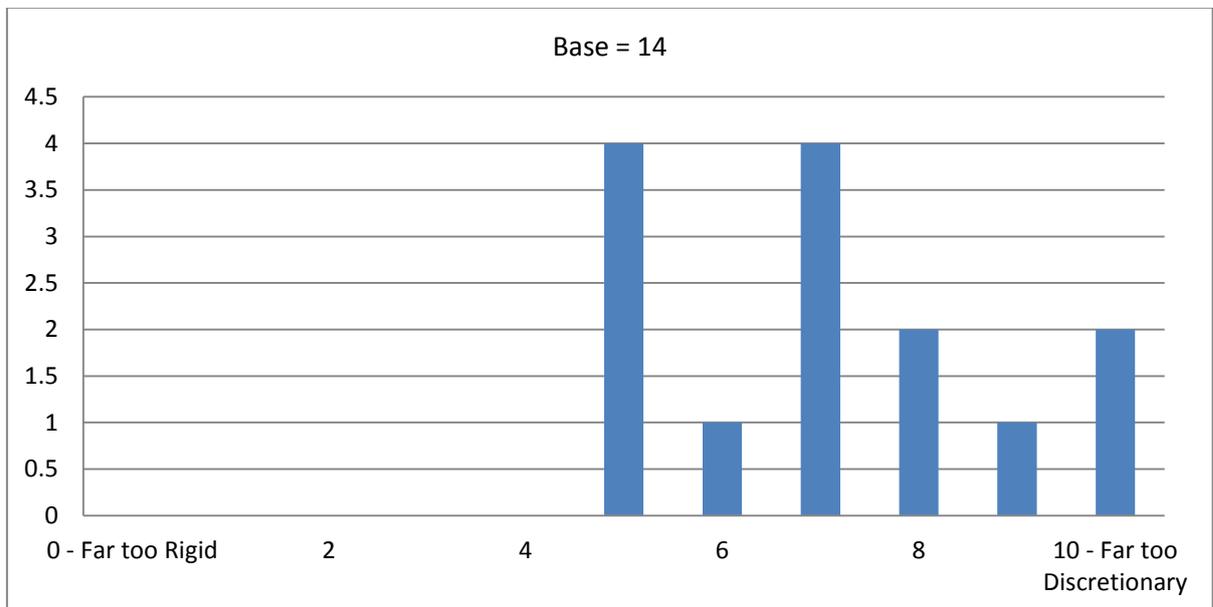


Table 5.3: Attitudes towards how rigid/discretionary Australia is.



The Australian interviewees indicated a number of procedural difficulties which seemed to be linked to this level of discretion. At the heart of this was the lack of certainty or predictability that such an approach has, which almost all the lawyers had indicated in some form during their interviews. Some were concerned that there was a lack of consistency with the way that

the judges were valuing contributions, although others felt that this was due to evidence problems.

...so they rely quite heavily on whatever the individual judge sees as being something he can hang his hat on as to why he made the quantity decision he made. (AusLaw6)

Another theme linked to this 'inconsistency' was 'advising clients'. Almost half of those who took part stated that the lack of certainty made it difficult to advise clients. Generally, the practitioners felt that it was possible to predict a range that the courts would operate within, usually between 10-15%, but overall it was too broad to give an adequate prediction to the client.

...the width of the range and the discretion is about 10 or 15% depending on who's hearing it and I think that we often get dissatisfied with that because, you know, that can make a big difference on what your outcome is and it's hard to advise. (AusLaw4)

Nevertheless, the respondents were aware of how particular judges approached cases, which indicates that the judges themselves are predictable and therefore consistent in their approach.

So all of us have worked out which judges are likely to do what...[but it's] on the morning of our trial generally cos that's when we know who our judge is. (AusLaw15).

However, as the lawyers may not find out who the judge is until the day of the trial, it remains difficult to advise clients. Consequently, the lawyers wanted to provide their clients with better advice. Accordingly, this lack of certainty and subsequent difficulty in preparing a case means that it is a complex and uncertain route for individuals to attain a judicial remedy. Therefore, while New Zealand and Scotland indicated that individuals were aware of their legal entitlements and frequently settled outside of court, in Australia, access to a lawyer is vital to make sense of the system.

It is also possible that such a breadth in outcomes and the unpredictability of the courts may encourage a more litigious approach to financial provision on relationship breakdown. In fact, the respondents were concerned that too many cases were going to court:

We don't apply strict rules but it creates lack of certainty and so it's very hard to advise people with that lack of certainty as to how their arguments will go and therefore more cases probably run than they should. (AusLaw2)

Therefore, there is some concern that Australia's approach may foster a more litigious environment at the end of a relationship and perhaps unnecessarily so, as one of the New Zealand lawyers indicated:

...in Australia they have...a lot of litigation. But Australian law is in a bloody terrible way. Australian lawyers are shark-like in their approach of these things, but only because they have the opportunity to do so... (NZLaw9)

This potential to drag cases through the courts unnecessarily means unnecessary costs. This may act as a deterrent for the economically weaker party who cannot afford a lengthy court proceeding or high-quality counsel and therefore is placed in a weaker bargaining position. Arguably, it could mean that the financially vulnerable party is pressurised to settle outside of court and therefore is possibly controlled by the financially stronger party. This may hinder the primary care-giver's ability to litigate effectively:

The person with the more money has more, um, bargaining power to get you know, bigger guns on their side...The problem is you need to make an application to the court and get all your material together...to get to that stage, but if you don't have representation or money, that is very hard for a person to do it on their own. Um to navigate through the system. (AusLaw14)

Despite the procedural difficulties voiced by the interviewees, it was clear that the lawyers highly valued the 'benefits of discretion'. A key theme linking heavily with this concept of individual justice was the perception that each individual case was different. Over half the interviewees specifically referred to this theme and there was a strong belief that a high level of 'flexibility' was needed to achieve an appropriate outcome according to the unique features of each case; a fairer outcome is achieved through individual justice:

I don't think you can prescribe these things into a formula because each relationship is its own enterprise and it should be assessed on its own facts and circumstances. (AusLaw7)

Furthermore, most of those interviewed were satisfied with the approach taken in Australia and therefore the participants perceived that individual justice is being achieved in most cases. Thus, despite the earlier procedural concerns, it seems that by and large the discretionary nature of the scheme was the appropriate mechanism to achieving fair and appropriate results:

Well, there's no such thing as a perfect system, but, um, I think that it is as close to perfect as one can get. Because underlying that is enormous discretion...and I think in Family Law you need a flexible system. (AusLaw6)

5.5.2.2 Equality

When the lawyers were asked about the substantive aspects of their system, surprisingly, the equality theme emerged. The central component of this theme was that domestic contributions were (and should be) valued equally against financial contributions. This was particularly unanticipated given that Australia is the only jurisdiction under analysis where it is outwardly stated that there is no presumption of equality between differing contributions.

Nevertheless, 'equality' and the sub-theme 'partnership' were dominant themes throughout the qualitative analysis in Australia. Consequently, for nearly half the participants, equality was an entitlement which recognised both that marriage is a partnership and that the way that couples order their affairs is a lifestyle choice within that relationship:

...marriage is a partnership, and you know, that is the parties' arrangement. They agreed to organise their affairs in that manner. And so to judge their contributions equally is fair. (AusLaw8)

The lawyers were also satisfied on a practical level with valuing homemaking and breadwinning contributions equally because it avoided the complexity of actually attributing a value to the non-financial contributions. Consequently, 'equality' meant that a satisfactory value was placed on domestic contributions and therefore avoided the danger that these would be undervalued or overlooked by the courts.

While the majority were satisfied with generally treating the homemaker and breadwinner equally, some believed that equality had 'limited suitability' and therefore was only appropriate in certain situations. These situations seemed to hinge on children (without which there should not be a presumption of equality) and also on original assets; lawyers deemed that the relationship property that should be divided equally should exclude initial contributions, much like Scotland's approach:

I think that if that's the way they live their lives then they should be equally treated and it is equally treated. It's different with introducing assets at the beginning. (AusLaw4)

5.5.2.3 The Burden Of Caring

As the previous theme of 'limited suitability' demonstrated, the lawyers clearly believed that equality was not appropriate where there were children. The message was clear and also far stronger than it had been in the previous jurisdictions: children make a substantial difference. Thus, Fineman's care-dyad appears to be more central to Australia's legal framework than in the previous jurisdictions. The lawyers attributed this difference to the burden of caring that accompanied having children, as it involved additional work on top of everyday homemaking contributions. Furthermore, the lawyers recognised that having children severely interfered with the primary care-giver's financial autonomy and ability to make independent choices:

Those without children, it should be valued less because they have the potential to do something else; I'm not saying they have to, they have the potential. (AusLaw11)

As a result of the economic impact of care-giving, the lawyers identified that care-givers were more financially vulnerable and therefore had greater needs post-separation:

I think they should favour people with children, because you're financially vulnerable...They're trying to, you know, they've got the emotional side of it, they've got the financial aspect trying to keep their job and also trying to settle the children, and that would cause a lot of financial strain if they have that extra support it would help. (AusLaw14)

In fact, it seems that there is a greater concept of partnership where there are children as some of the respondents thought that the courts should avoid evaluating the contributions only where there were children.

When evaluating the lawyers' perceptions of 'substantive fairness' within Australia, the responses contained two themes: how the system dealt with the 'impact of caring' and secondly how the system dealt with any 'additional burden'. In terms of the 'impact of caring', the lawyers were satisfied with the way in which Australia rebalances disadvantages and also meets the future needs of parties. Only one lawyer indicated that they were dissatisfied overall with the approach and another lawyer indicated that they were dissatisfied with the approach where there were no children in the relationship. However, there was indication that future disadvantages that were relationship generated were hard to quantify:

...it's hard to value that past present and future disadvantage. I think they try to do it but not always successfully... (AusLaw6)

Moreover, the lawyers were content with the operation of 'maintenance' within their system. In fact, in comparison to the other jurisdictions, no-one voiced any concerns in relation to the maintenance provisions. Generally, the consensus was that clean break was the preferable option at the end of the relationship. Those who preferred clean break raised similar themes to those in earlier chapters: economic ties should not be ongoing as maintenance prolongs conflict whereas clean break allows people to move on with their lives. However, most of the respondents emphasised that there should only be a clean break if the award would not be unfair. A clean break was identified as being potentially unfair where there were children or health reasons for not being financially independent. Three deemed that clean break was only suitable for larger asset pools:

[In] a smaller pool, a very small pool, I would be content with the breadwinning party having an ongoing obligation to support the person. Not forever, but for a period of time, you know spousal maintenance. In a big pool where they can both get enough money to look after themselves, then I am content with financial independence if you like. (AusLaw7)

For those who promoted the use of maintenance it was generally in relation to where there was a nexus between the dependency and relationship roles. Using the idea of a social contract, nearly all the lawyers felt that both parties are responsible for any such dependency:

Financial dependence is at the consent of both parties. Revoking an agreement is inappropriate and unconscionable. (AusLaw1)

Yet, where maintenance was desirable, most of the lawyers argued that it should be rehabilitative and therefore it should be used to make parties self-sufficient by retraining:

...you may need some further ongoing spousal maintenance either to retrain or for an ongoing period. (AusLaw8)

Overall, it seems that the Australian lawyers were happy with the way that Fineman’s care-dyad was treated on relationship breakdown in the married context. This child-centric approach was further demonstrated when the lawyers were asked to rank the list of principles in order of importance within their jurisdiction as displayed in Table 5.4 below.

Table 5.4 Order of principles ranked by importance

Ranking by Average Score	Principle	Number of Times the Principle was Omitted from the List
1	Child's Welfare	4
2	Needs	2
3	Economic Burden of Caring	0
4	Fairness	1
5	Reward for Past Contributions	0
6	Compensation	3
7	Equal Sharing	6
8	Retention of Property Interests	6
9	Clean Break	2

Rather than ranking ‘reward for past contributions’ or ‘clean break’ as the most important principles (as was expected after the doctrinal analysis), the lawyers instead listed the needs-focused principles as most important. Most notably, clean break was listed as the least important principle of all which was surprising given that there appeared to be a strong preference towards clean break within the doctrinal analysis. It seems that in practice, both needs and maintenance play a greater role than the doctrinal analysis had indicated. This gap between the empirical and doctrinal results may reflect the disparity between cases that reach the higher courts, and the average day to day cases that these lawyers encounter. The former often involve disputes over large asset pools and thus may require a greater evaluation of the contributions made by the parties.

While the themes relating to the ‘impact of caring’ were generally positive, the lawyers demonstrated that there were some difficulties in recognising any ‘additional contributions’ made by the primary care-giver. This theme related to dual earner relationship models where

one party was also carrying out the majority of the homemaking/care-giving contributions. Some lawyers believed that domestic contributions should not be valued on the grounds of 'practicality' and 'choice'; the couple should work out their own domestic arrangements.

Yet, those respondents who were in favour of recognising this additional contribution felt that it was only acceptable where both parties were on more or less the same financial income. However, if one party was on a lower income and carried out the domestic contributions, the lawyers considered the additional contribution to 'make up' for the income disparity:

...it would therefore take into account the...commitment necessary to earn an income. You might have one person who's on a very high income, one on a moderate income but therefore more available to do homemaker tasks so... (AusLaw8)

In fact, some lawyers felt that a spouse could not be earning an income and also conducting the majority of domestic contributions. Consequently, the respondents assumed that the spouse with the dual burden would either have sacrificed their career or only be making minimal homemaking contributions:

...it's unlikely that someone who works fulltime could be making that, um, degree of contribution in the homemaker role to have really any significance in the overall decision. (AusLaw2)

...it will enhance the award to the one who's been sacrificial in terms of homemaker contributions. (AusLaw10)

There appeared to be disbelief that only one party would have a dual burden of homemaking and breadwinning:

...because there's a certain amount of disbelief, um, or credit concerns where you've got someone working who is saying, you know, they're a super homemaker. (AusLaw2)

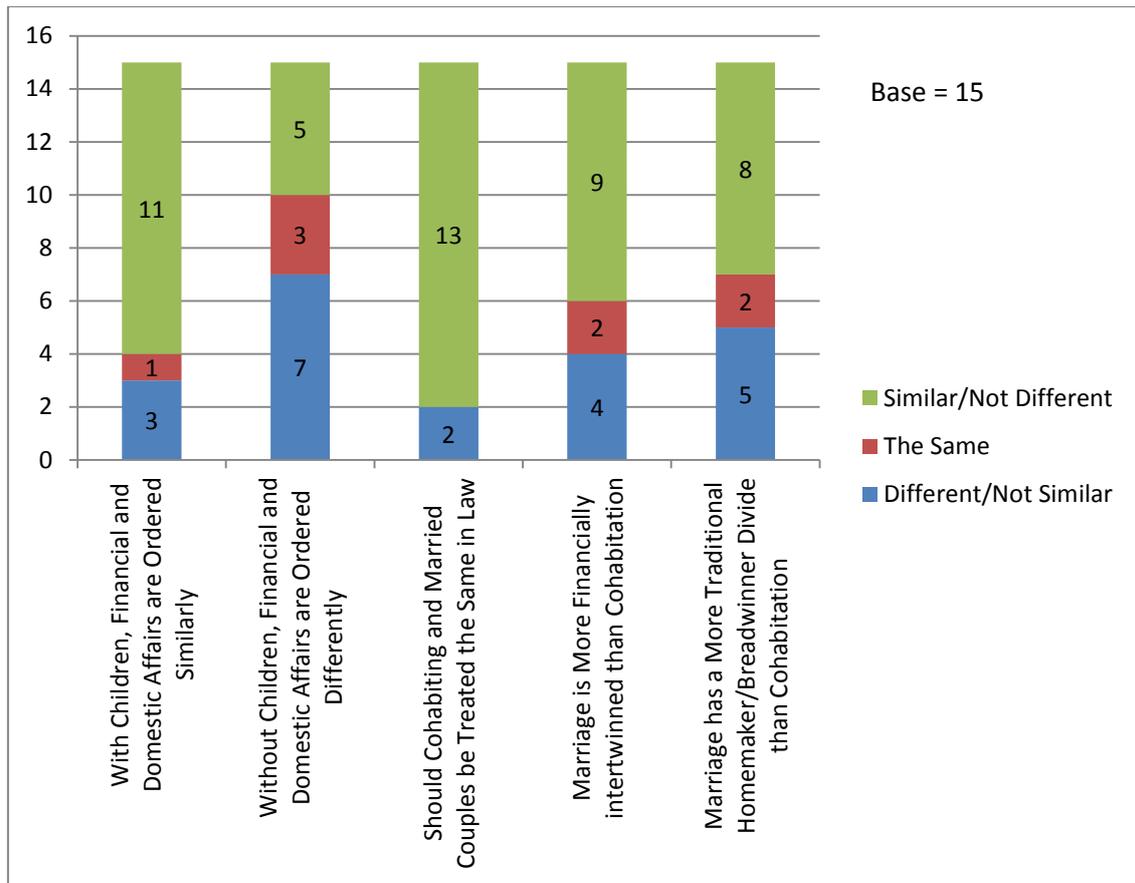
Therefore, the lawyers would only want to recognise an additional burden where both parties are on equal incomes. If there is a disparity of incomes, then the additional contribution makes up for this. However, there were concerns that a pay gap exists between men and women places a glass-ceiling on the primary care-giver's potential awards:

...and yeah, generally it is not an equal financial contribution because of Australia's pay situation we don't have equal pay for equal work. So there will generally be a disparity... (AusLaw15)

This was reflected by half of the respondents who felt that the current valuation was unsatisfactory. Thus overall, the lawyers tended to be satisfied, but it was clear that for some (and much more prominently than Scotland and New Zealand) not enough recognition was being given on relationship breakdown where a dual role had been carried out.

5.5.3 Responses in the Cohabitation Context

Table 5.5: Attitudes towards cohabitation and marriage in Australia



Overall, the lawyers tended to believe, as Table 5.5 shows, that little difference existed between registered and unregistered relationships. This table has a similar distribution as in New Zealand. Seven lawyers felt that where there were no children, married couples organise their affairs differently from cohabiting couples and therefore there is some perception of a difference between the two relationships. This does not mean that they think marriage is more financially intertwined than cohabitation or that married couples divide their roles more traditionally. In fact, 100% of respondents answered yes to the question of whether the same principles on relationship breakdown should apply uniformly between married couples, cohabiting couples and same-sex couples. More specifically, 100% of respondents stated that there was no difference in how homemaker contributions were valued in these two relationship styles and also no difference between how they *should* be valued next to one another.

Table 5.6 below sets out the major themes that emerged from the data in this section. The overwhelming majority of interviewees believed that cohabiting couples and married couples were functionally similar and therefore both relationships should be treated in the same manner:

I just don't think it matters whether the couples are married or not. Homemaking contributions are homemaking contributions and whether you've got a ring on your finger or a piece of paper um ought not colour the nature of contributions. (AusLaw7)

Table 5.6 Australian themes in the cohabiting context

Themes	Sub-Themes
Some uncertainty	N/A
Difference	Nature of the relationship Short relationships
Similar	Function In practice Both should be regulated by Family Law

A small minority thought that cohabiting couples and married couples should be treated differently as they differed in their very nature and therefore organised their relationships differently. One lawyer stated that there should be a difference, but could not clarify why:

...I'm a little old fashioned in my beliefs in that there should be some benefit to being married...That's the only expansion I could make (laughs). There has to be some benefit going through the marriage business (laughs). (AusLaw6)

For another respondent, there was only a difference between *short* cohabiting and marital relationships. This suggested that potentially a timeframe should be in place particularly where the potential award is so great:

...marriage is only financially intertwined than de facto in certain circumstances...I certainly think that in a marriage people mix and intertwine financially more than just in shorter de facto relationships but in longer de facto relationships I think they become more like a marriage... (AusLaw4)

In practice, the lawyers were unsure how the regime would work as the cohabitation legislation was so new. However, the general consensus is that it will be the same as marriage:

...as the new legislation only came in last year it's, um, not very well tested and there aren't many precedents...[and] at the moment it's kind of piggy backing on what would apply for married couples. (AusLaw3)

Yet, there was some concern that, in reality, the courts would treat these relationships differently. The main assertion from the respondents was that married couples would be afforded greater protection than cohabiting couples. This preferential treatment was attributed to the embryonic stage of the legislation.

Despite the uncertainty that surrounded the responses in the cohabitation context, the qualitative analysis clearly demonstrated that the lawyers viewed the new provisions as a vast improvement on the old ones. The lawyers criticised the fact that, previously, cohabiting couples were dealt with under Property Law. Although the previous regime in Queensland had

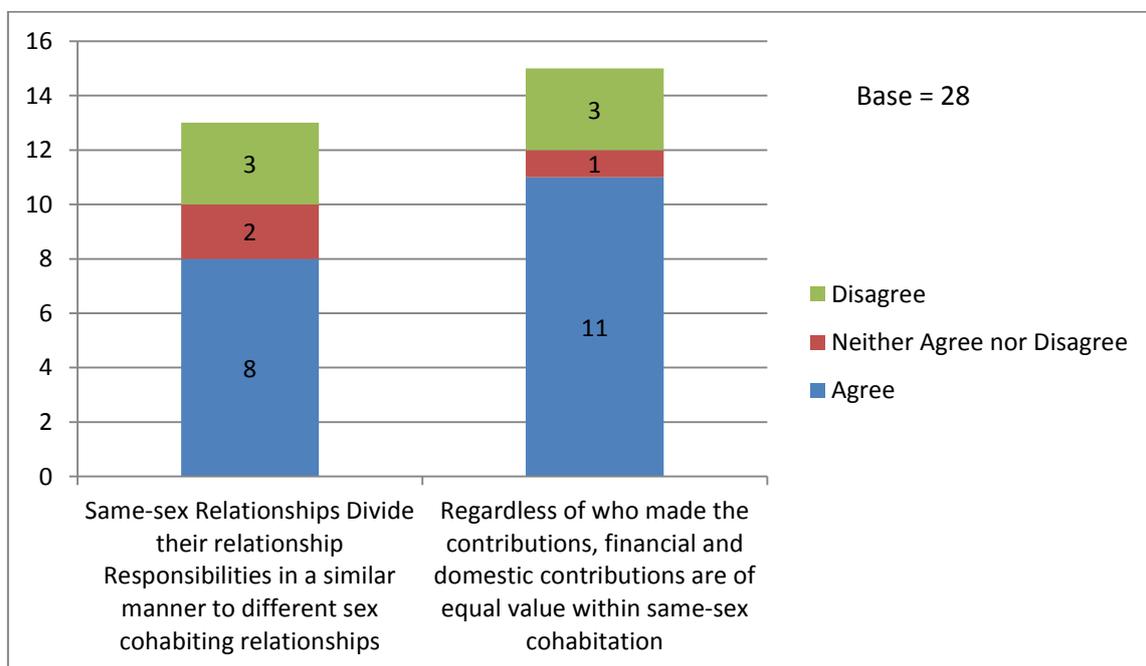
been based on the federal scheme for married couples, dealing with these disputes in the State courts was felt to be completely inappropriate as these courts ‘do not do Family Law’. AusLaw7 in fact indicated that lawyers actually avoided cohabiting cases under the old law:

...we would avoid like the plague taking a de facto matter be it same- or different-sex to the state court cos they don't do Family Law. They don't get it... (AusLaw7)

This therefore questions Deech’s argument that cohabitants should be kept from the mire of Family Law; keeping disputes out of the family courts was extensively criticised by the respondents.

5.5.4 Same-Sex Relationships

Table 5.7: Attitudes towards same-sex relationships in Australia



As there is no federal registered relationship status that same-sex couples may enter into in Australia, the comparisons made in the interviews were solely relating to the cohabitation context. Nevertheless, as Table 5.7 demonstrates, most respondents believed that same-sex relationships divided their relationships in a similar manner to different-sex relationships and 11 felt that domestic and financial contributions were of equal value on relationship breakdown. The rest of the distributions in the interview were exactly the same for same-sex and different-sex cohabiting relationships. Eleven respondents thought that same-sex relationships are and 13 thought that they should be treated the same as different-sex relationships.

In the cohabitation context, the respondents were uncertain over how the legislation was going to be applied. Furthermore, the lawyers also indicated that they had not had a lot of

experience with same-sex relationships. However, the qualitative themes outlined in Table 5.8 supported the quantitative figures.

Table 5.8 Australian themes in the same-sex context

Themes	Sub-Themes
Uncertainty	Lack of experience
	Presumed similarity
	Children
	Potential bias

Most lawyers⁹⁰⁹ specifically stated that there should be no difference between same-sex and different-sex couples:

...the aim of the legislation is to ensure that there's no discrimination between de facto couples and married couples...I think that's...it's a very good aim to have. (AusLaw8)

Despite the presumption that same-sex and different-sex couples should be treated similarly, there were some concerns that in practice there would be a difference. Mainly, this related to the fact that same-sex couples are less likely to have children. Furthermore, one lawyer thought that same-sex couples tended to be more financially dependent at the end of a relationship:

Um, same-sex couples it does tend to be a bit different, and I don't really know why. It seems to be this ongoing lingering you know almost financial dependence that goes on. I don't really know why. (AusLaw13)

For others, there was the fear that there could be potential bias where same-sex couples would be treated differently based on gendered assumptions about roles:

...It's never specifically said, but...I think there is a bit of a divide between the female who works and the female who stays at home, the female who works is 'oh, you're not caring for your child'. Whereas in the gay couples, the one who stays at home 'oh, you're a bit of a namby-pamby, not out being the breadwinner that's what blokes should be doing. So you'll understand at the beginning when I say my portion before we started why we would avoid like the plague taking same-sex stuff to the courts.' (AusLaw7)

Thus, out of all the jurisdictions, Australia was most concerned with bias.

⁹⁰⁹ AusLaw2,4,7,8,9,11,12,13,14,15

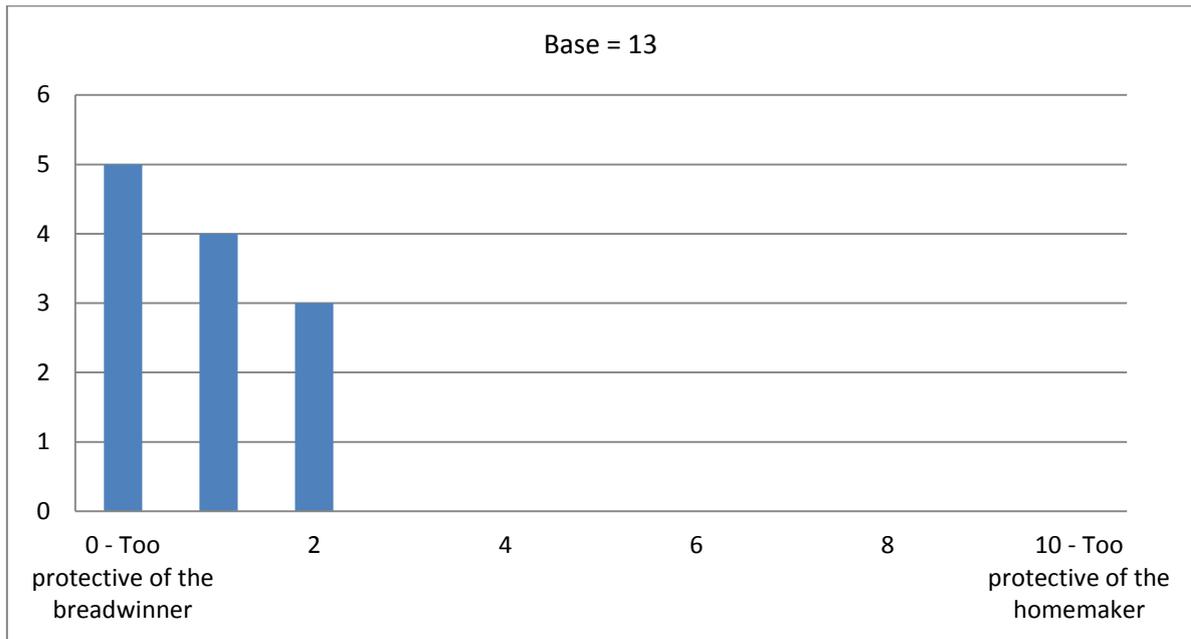
5.5.5 The Vignettes

5.5.5.1 Scenario A⁹¹⁰

The lawyers clearly thought that the outcome in England and Wales (Table 5.9 below) was too protective of the breadwinner. Similarly to New Zealand, seven lawyers⁹¹¹ were shocked by the way in which Miss Jones would be treated on relationship breakdown:

Holy hell. Jeez, that's a bit tough in England. Christ. (Laughs). (AusLaw13)

Table 5.9: Attitudes towards England and Wales' outcome in Scenario A



Consequently, when the lawyers were asked how Australia's approach would alter in comparison to England and Wales, 100% indicated that the outcome in Australia would be 'much more generous'. In fact 11 of the lawyers⁹¹² stated that not only would Miss Jones get 50% of the relationship property, but also that she would receive an additional sum to compensate her lack of earning capability and also would have her needs met through maintenance. The respondents emphasised that after 20 years, the relationship's length outweighs any initial financial contributions.⁹¹³ Eight lawyers felt that this was about right although three felt that the approach was a little too generous due to Mr Smith's initial financial contribution, and two thought that it was not generous enough as they wanted a greater recognition of Miss Jones' needs.

⁹¹⁰ See Appendix A This scenario is based on *Burns v Burns* (1984) Ch. 317

⁹¹¹ AusLaw1,4,5,10,12,13,15

⁹¹² AusLaw1,2,3,4,5,6,7,8,12,13,15

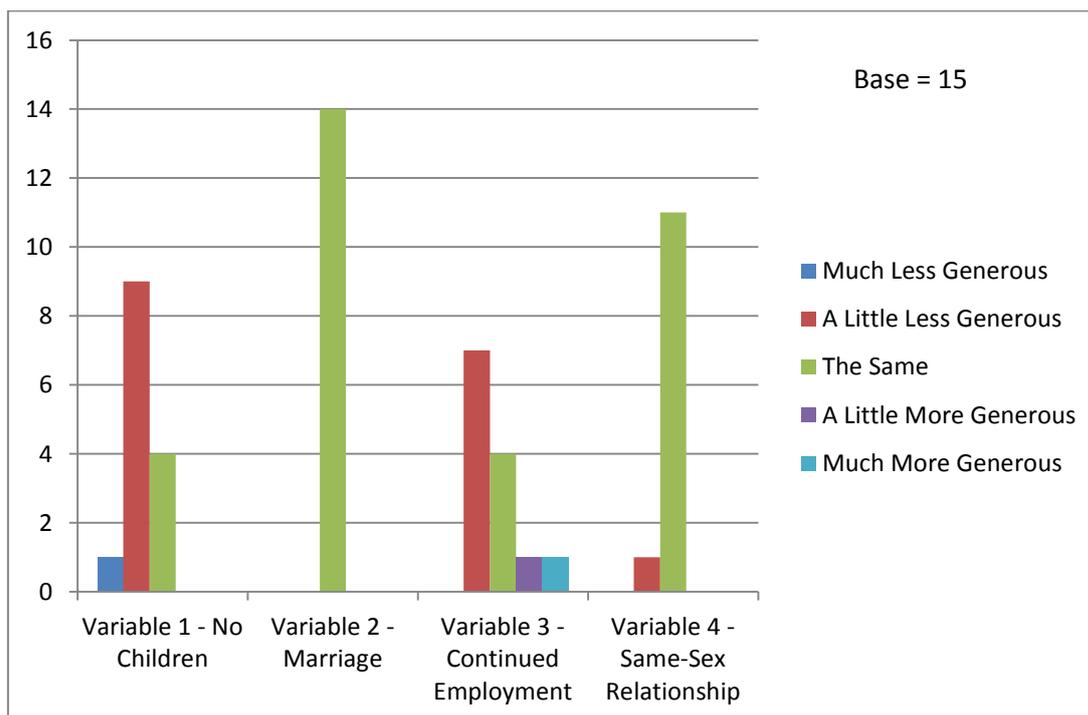
⁹¹³ AusLaw1,2,5,10,13

5.5.5.1.1 Scenario A – The Variables

The lawyers were then asked about how the law would alter its response for the four different variables.⁹¹⁴ Nine indicated that the award would be a little less generous without children, stating that the quality of contributions would drop without children.⁹¹⁵ In fact two lawyers⁹¹⁶ stated that the crucial question would be why she was not working:

...the courts would be looking for a reason why she wasn't working; it would be unusual for a person with no children to be not working at all... (AusLaw5)

Table 5.10: How Scenario A's outcome in Australia would vary for each variable



Where Miss Jones did continue working, seven felt her award would be less generous on account of reduced needs.⁹¹⁷ Again, for three,⁹¹⁸ there was a level of disbelief that she could be carrying out the same contributions and earning:

...presuming that she's done the actual work...if she's done that as well as working, she's unlikely to get that as any recognition of a contribution. (AusLaw6)

Thus, it seems that even in small asset cases where there are no children there is some level of evaluation of the contributions that the parties have made to the relationship, although, for three lawyers, the fact that the relationship was 20 years long meant that whether she had

⁹¹⁴ Listed in section 3.5.5.2

⁹¹⁵ AusLaw1,2,4,5,7

⁹¹⁶ AusLaw5,6

⁹¹⁷ AusLaw1,13

⁹¹⁸ AusLaw6,8,9

worked or not was irrelevant. However, as both Tables 5.11 and 5.12 demonstrate, overall the lawyers were happy with the approach, although there was some room for manoeuvre for a more generous award where Miss Jones had stayed in continuous employment.

Table 5.11: Attitudes towards Australia's approach towards each of Scenario A's variables

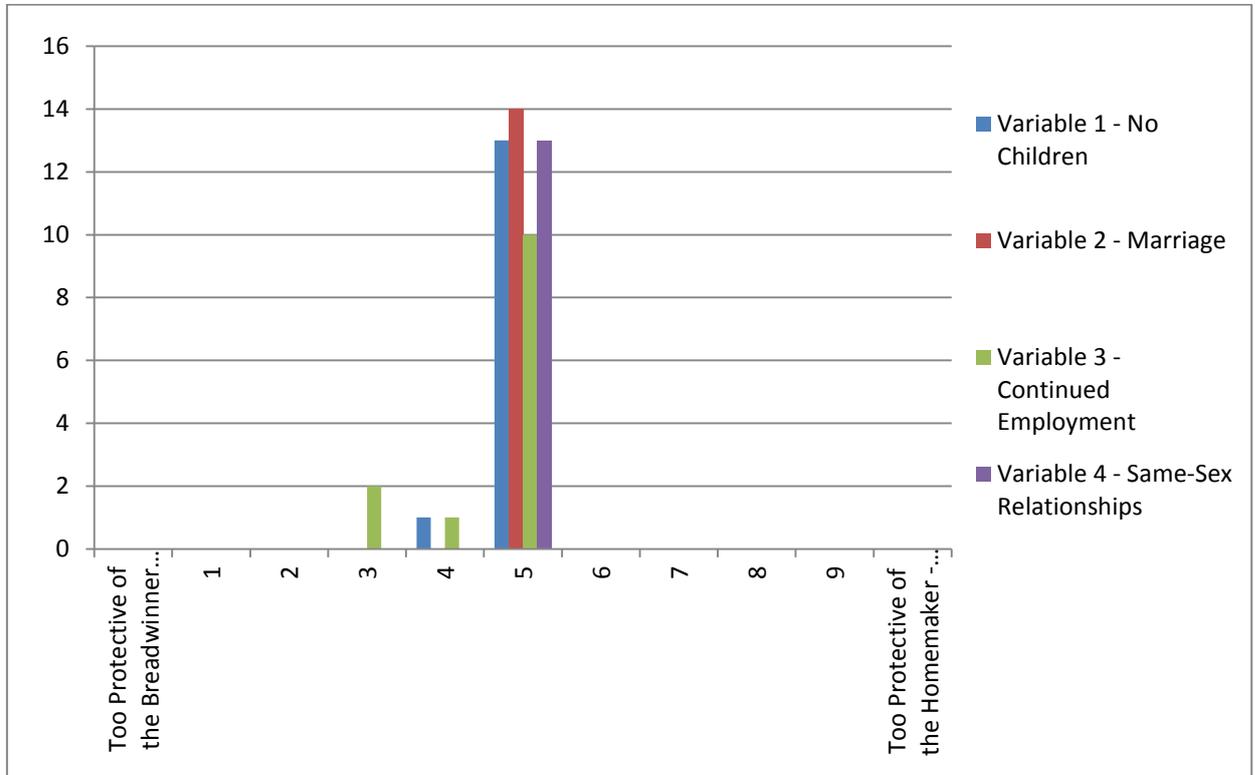
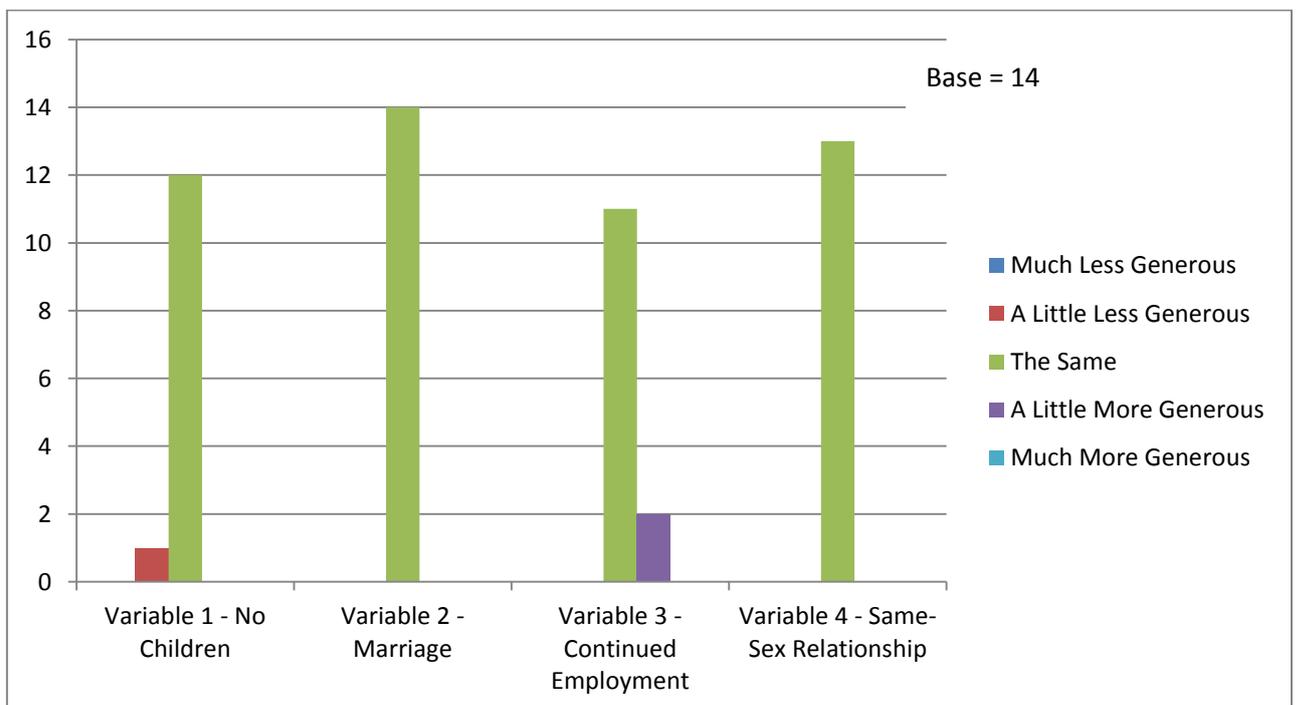
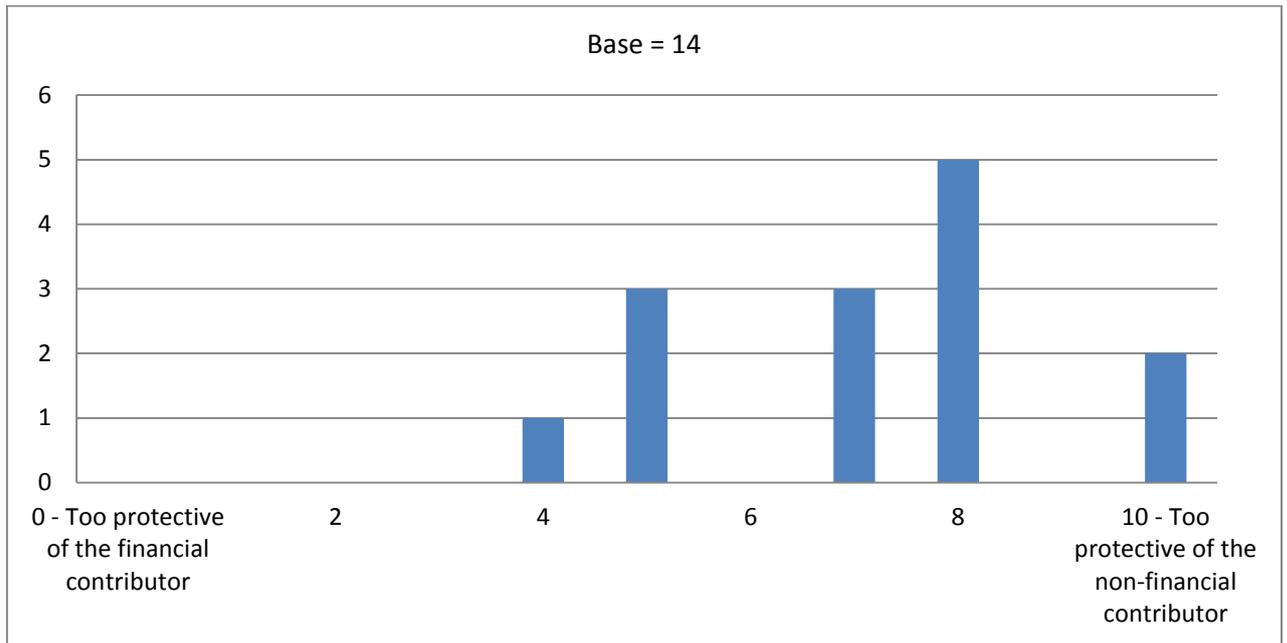


Table 5.12: How the lawyers would alter Australia's approach to Scenario A



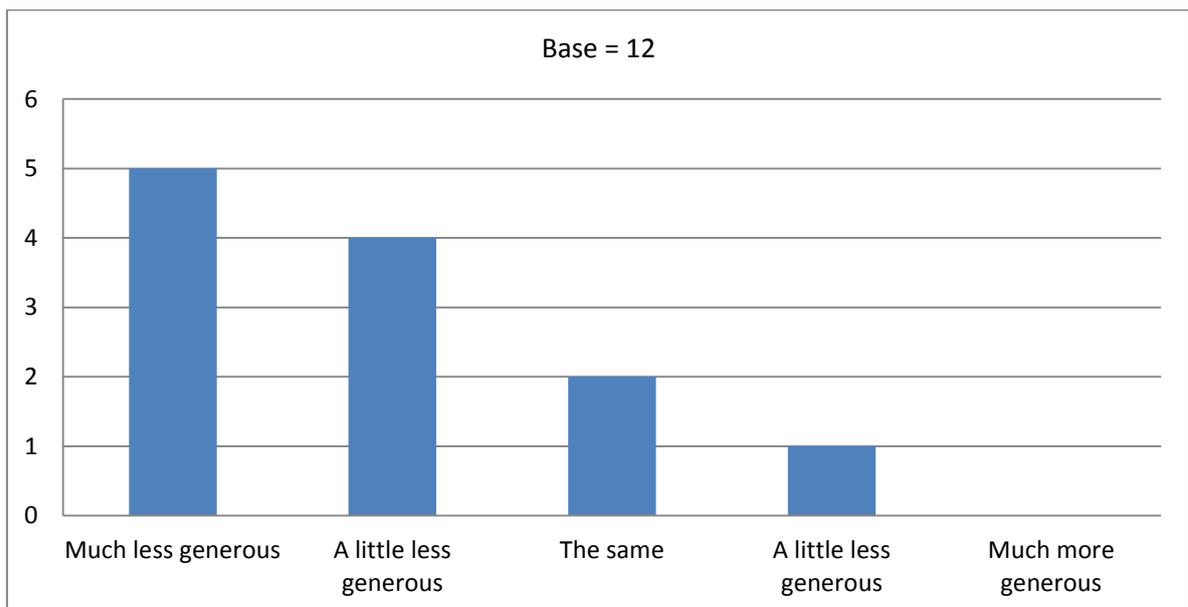
5.5.5.2 Scenario B

Table 5.13: Attitudes to England and Wales' outcome in Scenario B



Generally, the respondents thought that the approach in England and Wales was too generous to Mrs Higgins (as demonstrated in Table 5.13), although four thought it was about right. Nine lawyers indicated they would make it less generous with five making it much less generous: most answers indicated that she would get between five and ten per cent of the net pool.⁹¹⁹ Nine lawyers thought Australia's approach here was about right.

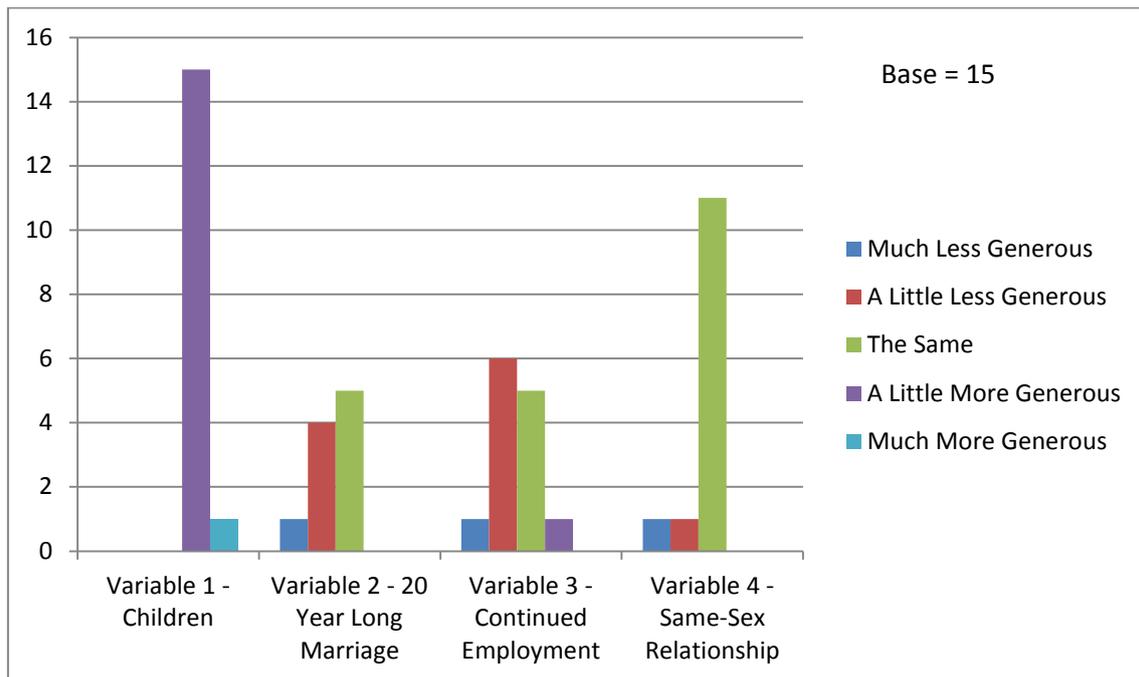
Table 5.14: How Scenario B's outcome in Australia would vary



⁹¹⁹ AusLaw2,4,5,6,8,12

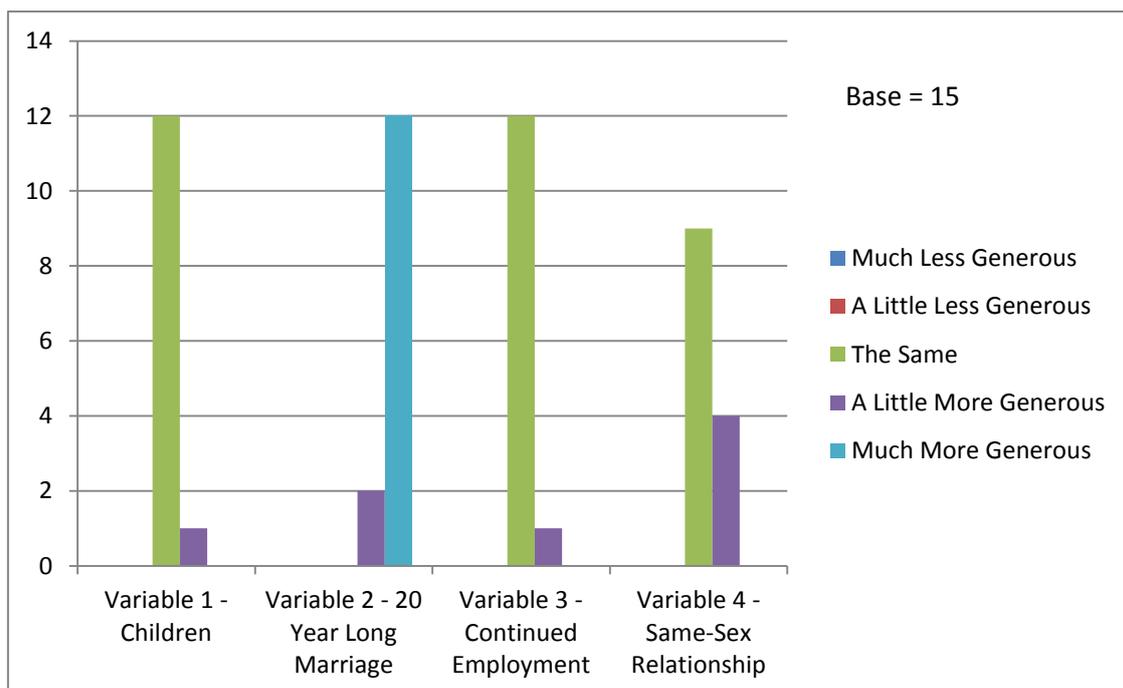
5.5.5.2.1 Scenario B – The Variables

Table 5.15: How Scenario B's outcome in Australia would vary for each variable



The lawyers were then asked about how the law would alter its response for four different variables. As Table 5.15 shows, where there are children the award would be a little more generous. However, if Mrs Higgins had remained in continuous employment or even if the relationship had been longer, the lawyers tended to think that the approach would be less generous.

Table 5.16: How the lawyers would alter Australia's approach to Scenario B



Most notably, as shown in Table 5.16, 12 lawyers thought that the award should be much

more generous in long-term marriages. This perhaps reflects the fact that particularly in big asset cases the courts evaluate contributions without a presumption of equality between homemaker and breadwinner. For same-sex couples it was clear that three felt it was not quite right, and that they would make it a bit more generous.

5.6 Australia's System of Financial Provision: A

Conclusion

This chapter explored Australia's framework of financial provision which embodies a mixture of both Fineman's and Deech's approaches. Australia has a discretionary approach which prioritises 'individualised justice' and primarily evaluates contributions made in relationships. However, the discretionary approach, in the absence of a core guiding principle, has produced a complex system. There are two conflicting methods of valuing contributions and it is unclear how these interact with each other or when either should apply. Furthermore, there are clear procedural problems relating to the high level of discretion within Australia: namely inconsistency and uncertainty. This has led to the criticism that in fact it was difficult to advise clients and there was an indication that it may also lead to a greater level of litigation. As a result, the system may place homemakers at a further disadvantage with the cost of unnecessary litigation causing parties to settle. Yet, these out-of-court settlements, in the absence of a rule-based system, may accentuate inequalities in bargaining power as a result of financial inequalities between spouses. This presents real concern for Fineman's care-dyad where the primary care-giver is often at a financial disadvantage in comparison to the other spouse.

Both the doctrinal and feminist analysis demonstrated that in the absence of a presumption of equality between the homemaker and breadwinner contributions, the Australian system itself seems to give weight to financial contributions. This serves to disadvantage the primary carer. Even where the partnership theme has developed, the courts still emphasise the importance of establishing a nexus between domestic contributions and the relationship. This is an arduous task for the homemaker. Nevertheless, the requirement of 'nexus' demonstrates that homemaking is of secondary importance in comparison with breadwinning. Moreover, Australia appears to have a retrospective focus which examines past contributions and, consequently, needs and relationship-generated disadvantage appear to be secondary considerations. This, combined with the limited scope of maintenance, affords little protection for Fineman's care-dyad especially in small asset cases. The actual (and unclear) method of valuing domestic contributions therefore appears to be an undesirable approach to property

settlement in either relationship context. Yet, if these unsatisfactory cases are usually the ones with big assets, would an approach that has a narrower conception of relationship property avoid the complex problems that evaluation raises?

There appears to be a noticeable gap between the doctrinal and empirical analysis. The empirical results demonstrated that in practice, there was a presumption of equality between homemaking and breadwinning contributions. Consequently, it seems that 'evaluating contributions' in principle is not as dominating as the doctrinal analysis first suggested. Instead, the approach towards property settlement in practice was welfare based, with a strong emphasis on needs and redressing the impact of caring. Similarly, the emphasis on clean break that was apparent in the doctrinal phase was seemingly absent from the empirical data. The lawyers were extremely satisfied with the way in which the Australian system operated, although there were calls for a greater level of certainty to limit the procedural difficulties. Yet, why is there such a gap? Arguably, it could be down to the type of cases that end up within the court system: those with big assets and those who are in dispute over the source of those assets. In these cases, the narrow approach towards evaluation in big asset cases seems to be in place because of the wide definition of relationship property. The day-to-day cases that the interviewees deal with are most likely small asset pool cases and therefore may not require such an extensive consideration of the contributions that have been made in the relationship. The courts may therefore avoid the arduous task of valuing contributions when it is unlikely to make a great deal of difference to the awards. This supports Dewar's contention over the normal chaos of Family Law where the lawyers themselves make sense of a seemingly chaotic system.⁹²⁰

With regard to other relationship forms, the qualitative analysis revealed that the respondents believed that these relationships should be treated the same as married couples (although with a limitation period for cohabiting couples). However, there was a level of uncertainty over the application of the scheme which prevented detailed substantive analysis of the system in operation. Nevertheless, the respondents emphasised that Property Law was not the appropriate forum for awarding financial provision at the end of a cohabiting relationship. Therefore, it seems that the respondents from Australia rejected Deech's contention that cohabitants should be 'protected' from Family Law. Instead there was overwhelming support for Fineman's position that relationships should be treated according to function and based on discretionary Family Law remedies.

⁹²⁰ J Dewar, 'The Normal Chaos of Family Law' (1998) 61 *Modern Law Review* 467, 473 - 474

CHAPTER 6: FINEMAN'S POSITION IN PRACTICE - **ENGLAND AND WALES**

6.1 Introduction

This chapter looks at England and Wales, a system which most closely resembles Fineman's end of the spectrum out of all the jurisdictions examined in this thesis. England and Wales exemplifies Fineman's principles of discretion, protection and substantive equality and places the care-dyad central to financial awards as needs is at the heart of this system. Consequently, this means that the discretion used in England and Wales is forward looking and it considers the future economic positions of former spouses. Therefore, this system has a wide scope to consider the long-term implications of care-giving. This is in direct contrast with Australia's system which has a retrospective discretionary approach that looks back at past contributions made in a relationship. Subsequently, England and Wales potentially offers greater relief for the care-dyad in comparison with the level of protection that Australia offered in practice. Yet, while England and Wales may offer improved protection towards Fineman's care-dyad, this jurisdiction has been at the receiving end of Deech's critique, accused of entrenching gendered stereotypes, rewarding women with maintenance for remaining in the private sphere and consequently employing a system that traditionally has done little to promote financial autonomy.⁹²¹

However, the decision in *Radmacher v Granatino*⁹²² has heralded a move towards greater recognition of autonomy by radically altering the position of pre-nuptial agreements as the courts now no longer consider them to be contrary to public policy.⁹²³ Yet, there is uncertainty over the enforceability of these agreements as there is wide scope for these courts to dismiss them if both needs and compensation render the agreement unfair.⁹²⁴ Furthermore, it seems that this greater acceptance will apply to those contracts post-*Radmacher*.⁹²⁵ Thus, those agreements entered into before this case are unlikely to meet the measure of fairness and therefore the parties will be subject to a system which has little regard for autonomy. As a result, this system appears to be even more opposed to Deech's stance than Australia. Yet, since Australia's retrospective focus failed to satisfy either of the feminist viewpoints, the question posed in this chapter is whether this alternative direction of discretion offers a better

⁹²¹ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1141 - 1143

⁹²² *Radmacher v Granatino* [2010] UKSC 42

⁹²³ See *F v F* [1995] 2 FLR 45 where Thorpe J at [66] declared pre-nuptial agreements to be of 'very limited significance'.

⁹²⁴ See section 6.3.5

⁹²⁵ Law Commission, *Marital Property Agreements* (Law Com CP No 198, 2011)

way of balancing Deech's and Fineman's divergent positions. Additionally, this system of financial provision on divorce, unlike the Australian approach, has been extended to same-sex couples who can enter a civil partnership affording them almost identical rights to married couples.⁹²⁶

Paradoxically (considering that out of all the jurisdictions financial autonomy is given the least weight in England and Wales), in the cohabitation context the reverse is true. Instead, cohabitants have no specific Family Law remedy and therefore cohabiting parties must (in the absence of legal title) rely on Trust Law to ascertain an interest in the property. However, it is possible under Schedule 1 of the Children Act 1989 for cohabitants to apply for child maintenance, although awards under this provision are expressly child-focused and thus will not provide financial support for the care-giver where the children have left home or for the economic consequences of assuming the care-giving role.⁹²⁷ Consequently, financial provision for cohabiting couples post-separation from Fineman's position is completely inconsistent with her belief that the law should protect the care-dyad regardless of relationship status. Yet for Deech this is more than adequate. This approach respects the couple's choice not to marry and provides them with 'a corner of freedom where couples may escape Family Law with all its difficulties.'⁹²⁸

Therefore, the legal framework in England and Wales demonstrates how the two extremes on the feminist spectrum would work in practice, where the marriage context is closest to Fineman's position and the cohabitation context is closest to Deech's position. Furthermore, this system reveals how appropriate it is to treat married and cohabiting couples in completely different manners. To examine the success of both approaches, this chapter uses Deech's and Fineman's stances⁹²⁹ to critique England and Wales' law of financial provision on relationship breakdown in the married/civil partner and cohabiting context. This chapter now considers the gender implications by further exploring the legal practitioners' opinions of how the system treats homemaking contributions in practice and also it draws comparisons with the empirical results from the former jurisdictional chapters.

⁹²⁶ Civil Partnership Act 2004

⁹²⁷ Under Paragraph 4(1) of Schedule 1 of the Children Act 1989, the court can consider circumstances such as the financial resources, the financial needs, obligations and resources of both the primary care-giver, the financial needs and resources of the child, any physical and mental disability of the child, the manner in which the child was being, or is expected to be, educated or trained. However, the awards made are to be for the benefit of the child, rather than for the primary care-giver (*MT v OT* [2007] EWHC 838 (Fam).)

⁹²⁸ R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 43

⁹²⁹ Appendix I and Chapter 2, section 2.2.2.4

6.2 Financial Provision on Divorce and Dissolution: Married Couples and Civil Partners

Financial provision on divorce, or ancillary relief, in England and Wales is governed by the Matrimonial Causes Act 1973 (hereafter MCA). Since the MCA's amendments in 1984,⁹³⁰ the courts' first consideration is for the welfare of the children under 18 although this is not a paramount consideration.⁹³¹ Furthermore, the courts have a duty to consider the appropriateness of a clean break in light of what the court believes to be 'just and reasonable'.⁹³² The courts therefore are unlikely to grant a clean break order if it departs from the overall requirement of fairness.⁹³³ This differs from the other jurisdictions which put a far greater emphasis on clean break and thus have a high bar in place for maintenance to be considered.⁹³⁴ Consequently, this system offers greater provision for Fineman's care-dyad in small asset cases.

Part II MCA outlines the orders that are available to the court and s25⁹³⁵ gives the courts wide discretion when making awards, with a list of factors under s25(2) which are similar to the factors considered in Australia.⁹³⁶ Yet, just as Australia lacks an overriding principle within its legislation, the s25(2) factors are to be used without any particular order; although here, the children are the courts' first consideration. This may account for England and Wales' needs-based approach which is forward-looking on the impact of contributions in comparison to Australia's retrospective approach to the parties' past contributions.⁹³⁷

Before 2000, needs⁹³⁸ were the only measure for awards. This placed a glass-ceiling on potential decisions (particularly for women in big money cases) which tended to be no more than a third of the assets.⁹³⁹ However, the landmark case of *White*⁹⁴⁰ dramatically changed this, introducing the concept of fairness as the new rationale of interpreting and applying the s25 provisions and the yardstick of equality. The decision in *White* was an attempt to remove

⁹³⁰ Matrimonial and Family Proceedings Act 1984

⁹³¹ Section 25(1) Matrimonial Causes Act 1973

⁹³² Matrimonial Causes Act 1973, s 25A(1); and Civil Partnership Act 2004 schedule 5, part 5, para 23(2).

⁹³³ See for example *S v S* [2008] EWHC 519 (Fam) [27] (Sir Mark Potter). The concept of the overall requirement of fairness is developed later at section 6.2.1

⁹³⁴ This shall be discussed below.

⁹³⁵ Appendix S

⁹³⁶ s79(4) and s75(2) FLA (Cth) 1975 Australia considerations demonstrated in Chapter 5

⁹³⁷ under ss79(4)(a) – (c) of Australia's FLA (Cth) 1976

⁹³⁸ Needs was previously called 'reasonable requirement.' This could be a very generous consideration of needs. See, for example *Duxbury v Duxbury* [1987] 1 FLR 7

⁹³⁹ Never more than £12 and 15 million of See chapter 1 for further discussion

⁹⁴⁰ *White v White* [2000] UKHL 54 at [24], [2001] 1 AC 596

the gendered discrimination that had been so prevalent in the prior approach. Lord Nicholls identified that there was now:

*...no place for discrimination between husband and wife and their respective roles...whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party.*⁹⁴¹ [605] (Lord Nicholls)

He went on to say that when assets went beyond needs, there was no reason to presume that the surplus belonged to the husband and that the judge has discretion to 'check his tentative views against the yardstick of equality of division and depart from equality only if...there was good reason for doing so.'⁹⁴² Subsequent cases affirmed this yardstick and *Charman v Charman*⁹⁴³ confirmed that the principle of fairness is to be used as a starting point. *Miller;McFarlane*⁹⁴⁴ expanded that fairness comprises of three factors: needs, compensation and (equal) sharing which this chapter examines below.

Schedule 5 of the Civil Partnership Act 2004 sets out a framework for financial provision on the dissolution of civil partnerships which is to correspond to those provisions in the MCA 1973; s21(2) of the schedule mirrors s25 of the MCA setting out the factors which must be taken into account when making a financial order on dissolution. *Lawrence v Gallagher*⁹⁴⁵ has since confirmed that the approach in *White* and *Miller;McFarlane* will be followed in this context and thus, it seems that the same assumptions in the matrimonial context will be extended to Civil Partnerships.

6.2.1 Fairness and Equal Sharing

This equal sharing principle has arguably introduced a quasi-community-of-property scheme⁹⁴⁶ similar to the approaches in New Zealand and Scotland. Both the breadwinner and homemaker are treated without discrimination and an approach which embraces equal division of matrimonial property suggests that the courts are moving towards a concept of partnership,⁹⁴⁷ where the parties are entitled to an equal division of assets. However, *Charman*⁹⁴⁸ held that equal sharing is the informal starting point unless there is good reason to depart from this,

⁹⁴¹ *White v White* [2000] UKHL 54 at [24], [2001] 1 AC 596 [605] (Lord Nicholls)

⁹⁴² *White v White* [2000] UKHL 54 at [24], [2001] 1 AC 596 [605] (Lord Nicholls)

⁹⁴³ *Charman v Charman* (No. 4) [2007] 1 FLR 1246

⁹⁴⁴ *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618

⁹⁴⁵ *Lawrence v Gallagher* [2012] EWCA Civ 394

⁹⁴⁶ S Cretney, 'Community of Property Introduced by Judicial Decision', (2003) 119 *Law Quarterly Review* 349, 349; A Barlow,

'Community of Property- the Logical Response to Miller and McFarlane?' (2007) 39 *Bracton Law Journal* 19, 22 - 23

⁹⁴⁷ L Glennon, 'Obligations between Adult Partners: Moving from Form to Function?' (2008) 22 *International Journal of Law, Policy and the Family* 22, 31 - 32

⁹⁴⁸ *Charman v Charman* (No. 4) [2007] 1 FLR 1246

such as needs.⁹⁴⁹ Therefore, the aim of the courts is to 'give each party an equal start on the road to independent living'⁹⁵⁰ by equally sharing the matrimonial assets. This is regardless of the marriage's duration⁹⁵¹ although the duration would likely affect the size of the asset pool to be divided. Thus, this principle of equality is not as strictly adhered to as it is in Scotland and New Zealand, and Lord Nicholls in *Miller;McFarlane* emphasised that the equal sharing principle was an aid rather than a rule. Consequently, the concept of partnership seems to reflect Fineman's position that provision in the Family Law context should be based on achieving 'equality of resources' rather than Deech's notion that partnership should reflect formal equality and therefore be gender-neutral.

Yet whereas the previous chapters have seen that equal division as a starting point can ignore the care-dyad and the economic consequences of care-giving, the discretionary consideration of needs serves to avoid this, and *Lambert v Lambert*⁹⁵² determined that only once these are met will the rest of the matrimonial property be divided equally. Therefore it seems that the courts acknowledge that an unequal and gendered division of roles exists, which leads to financial vulnerability on relationship breakdown. However, for Eekelaar this implicitly reinforces a social bargain; that 'the wife should perform domestic functions, and in return she should receive protection and support from her husband'⁹⁵³ and, as Deech herself argues, it therefore assumes and even promotes⁹⁵⁴ the role division of male breadwinner and female homemaker. This in turn discourages women from pursuing financial autonomy as it encourages wives to become dependent on their husbands.⁹⁵⁵ Yet, the extent of Deech's fears cannot be fully examined without considering what constitutes matrimonial property subject to equal division.

6.2.1.1 Matrimonial Property

The very definition of non-marital and marital property is itself unclear, and in *Miller*⁹⁵⁶ Lord Nicholls and Baroness Hale offered conflicting definitions. Lord Nicholls' definition was similar to the definition within Scotland; matrimonial assets consisted of the matrimonial home and everything acquired during the marriage (excluding gifts, inheritances and pre-marriage assets). Baroness Hale offered a stricter category for matrimonial assets that was similar to New Zealand's approach. Hale's definition looked at 'family assets' which requires a particular

⁹⁴⁹ *Charman v Charman* (No. 4) [2007] 1 FLR 1246 [80] (Sir Mark Potter)

⁹⁵⁰ *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618 [144] (Lady Hale)

⁹⁵¹ *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618 [16] – [17] (Lord Nicholls)

⁹⁵² *Charman v Charman* (No. 4) [2007] 1 FLR 1246 [65] (Sir Mark Potter)

⁹⁵³ J Eekelaar, 'Uncovering Social Obligations: Family Law and the Responsible System' in M MacLean (eds), *Making Law for Families* (Hart 2000) 16

⁹⁵⁴ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1141 - 1142

⁹⁵⁵ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1142

⁹⁵⁶ *Miller v Miller* [2006] 2 FCR 213

nexus between the family and the assets. Therefore, property acquired through the sole efforts of one party even throughout the relationship would be excluded. *Charman*⁹⁵⁷ preferred this latter, narrower approach, considering it to be more pragmatic and asserted that ‘unilateral’ assets (essentially non-matrimonial property) would not be subject to the sharing principle. Consequently, if the homemaker cannot prove a nexus between her contributions and the asset, then it will not be equally shared. Yet, as the analysis from previous jurisdictions has shown,⁹⁵⁸ requiring a nexus between the homemaker’s contributions and the assets seems to result in awards that are weighted heavily against the homemaking role. It is incredibly difficult to show that there is a link between the homemaking contributions and the property which causes difficulties in scenarios where a party has assumed the care-giving role or has had some degree of financial independence in order that the other party can progress in their career.⁹⁵⁹ As Herring points out, this potentially discriminates between homemakers who can and cannot afford time to help their husbands’ business⁹⁶⁰ and it appears to limit the degree by which domestic and financial contributions are considered to be equal. Subsequently, Lord Nicholls’ approach appears to be more fitting with Fineman’s belief that the aim of Family Law should be to achieve an ‘equality of resources’ at the end of a relationship.

Furthermore, there is uncertainty over how rigid the boundary between matrimonial and non-matrimonial property is. The court in *K v L* (2011) indicated that the acquisition and ‘usage’ of property may affect the classification of that asset.⁹⁶¹ In *K v L*, (a 25-year-long relationship, including marriage and cohabitation, with two children) the wife had inherited shares worth £57.4 million. The family lived modestly off the income of those shares, but the capital itself remained untouched. Consequently, the courts held that the shares were non-matrimonial property. In his judgment, Lord Justice Wilson outlined three situations where the importance of the source of the assets may diminish over time:

- (a) *Over time matrimonial property of such value has been acquired as to diminish the significance of the initial contribution by one spouse of non-matrimonial property.*
- (b) *Over time the non-matrimonial property initially contributed has been mixed with matrimonial property in circumstances in which the contributor may be said to have accepted that it should be treated as matrimonial property or in which, at any rate, the task of identifying its current value is too difficult.*
- (c) *The contributor of non-matrimonial property has chosen to invest it in the purchase of a matrimonial home which, although vested in his or her sole name, has – as in most*

⁹⁵⁷ *Charman v Charman* (No. 4) [2007] 1 FLR 1246 case facts discussed below

⁹⁵⁸ See New Zealand at sections 3.4.1 and 3.4.2, see Scotland at section 4.3.2 and also see Australia at section 5.3.2.1.(ii) and 5.4.1

⁹⁵⁹ J Miles, ‘Charman v Charman (No. 4): Making Sense Of Needs, Compensation And Equal Sharing After Miller/McFarlane’ (2008) 20(3) *Child and Family Law Quarterly* 378, 391

⁹⁶⁰ J Herring, *Family Law* (4th edn, Pearson Education 2010) 241

⁹⁶¹ *K v L (Non-Matrimonial Property: Special Contribution)* [2011] EWCA Civ 550, [2011] 2 FLR 980

*cases one would expect – come over time to be treated by the parties as a central item of matrimonial property.*⁹⁶²

These appear to be exceptions which are similar to the provision in Scotland which excludes property from equal sharing according to its 'usage'.⁹⁶³ Furthermore, it seems that the classification of non-marital property alters as the relationship lengthens⁹⁶⁴ (in a similar manner to the erosion principle in Australia).⁹⁶⁵ This is not a rigid rule and does not necessarily mean that non-marital property will be reclassified as marital property after a lengthy marriage.⁹⁶⁶ Consequently, it seems that the categories of property are not necessarily fixed although it is not possible to predict when these boundaries may move. This seems to enable a broader definition of non-matrimonial property which allows more opportunity for the courts to achieve 'equality of resources' between the spouses. From Deech's standpoint, the lack of clarity over this definition and the absence of protective functions (especially pre-*Radmacher*) that are present in New Zealand and Scotland (for example the automatic exclusion of business assets or the source of funds argument, presents a lack of protection over the financial gains of a party) may lead to overly generous awards which promote financial dependency by encouraging women to rest on their husband's wealth.⁹⁶⁷ While pre-nuptial agreements can now offer some protection, the ambiguity surrounding the definitions of unfairness where agreements may be overturned, still means that there is little opportunity to safeguard one's assets.

While difficulties exist over the definition of non-matrimonial property, there are also uncertainties over how this property is to be treated by the courts. Two schools of thought appear to have emerged from the courts. The first, favoured by the Court of Appeal in cases such as *Charman v Charman*,⁹⁶⁸ *Robson v Robson* (2010)⁹⁶⁹ and *AR v AR* (2012)⁹⁷⁰ is a non-formulaic, discretionary approach where the sharing principle is applied to all the assets and therefore all assets are also available to meet needs. Here, the courts consider all the circumstances of the case and the s25 MCA factors, and judge what is fair in light of these. However, non-matrimonial assets are to be the last of the assets used to meet needs and are a reason to depart from the equal sharing principle. The second approach favoured in cases such

⁹⁶² *K v L (Non-Matrimonial Property: Special Contribution)* [2011] EWCA Civ 550, [2011] 2 FLR 980 [18] (Lord Wilson)

⁹⁶³ See section 4.3.1 and the discussion concerning section 10(6)(d) Family Law (Scotland) Act 1985

⁹⁶⁴ Baroness Hale and Lord Nicholls in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186; *Charman v Charman* (No. 4) [2007] 1 FLR 1246.

⁹⁶⁵ See Chapter 5 at section 5.2.2.1

⁹⁶⁶ See for example *N v N* [2010] EWHC 2654 (Fam) [394] (Charles J) – after a 32 year marriage, the wife only got 32%

⁹⁶⁷ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1141 - 1142

⁹⁶⁸ *Charman v Charman* (No. 4) [2007] 1 FLR 1246

⁹⁶⁹ *Robson v Robson* [2012] EWCA Civ 1171

⁹⁷⁰ *AR v AR (Treatment of Inherited Wealth)* [2011] EWHC 2717, [2012] 1 FLR

as *Jones v Jones* (2011)⁹⁷¹ and *K v L*⁹⁷² is a two stage process, and much more formulaic. This approach separates matrimonial property from non-matrimonial property. Then, the equal sharing principle is applied to the marital property and, where this is insufficient to meet needs, the courts can redistribute the non-matrimonial assets.

The differences between these approaches seem to reflect the differences between Fineman's and Deech's positions. The approach favoured in *Robson*⁹⁷³ offers greater protection for Fineman's care-dyad. The broad discretion that the courts have to achieve a fair and just outcome with access to a larger range of assets provides a greater chance for the courts to achieve substantive equality and equality of resources between the spouses, post-separation. On the other hand, as Justice Moylan notes in *AR v AR*, the approach favoured in *Jones*⁹⁷⁴ is in danger of being too rigid and may 'unduly...fetter the exercise by the court of its discretionary powers'.⁹⁷⁵ This approach would 'risk re-imposing the ceiling identified as resulting in unfairness in *White* and *Miller and McFarlane*,⁹⁷⁶ which inevitably would be to the detriment of Fineman's care-dyad. Yet, and unsurprisingly, from Deech's position, this latter approach would be most preferable as it moves closer towards consistency and predictability.

Thus, it seems that two philosophically opposed approaches to defining and also treating non-matrimonial property exist in England and Wales which reflect (to varying degrees) Fineman and Deech's stances. While Chandler states that they are irreconcilable in their approach,⁹⁷⁷ it is not clear how far either approach will differ in outcome.⁹⁷⁸ However, the impact that the two conceptually different approaches can have on the award has been observed in the Australian jurisdiction.⁹⁷⁹ Consequently it seems undesirable in a discretionary system to have the side-by-side operation of Fineman's and Deech's approaches particularly where there is no clarity as to when or why one approach will apply rather than the other. These dual approaches may produce inconsistent and uncertain outcomes that may hinge on the individual judge who presides on the case. It is evident that greater clarity from the courts is

⁹⁷¹ *Jones v Jones* [2011] EWCA Civ 41

⁹⁷² *K v L (Non-Matrimonial Property: Special Contribution)* [2011] EWCA Civ 550, [2011] 2 FLR 980

⁹⁷³ *Robson v Robson* [20120] EWCA Civ 1171

⁹⁷⁴ *Jones v Jones* [2011] EWCA Civ 41

⁹⁷⁵ *AR v AR (Treatment of Inherited Wealth)* [2011] EWHC 2717, [2012] 1 FLR [77] (Moylan J)

⁹⁷⁶ *AR v AR (Treatment of Inherited Wealth)* [2011] EWHC 2717, [2012] 1 FLR [77] (Moylan J)

⁹⁷⁷ A Chandler, 'The Law is Now Reasonably Clear: The Courts' Approach to Non-Matrimonial Assets' (2012) 42(1) *Family Law* 163, 167

⁹⁷⁸ G Douglas, '*AR v AR (Treatment of Inherited Wealth)* [2011] EWHC 2717 (Fam)' (2012) 42(1) *Family Law* 15, 17

⁹⁷⁹ See the discussion in Chapter 5 at section 5.3.2. Here a dual approach towards valuing domestic contributions exists. The evaluative approach reflects Deech's position and the partnership approach reflects Fineman's position (to varying degrees)

both needed and desired⁹⁸⁰ and currently the Law Commission is considering the classification of property in its current project 'Matrimonial Property, Needs and Agreements'.⁹⁸¹

6.2.1.2 *Special Contributions*

Special contributions, much like Australia's special contributions doctrine,⁹⁸² are contributions that merit a departure from equality as a result of a party's special skill such as business acumen or talent. Therefore, this approach essentially evaluates contributions. Generally, the courts have been reluctant to use this doctrine for two reasons. Firstly, in *Lambert*,⁹⁸³ the court emphasised that evaluating domestic duties should be avoided due to its '*intrusion, indignity and possible embarrassment*',⁹⁸⁴ thus, recognising special contributions should be limited to exceptional circumstances. Secondly, Baroness Hale in *Miller; McFarlane*⁹⁸⁵ emphasised the difficulty in identifying a comparative outstanding contribution by the homemaker.⁹⁸⁶

Yet, despite the reluctance to examine contributions, the courts have applied this principle in certain cases where there is an 'exceptional and individual quality which deserves special treatment'.⁹⁸⁷ For example, in *Charman*⁹⁸⁸ the wife had stayed at home and raised their two children while the husband had built up a hugely successful career and an asset pool of £131 million over the course of their 28-year marriage. It was held that Mr Charman's contributions were special, justifying a departure from equality. The court granted Mrs Charman £48 million (around 36%) of the total assets. Here the courts reasoned that special contributions must result from a 'genius element' and should only vary the other spouse's award from 50% to an award in the region of 33-45%, although *K v L*⁹⁸⁹ emphasised that this percentage boundary only applied to special contributions made towards matrimonial property. However, the definition of this 'genius element' seems to be worded in a way that excludes considerations of domestic contributions and 'super women'. In practice cases where special contributions have justified a departure from equality, these have been limited to the husband's business acumen⁹⁹⁰ reflecting Baroness Hale's concerns that such an evaluation may be only applicable to the breadwinning spouse. Similarly in Australia, the special contributions doctrine has also been used in large asset cases and only to recognise the contributions of the breadwinner.

⁹⁸⁰ G Douglas 'AR v AR (Treatment of Inherited Wealth) [2011] EWHC 2717 (Fam)' (2012) 42(1) *Family Law* 15, 17

⁹⁸¹ Law Commission, *Press Release Clarifying the Law on Financial Provision for Couples when Relationships End* (The Law Commission, 6 February 2012) <http://lawcommission.justice.gov.uk/news/Press_notice_financial_provision.htm> accessed 5 May 2012

⁹⁸² See Chapter 5, section 5.3.2.1

⁹⁸³ *Lambert v Lambert* [2002] 3 FCR 673

⁹⁸⁴ *Lambert v Lambert* [2002] 3 FCR 673 [38]

⁹⁸⁵ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186

⁹⁸⁶ *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618 [27]

⁹⁸⁷ *Charman v Charman* (No. 4) [2007] 1 FLR 1246 [80] (Sir Mark Potter)

⁹⁸⁸ *Charman v Charman* (No. 4) [2007] 1 FLR 1246 [80] (Sir Mark Potter)

⁹⁸⁹ *K v L (Non-Matrimonial Property: Special Contribution)* [2011] EWCA Civ 550, [2011] 2 FLR 980

⁹⁹⁰ *Cowan v Cowan* [2001] 3 FCR 316 and *Sorrell v Sorrell* [2006] 1 FCR 62

Thus it seems that this doctrine is used to limit the broad conception of matrimonial property in both discretionary jurisdictions. Would a narrower conception of property avoid the task of evaluating contributions? From Deech's position this focus on financial contributions goes some way to protecting an individual's substantial assets. Yet, the limited use of this doctrine means that the breadwinning spouse does not have enough protection for his or her (substantial) financial assets. Consequently, it may therefore, from Deech's perspective, encourage 'gold-digging' attitudes, and yet from Fineman's perspective it ignores the societal value of care-giving activities. In fact, where each of the jurisdictions explored within this thesis have used approaches or provisions which involve valuing contributions, this has continually been to the homemaker's detriment.

6.2.2 Equal Sharing and Needs

Nevertheless, where special contributions may appear to limit the protection of Fineman's care-dyad, needs are the cornerstone of the system in England and Wales and therefore Fineman's care-dyad is placed firmly at the centre of financial provision on relationship breakdown. This forward-looking approach sets England and Wales apart from all other jurisdictions explored in this thesis. Substantive rather than formal equality therefore defines this jurisdiction, as equal sharing can be departed from on the grounds of needs,⁹⁹¹ rather than equality at the expense of needs.⁹⁹²

Yet, the courts have disagreed over how needs should be defined. In *Miller;McFarlane*⁹⁹³ Baroness Hale defined them as relationship-generated needs whereas Lord Nicholls indicated that needs should also include independent ones such as age or disability.⁹⁹⁴ In the majority of cases, this difference will be irrelevant as most separating couples only have a small pool of assets and therefore it will only ever be possible to meet basic housing needs and the needs of the children and care-giver.⁹⁹⁵ Even then, this is a marked difference from Scotland and New Zealand's approach where the homemaker in a small asset case would only receive 50% of the matrimonial property. However, in England and Wales where assets exceed these basic needs the courts can use a broader definition, and therefore they will also look at other factors such

⁹⁹¹ *Charman v Charman* (No. 4) [2007] 1 FLR 1246 confirmed that it was to meet the needs then to share the rest.

⁹⁹² This is in comparison to Scotland and New Zealand.

⁹⁹³ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186

⁹⁹⁴ At [144] and [138]

⁹⁹⁵ E Hitchings, 'Everyday Cases in the Post-White Era' (2008) 38 *Family Law* 873, 874 – 875; See *Clutton v Clutton* [1991] 1 All ER 340, [1991] 1 WLR 359, CA; *M v B (Ancillary Proceedings: Lump Sum)* [1998] 1 FCR 213, [1998] 1 FLR 53 (CA); *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186 [13] (Lord Nicholls) – most cases begin and end with needs

as the age (namely the potential earning capacity),⁹⁹⁶ health, standard of living and resources of the parties. Within this, the courts will also consider the cost of a home, as well as:

*...what budget the [parent] reasonably requires to fund...expenditure in maintaining the home and its contents and in meeting other expenditure external to the home, such as school fees, holidays, routine travel expenses, entertainment, presents etc.*⁹⁹⁷

Thus the courts, where it is possible, try to have a holistic approach to needs. This strand of fairness, therefore, allows the court to fully recognise the impact that the homemaker role has on financial independence, and it permits the court to adequately protect the financially vulnerable which has been absent in the other jurisdictions.

This approach to needs for Deech is too generous as (while she recognises some needs must be met) she believes that financial provision on relationship breakdown should be limited to where there is no state support for the spouse, and only where any financial disadvantage or need is attributable to the cohabitation.⁹⁹⁸ Perhaps the greatest cause for contention for Deech is the broad definition of a party's 'standard of living' which is designed to reduce the disparity of living between the spouses, especially where there are children.⁹⁹⁹ This is calculated through the expenditure during the marriage¹⁰⁰⁰ and alters according to the relationships' length and (most significantly) to the size of the asset pool. For example in *Miller*¹⁰⁰¹ a short marriage of two years without children, Mrs Miller gave up her high income job to become a homemaker for Mr Miller who had assets of over £30 million. The courts found that needs and economic disadvantage arising from the marriage were actually very small but that Mrs Miller was used to a high standard of living and a large amount of the wealth had been acquired during the marriage. She was accordingly awarded £5 million of her husband's total £32 million assets. Furthermore in *F v F*¹⁰⁰² the award of three houses was considered to be meeting needs and in *Preston v Preston*¹⁰⁰³ the courts determined that, on account of the wife's standard of living, the cost of housing would include 'a home in a house or flat at the top end of the market, and probably a second home in the country or abroad, together with a very high spending power.' This is an extremely generous interpretation of

⁹⁹⁶ This is emphasised when comparing couples without children with older more economically vulnerable parties; Compare *Soni v Soni* [1984] FLR 294, [1984] Fam Law 268 with *Flavell v Flavell* [1997] 1 FCR 332, [1997] 1 FLR 353, CA

⁹⁹⁷ *Re P (Child: Financial Provision)* [2003] 2 FLR 865 at [47]

⁹⁹⁸ A Diduck and F Kagnas, *Family Law, Gender and the State: Texts, Cases and Materials* (2nd edn, Hart 2006) 240

⁹⁹⁹ *Calderbank v Calderbank* [1976] Fam 93, [1975] 3 All ER 333, CA; *Delaney v Delaney* [1991] FCR 161, [1990] 2 FLR 457, CA

¹⁰⁰⁰ *Dart v Dart* (1996) 2 FLR 286, [1997] 1 FCR 21 also per Baroness Hale in *Miller v Miller*; *McFarlane v McFarlane* [2006] 2 AC 618

¹⁰⁰¹ *Miller v Miller*; *McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186

¹⁰⁰² *F v F* (Ancillary Relief: Substantial Assets) 1995 2 FLR 45

¹⁰⁰³ *Preston v Preston* [1982] Fam 17 [26], [1982] 1 All ER 41 [48], CA

needs although equally the courts can reduce the scale of the award according to the standard of living.¹⁰⁰⁴

While Mrs Miller received only one-sixth of her husband's total assets, from Deech's position the sum of £5 million seems overly-generous indeed for such a short relationship (particularly in comparison to the approaches in the other jurisdictions). This offers a huge amount of protection for the care-dyad in a way that is absent in the other jurisdictions (and in fact where there is no care-dyad such as in *Miller*). This presents a precarious position for the wealthy breadwinner particularly when there are few safeguards in place to protect big assets through the definition of matrimonial property and given the uncertainty of whether a pre-nuptial agreement will be upheld in the court post-*Radmacher*. However, in *Radmacher*¹⁰⁰⁵ the courts emphasised that there is a difference between need and 'real need'. By delineating between these two types of need, it seems that the courts may be narrowing this overly-generous approach (although it also suggests a wider conception to compensation as discussed below). Nevertheless, without the presence of safeguards for breadwinning contributions, needs remains a highly unsatisfactory consideration for Deech and even from Fineman's position it could be argued that it goes beyond safeguarding her care-dyad. Nevertheless, this approach appears to be the closest out of all the jurisdictions to satisfying Fineman's conception that this dyad should be protected.

6.2.3 Equal Sharing and Compensation

This strand of fairness, as Lord Nicholls described, '...is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage.'¹⁰⁰⁶ Compensation, therefore, attempts to rectify situations where the relationship role has greatly advantaged one party financially at the expense of the other (for example becoming the homemaker to raise children while the other is then able to pursue a career). Thus, this strand of fairness recognises that not only may formal equality not equate to equity, but also that needs may not account for the full economic impact of a career sacrifice. Therefore, this provision is concerned with future fairness by rebalancing that economic disadvantage.¹⁰⁰⁷ For example in *McFarlane v McFarlane*¹⁰⁰⁸ (a 19-year marriage) both parties had been in equally lucrative careers and Mrs McFarlane gave hers up to look after their three children. On divorce, the couple had assets worth £3 million and Mr McFarlane was earning £1

¹⁰⁰⁴ *K v L (Non-Matrimonial Property: Special Contribution)*[2011] Here, on the grounds the husband was granted £5 million of the total £59 million assets (£57 million from the wife's assets) after a 21 year marriage with three children as they had a modest standard of living of £300,000 a year

¹⁰⁰⁵ *Radmacher v Granatino* [2010] UKSC 4

¹⁰⁰⁶ *White v White* [2000] UKHL 54 at [24], [2001] 1 AC 596 [13] (Nicholls LJ)

¹⁰⁰⁷ *Miller v Miller* (2006) 2 FCR 213 [129] (Baroness Hale)

¹⁰⁰⁸ *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618

million a year. The court granted Mrs McFarlane £250,000 per annum as it recognised that if the assets were divided equally, the husband would quickly exceed his wife's wealth, whereas she had sacrificed 'what would very probably have been a lucrative and successful career.'¹⁰⁰⁹

However, this strand has (similarly to compensation provisions in other jurisdictions) been relatively unused since *Miller;McFarlane* and therefore it remains largely undeveloped. Where it has been awarded, the courts have used it to redress an economic disadvantage relating to the applicant's earning ability that has arisen as a result of his or her contributions to the family. Rather than just limiting this conception of a relationship generated disadvantage to those who may have had lucrative careers (as some of the other jurisdictions have),¹⁰¹⁰ the courts have also recognised the economic disadvantage that may arise more generally from a career break that has caused the applicant to remain out of the labour market for a prolonged period of time. In *Lauder v Lauder*,¹⁰¹¹ for example, (a marriage of 24 years with three children aged 14, 18 and 20 at the time of separation) the couple had originally settled in 1988, and the wife was now seeking to appeal a capitalised maintenance order. During that period the wife had been the primary care-giver for their youngest child while the husband had excelled in business ventures partly funded from matrimonial assets. Baron J stated that:

*...in the context of a marriage which lasted 24 years and produced three children this lady did her best after divorce and continued to spend many years caring for the younger child of the family. Despite her disability, given that she was 50 years old when the parties separated, the wife had a modest earning capacity. This was a direct result of the marriage and the parties' decision that she should be a wife and mother. This disadvantage requires proper compensation.*¹⁰¹²

Thus, the courts are able to recognise the impact that the care-giving role can have on the economic position of the care-giver in 'moderate' careers and seemingly to a greater degree than in comparison with the other jurisdictions. Furthermore, the courts are also acknowledging that often this career break arises from the decision of both parties rather than the sole decision of the care-giver as Deech tends to suppose.¹⁰¹³ This offers far greater scope for the use of the compensatory provision and therefore for protecting Fineman's care-dyad.

¹⁰⁰⁹ *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618 [140] (Baroness Hale)

¹⁰¹⁰ See New Zealand at section 3.4.2.3 and Scotland and section 4.3.2

¹⁰¹¹ *Lauder v Lauder* [2007] EWHC 1227 (Fam); [2007] 2 FLR 802 See also *S v S* [2006]

¹⁰¹² *Lauder v Lauder* [2007] EWHC 1227 (Fam); [2007] 2 FLR 802 [50] (Baron J)

¹⁰¹³ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1143

Charman also indicated that compensation could relate to a loss arising from the end of the relationship, such as pension rights.¹⁰¹⁴

Yet, for the most part, it seems that compensation is rarely used and is instead included in either a generous interpretation of needs or equal sharing. This was exemplified by Sir Mark Potter in *VB v JP*¹⁰¹⁵ where he stated that compensation was not a distinct strand, but a feature of fairness which can be fulfilled by equal sharing (in big-money cases) or an over-generous interpretation of needs (where capital assets are insufficient to meet maintenance needs). Consequently, it seems that compensation may only make a substantial difference to the award in a narrow band of cases where a generous interpretation of needs will not address compensation¹⁰¹⁶ such as *McFarlane*.¹⁰¹⁷ In fact, 'ordinary' career prospects (particularly in big money cases) are likely to have been compensated by equal division.¹⁰¹⁸ Therefore, the Law Commission argues that 'compensation' has in reality made no real difference to awards.¹⁰¹⁹ The courts' reluctance to engage with the compensation strand of fairness may be the result of the ambiguity that surrounds the term. Yet this also means that compensation's vagueness is not addressed by the courts, and its overlap with needs and equal sharing arguably complicates the role of compensation and when it is to apply. Yet, the Law Commission also observed¹⁰²⁰ that compensation 'draws attention to financial consequences that may not be obvious', namely the economic impact of the homemaking role.¹⁰²¹

The Law Commission also noted that the result of using 'compensation' to address the long-term financial impact of homemaking contributions has resulted in a narrower interpretation of needs. This can be seen in *Radmacher* where the court provided a firmer definition for compensation by narrowing need to 'real need' and expressing compensation as the 'long-term disadvantage generated by the devotion of one partner to the family and the home.'¹⁰²² This, as the Law Commission noted,¹⁰²³ may help the award focus on the actual loss born by the homemaking spouse. It is evident that the principle of compensation alongside needs offers the most generous approach towards the care-dyad out of all the jurisdictions. While the compensation provisions in the previous jurisdictions have often been restrictively applied, here there is a focus on the long-term impact that care-giving can have on the economic position of the primary care-giver.

¹⁰¹⁴ *Charman v Charman* (No. 4) [2007] 1 FLR 1246

¹⁰¹⁵ *VB v JP* [2008] 2 FCR 682 [59] (Sir Mark Potter)

¹⁰¹⁶ *VB v JP* [2008] 2 FCR 682 [59] (Sir Mark Potter)

¹⁰¹⁷ *McFarlane v McFarlane* [2006] 2 AC 618

¹⁰¹⁸ *VB v JP* [2008] 2 FCR 682 [59] (Sir Mark Potter)

¹⁰¹⁹ Law Commission, *Marital Property Agreements* (Law Com CP No 198, 2011) para 2.56

¹⁰²⁰ Law Commission, *Marital Property Agreements* (Law Com CP No 198, 2011) para 2.56

¹⁰²¹ Law Commission, *Marital Property Agreements* (Law Com CP No 198, 2011) para 2.56

¹⁰²² *Radmacher v Granatino* [2010] UKSC 4 [81]

¹⁰²³ Law Commission, *Marital Property Agreements* (Law Com CP No 198, 2011) para 2.58

Furthermore, the courts seem to have issues quantifying the loss itself as well as distinguishing it from need. While the other jurisdictions have struggled with the actual size that the alteration should be under the compensatory provisions,¹⁰²⁴ in England and Wales it seems that the courts frequently use compensation as a basis for an award without explaining how they have quantified it. Instead, compensation is vaguely referred to as being used to achieve fairness or a generous assessment of needs. For example, in *Lauder*¹⁰²⁵ Baron J felt that compensation should be added to the award however she '[did] not consider that it [was] right to seek to separate those two factors in delineating [her] figure.'¹⁰²⁶ Consequently, the actual amount that the compensatory value can alter the award is uncertain. This reluctance to develop the principle of compensation again creates further uncertainty over how this provision applies. As a result, this makes the system more complex and uncertain, potentially causing lengthy litigation and negotiation which may in turn serve to disadvantage those who are in a financially weaker position. While there is a tendency to gloss over compensation, Sir Mark Potter indicated in *VB v JP*¹⁰²⁷ that 'these complexities in relation to "compensation" may well merit closer examination and attempts at more precise quantification for the purposes of a clean break at some date in the future.'¹⁰²⁸ He continued that this principle will also require consideration in cases like *McFarlane*¹⁰²⁹ where the economic disadvantage 'went well beyond the compensation afforded by a generous interpretation of [Mrs McFarlane's] needs.'¹⁰³⁰

Miles (2008) criticised 'compensation' in England and Wales, observing that (as *Charman* indicated¹⁰³¹) compensation in this context fails to consider the respondent's position. The danger of this, Miles observes, is that rebalancing the financial positions between the two spouses may result in an award that places the applicant in a financially stronger position to the detriment of the respondent.¹⁰³² Instead, she feels that the focus of the courts should be on sharing the impact of the economic sacrifice rather than claims for future earnings and earning capacity losses.¹⁰³³ She suggests that an 'economic equality ceiling' is necessary to prevent over-generous ancillary relief awards and footnotes that this could be modelled on the approach in New Zealand where the claim can only be for half the award.¹⁰³⁴ Arguably there is

¹⁰²⁴ See New Zealand at section 3.4.2.3 and Scotland and section 4.3.2

¹⁰²⁵ *Lauder v Lauder* [2007] EWHC 1227 (Fam); [2007] 2 FLR 802

¹⁰²⁶ *Lauder v Lauder* [2007] EWHC 1227 (Fam); [2007] 2 FLR 802 [79] (Baron J)

¹⁰²⁷ *VB v JP* [2008] 2 FCR 682

¹⁰²⁸ *VB v JP* [2008] 2 FCR 682 [59] (Sir Mark Potter)

¹⁰²⁹ *McFarlane v McFarlane* [2006] 2 AC 618

¹⁰³⁰ *VB v JP* [2008] 2 FCR 682 [59] (Sir Mark Potter)

¹⁰³¹ *Charman v Charman* (No. 4) [2007] 1 FLR 1246 [72]

¹⁰³² J Miles, 'Charman v Charman (No. 4): Making Sense of Needs, Compensation and Equal Sharing after Miller/McFarlane' (2008) 20(3) *Child and Family Law Quarterly* 378, 390

¹⁰³³ J Miles, 'Charman v Charman (No. 4): Making Sense of Needs, Compensation and Equal Sharing after Miller/McFarlane' (2008) 20(3) *Child and Family Law Quarterly* 378, 391

¹⁰³⁴ J Miles, 'Charman v Charman (No. 4): Making Sense of Needs, Compensation and Equal Sharing after Miller/McFarlane' (2008) 20(3) *Child and Family Law Quarterly* 378, 390. Also see section 3.4.2.3 on s15 and economic disparity in New Zealand.

a danger that an unrestrained application of compensation could result in what Deech perceives to be overzealous awards that interfere with the financial autonomy of the breadwinner and serve to discourage women from engaging with the public sphere.

However, for Deech, as earlier chapters have discussed,¹⁰³⁵ compensation itself is an unrealistic conceptual basis as it is a free choice of the woman to remove herself from the public sphere (often to her own benefit).¹⁰³⁶ Additionally, the meshing of compensation and needs may lead to double counting and further limits the breadwinner's ability to safeguard their own assets and the high level of uncertainty here promotes Deech's contention that 'certainty about the way to split assets may be more important than total fairness.'¹⁰³⁷ Arguably, it goes too far beyond protecting the care-dyad and arguably it makes it far more beneficial to be in a homemaker/breadwinner model as there lacks a focus on rehabilitation and on couples who are dual earners.

For Fineman, the coexistence of needs and compensation seems to have avoided the limited approach that the other jurisdictions have had. Consequently, the full economic impact of the care-giving role is protected. Given that needs and equal sharing frequently catch the majority of compensatory issues, the difficulties associated with compensation are left in only a small selection of cases.

6.2.4 Potential Orders and Maintenance.

In comparison to the previous jurisdictions, maintenance has a much bigger role upon separation in England and Wales and it is considered during the course of property settlement rather than requiring a separate application. The courts have a wide selection of orders that they can make including capital orders, property orders and income orders¹⁰³⁸ which generally are made through periodical payment orders (PPO).¹⁰³⁹ PPOs can be for an unspecified amount of time, stopping at a specific date, death or remarriage. This makes maintenance far more accessible to the claiming spouse in this jurisdiction and consequently means that such orders are much more commonplace. However, the courts must consider whether a clean break is appropriate, although they will not make such an order if it would depart from the principle of fairness.¹⁰⁴⁰ Nevertheless, if the courts make a PPO they must consider limiting its length¹⁰⁴¹ and thus the courts may have consideration for the extent that a homemaker role can impact

¹⁰³⁵ See Chapters 3 (New Zealand) and 4 (Scotland)

¹⁰³⁶ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1142

¹⁰³⁷ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1143

¹⁰³⁸ Ss23 and 24 of the Matrimonial Causes Act 1973

¹⁰³⁹ S23 Matrimonial Causes Act 1973

¹⁰⁴⁰ S25A(1) Matrimonial Causes Act 1973

¹⁰⁴¹ S25(1)(a), (2) Matrimonial Causes Act 1973

on the capability to work. Generally in short childless marriages,¹⁰⁴² ‘big-money’ cases or dual earners,¹⁰⁴³ it is likely that clean break will apply.¹⁰⁴⁴ This is at the courts’ discretion and fairness will be the overriding measure here.

PPOs are not only needs-based but since *Miller;McFarlane*, they can be used for compensation too. The greater consideration of PPOs presents a number of benefits for Fineman’s care-dyad as it means awards can be altered at a later date if there is uncertainty over the recipient’s financial future¹⁰⁴⁵ or where there are young children.¹⁰⁴⁶ Consequently, the courts can take full account of the financial impact that the care-dyad may have on the economic situation post-separation especially when that is not necessarily immediately obvious, recognising that rehabilitation is not always possible. Furthermore, it offers support where assets are small and a lump sum would not cover needs or economic disparity.¹⁰⁴⁷ This, combined with an increased access to such provisions, means that the care-dyad is not as disadvantaged as in the other jurisdictions, particularly in small asset cases where often equality will not meet needs.

Yet for Deech, this specific approach encourages women to remain dependent on their ex-spouses, particularly considering that maintenance can be indefinite and that there is an overly generous interpretation of needs and compensation. She argues that without maintenance, or with a much narrower, rehabilitative approach, women will have to engage with the public sphere and find work.¹⁰⁴⁸ Maintenance, therefore, should only be for where there are young children and where the spouse is unable to work, and even then it should be rehabilitative.¹⁰⁴⁹ Certainly, greater onus should be placed on a rehabilitative function of maintenance or at least a clearer difference in the threshold between short-term and ongoing maintenance similar to the approach in Scotland (although not as restrictive, as it was clear that this severely disadvantaged Fineman’s care-dyad).¹⁰⁵⁰

6.2.5 Opting-out and Marital Agreements

¹⁰⁴² *Hobhouse v Hobhouse* [1999] 1 FLR 961

¹⁰⁴³ *Burgess v Burgess* [1996] 2 FLR 34, [1997] 1 FLR 89

¹⁰⁴⁴ J Herring, *Family Law* (4th edn, Pearson Education 2010) 223 - 224

¹⁰⁴⁵ E.g. *Whiting v Whiting* [1988] 2 FLR 189, [1988] FCR 589

¹⁰⁴⁶ *Suter v Suter-Jones* [1987] 2 FLR 232, [1987] FCR 52

¹⁰⁴⁷ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186 [39]

¹⁰⁴⁸ R Deech, ‘What’s a Woman Worth?’ (2009) 39 *Family Law* 1140, 1145

¹⁰⁴⁹ R Deech, ‘What’s a Woman Worth?’ (2009) 39 *Family Law* 1140, 1145

¹⁰⁵⁰ See the discussion at section 4.3.4

Traditionally, the courts have been reluctant to consider pre-nuptial agreements,¹⁰⁵¹ believing that they were contrary to public policy (a complete contrast to Scotland's position) as they were seen as undermining marriage, and consequently s34(1) MCA restricts parties from contracting out from the court's jurisdiction.¹⁰⁵² However, the past 15 years have demonstrated a shift within the courts to give pre-nuptial agreements greater weight¹⁰⁵³ in cases such as *S v S*¹⁰⁵⁴ and *M v M*.¹⁰⁵⁵ In *K v K*¹⁰⁵⁶ the courts held that these agreements counted as conduct that would be inequitable to disregard, and in *Crossley v Crossley*¹⁰⁵⁷ Thorpe LJ stated that these agreements could be 'not simply a peripheral factor but one of magnetic importance.'¹⁰⁵⁸

This trend towards a greater recognition of financial autonomy came to the fore in *Radmacher v Granatino*.¹⁰⁵⁹ This case involved an 11-year marriage between a German heiress and a French investment banker on a high salary. They entered a pre-nuptial agreement where Mr Granatino received no legal advice or a translation (he just had the effects explained by a German notary) which opted out of Germany's community-of-property regime declaring each party to be independent. During the marriage, Radmacher had substantial wealth transferred to her and was worth over £100 million while he had left his job to pursue a PhD. Lord Phillips argued that the reason why:

*...the court should give weight to a nuptial agreement is [because] there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future.*¹⁰⁶⁰

Thus, the Supreme Court held that the public policy rule making agreements void is:

*...obsolete and should be swept away...The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.*¹⁰⁶¹

¹⁰⁵¹ See *F v F* [1995] 2 FLR 45 and also Law Commission, *Marital Property Agreements* (Law Com CP No 198, 2011) para 2.56 Part 3

¹⁰⁵² S34(1) Matrimonial Causes Act 1973

¹⁰⁵³ *N v N* (Foreign Divorce: Financial Relief) [1997] 1 FLR 900

¹⁰⁵⁴ *S v S* [1997] 2 FLR 100 at p. 102, *M* (Prenuptial Agreement) [2002] Fam Law 177

¹⁰⁵⁵ *M v M* (Prenuptial Agreement) [2002] Fam Law 177

¹⁰⁵⁶ *K v K* (Ancillary Relief: Pre-Nuptial Agreement) [2003] 1 FLR 120

¹⁰⁵⁷ *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467

¹⁰⁵⁸ *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467 [15] (Thorpe J)

¹⁰⁵⁹ *Radmacher v Granatino* [2010] UKSC 42

¹⁰⁶⁰ *Radmacher v Granatino* [2010] UKSC 42 [78] (Phillips J)

¹⁰⁶¹ *Radmacher v Granatino* [2010] UKSC 42 [75] (Phillips J)

Still, it means that while the influence of these agreements has increased, they are not necessarily binding and thus needs and compensation may render the agreement unfair.¹⁰⁶² Yet this, as the Law Commission (2011)¹⁰⁶³ states, takes post- and pre-nuptial agreements as far forward as possible, as matrimonial agreements are at the mercy of the discretion of the courts in determining the fairness of the agreements. Yet, given the uncertainty of pre-nuptial agreements, the shape of the legal framework in England and Wales, from Deech's position, does not give enough weight to the autonomy of the parties. Yet, similarly for Fineman, the current situation also seems inadequate and, as Baroness Hale expressed in her dissenting judgment in *Radmacher*, such agreements can be used 'to deny the economically weaker spouse the provision to which she...would otherwise be entitled.' Baroness Hale was concerned that the test gave a presumption in favour of upholding agreements, placing an 'impermissible gloss' on s25's wide discretion. It could be argued that the limitation will serve to disadvantage the care-dyad by presuming that both parties are equally autonomous when making such contracts. This is evident in the earlier analysis of Scotland's approach to pre-nuptial agreements, where there lacks any formal requirements other than 'unfairness'.¹⁰⁶⁴ As a result of Scotland's approach, no safeguards exist to avoid any inequality of bargaining power and subsequently there is great scope for unfairness to follow from pre-nuptial agreements. This seems to support Hale's contention that the nature of the discretion and more formal requirement are necessary to ensure that the inequality of bargaining power as the result of being the economically weaker party is recognised by the courts. While the Law Commission is currently examining what shape the law should take,¹⁰⁶⁵ it seems that formal requirements are necessary to ensure a balance between Fineman's and Deech's perspectives.

6.2.6 Domestic Contribution on Divorce/Dissolution

It seems that in the marriage context, England and Wales has an approach which places needs (broadly defined) at its heart, thus amply protecting the care-dyad and the financially vulnerable at the end of a relationship. The mix of sharing, needs and compensation has produced an approach which strives for substantive rather than formal equality, and goes some way to recognise the full extent that care-giving has on the financial autonomy of the primary care-giver. Furthermore, the substantial use of maintenance allows for greater protection for care-dyads in smaller-asset families. However, there is a danger (particularly in big money cases) that the extensive provisions which protect the care-dyad in fact do not offer enough safeguards for breadwinners. Consequently, this approach may, as Deech fears,

¹⁰⁶² *Radmacher v Granatino* [2010] UKSC 42 [76] to [80] (Phillips J)

¹⁰⁶³ Law Commission, *Marital Property Agreements* (Law Com CP No 198, 2011) Para 1.11

¹⁰⁶⁴ See Chapter 4 Scotland at section 4.3.1

¹⁰⁶⁵ Law Commission, *Marital Property Agreements* (Law Com CP No 198, 2011)

encourage women to assume the homemaking role and thus reinforce gendered stereotypes. This potentially may be heightened because the generous interpretation of needs includes a generous definition of the standard of living which is relative to wealth. Additionally, maintenance does not have an overtly rehabilitative function and therefore may serve to perpetuate this gendered dependency. While this is appropriate in longer marriages where there are children, perhaps clearer differentiation is needed between those and shorter marriages without children. There are also some elements within this jurisdiction that require greater clarity. The definition and subsequent treatment of matrimonial property seems overly complex, and the courts seem to be developing incompatible conceptual approaches. Similarly, the role of compensation is unclear and further clarity is needed on its relationship with needs.

6.3 Financial Provision on Relationship Breakdown: Cohabiting Couples

In England and Wales, unlike the other jurisdictions, cohabiting couples have no Family Law remedy available to them on relationship breakdown and consequently must rely on Property Law and Trust Law. Therefore, unless the claimant is able to demonstrate a legal¹⁰⁶⁶ or beneficial interest in the home, they have no right to remain in the home and no security in it either.

For Deech, this approach allows cohabitants to order their lives in the private sphere without any interference from Family Law. Consequently, these couples can try alternative forms of relationships and 'not...have one form imposed on them especially one that treats women as perpetual dependents.'¹⁰⁶⁷ In fact, Deech strongly believes that any extension of marriage rights, particularly in the England and Wales context, would be a windfall to 'gold-diggers' and impose marriage rights *ex post facto* when cohabitants have chosen not to marry; they 'are well aware of the situation they have placed themselves in.'¹⁰⁶⁸ Yet, while this allows for financial autonomy, how far does Trust Law protect the Mother/Child care-dyad? The next sections shall consider the three ways through which a cohabiting couple can establish a beneficial interest: resulting trusts, constructive trusts or by way of proprietary estoppel.

6.3.1 Resulting Trusts

¹⁰⁶⁶ Through a joint tenancy or tenancy in common of either equal or unequal shares Law of Property Act 1925, section 34(1)

¹⁰⁶⁷ R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 42

¹⁰⁶⁸ R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 43

Since *Stack v Dowden*¹⁰⁶⁹ the use of resulting trusts is diminishing, particularly following the increasing usage of constructive trusts.¹⁰⁷⁰ Resulting trusts arise where one party is the legal title holder of the property and the other makes contributions to the purchase price where the property is then held in the same proportion as the financial contributions made under the trust, irrespective of the legal title. The contributions made must be financial in nature and thus cannot be indirect contributions¹⁰⁷¹ and neither can they include gifts or loans.¹⁰⁷²

6.3.2 Constructive Trusts

Constructive trusts are implied trusts which are most frequently used in relation to cohabiting couples and disputes over the family home. This trust developed in the 1970s as the use of the resulting trust was felt to be 'old-fashioned and inappropriate'¹⁰⁷³ and Lord Bridge in *Lloyds Bank v Rosset* (1991)¹⁰⁷⁴ held that it consists of first a common intention and second detrimental reliance based on this common intent.

6.3.2.1 Common Intent

Common intent can be either express or implied.¹⁰⁷⁵ Express intent looks for communicated intention specifically to share ownership;¹⁰⁷⁶ an express agreement where actual conversations on the topic have taken place;¹⁰⁷⁷ where there has been obvious recognition of the parties' interest. These can be almost throw-away remarks such as 'don't worry about the future because when we are married [the house] will be half yours anyway'¹⁰⁷⁸ and 'you need a secure home'.¹⁰⁷⁹ Express common intent has been interpreted quite generously; for example in *Grant v Edwards* and *Eves v Eves*,¹⁰⁸⁰ the courts have been prepared to treat excuses for not putting one party on the title documents as evidence of an express common intention to share. This is even though the private intention of the legal owner is that no such share should arise. Thus, relatively innocent statements can have a great deal of significance attached to them. For Deech, this is one of the pitfalls of this area leading her to warn people to 'conduct their love affairs in silence.'¹⁰⁸¹

¹⁰⁶⁹ *Stack v Dowden* (2007) UKHL 17 [66] (Lady Hale)

¹⁰⁷⁰ *Pettitt v Pettitt* [1969] 2 WLR 966; [1970] AC 777 dismissed the resulting trust as old-fashioned and inappropriate

¹⁰⁷¹ *Gissing v Gissing* [1970] 3 WLR 255; [1971] 1 AC 886 HL; *Burns v Burns* (1984) Ch 317

¹⁰⁷² For example, see *Fowkes v Pascoe* (1875) 10 Ch. App 343; *Sekhon v Alissa* [1989] 2 FLR 94

¹⁰⁷³ *Pettitt v Pettitt* [1969] 2 WLR 966; [1970] AC 777

¹⁰⁷⁴ *Lloyds Bank v Rosset* [1991] 1 AC 107

¹⁰⁷⁵ *Lloyds Bank v Rosset* [1991] 1 AC 107

¹⁰⁷⁶ *Lloyds Bank v Rosset* (1991) AC 107 (Lord Bridge)

¹⁰⁷⁷ These can include statements and 'excuses for not putting one party on the title documents' evident in *Grant v Edwards* [1986] Ch. 638 and *Eves v Eves* [1975] WLR 1338

¹⁰⁷⁸ *Hammond v Mitchell* [1992] 2 All ER 109, [1992] 1 FLR 229

¹⁰⁷⁹ *Savil v Goodall* [1993] 1 FLR 755, [1994] 1 FCR 325

¹⁰⁸⁰ *Grant v Edwards* [1986] Ch 638; *Eves v Eves* [1975] 1 WLR 1338

¹⁰⁸¹ R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 42

Alternatively, intent can be inferred where, in the absence of an express conversation, the courts instead look to the parties' actions and contributions to form the basis to infer common intent. However, the definition of contributions has been narrowly interpreted, only considering direct financial contributions to the acquisition of the house.¹⁰⁸² In *Lloyd's Bank v Rosset* the House of Lords indicated that only direct financial contributions would do when inferring a common intent and Lord Bridge stated that 'it is at least extremely doubtful whether anything less will do.'¹⁰⁸³

Consequently, domestic contributions and indirect financial contributions, and therefore Fineman's care-dyad, are excluded from the scope of conduct in this area and will not give rise to a beneficial interest. Nevertheless, there is some indication that a broader approach may be possible. In *Le Foe v Le Foe and Woolwich plc.*¹⁰⁸⁴ it was suggested that Lord Bridge had not considered previous cases such as *Gissing v Gissing*¹⁰⁸⁵ or *Burns*¹⁰⁸⁶ where in fact some indirect financial contributions could give rise to a common intent. For example, in *Burns*¹⁰⁸⁷ Lord Justice Fox stated that:

...a payment could be said to be referable to the acquisition of the house if, for example, the payer either (a) pays part of the purchase price or (b) continues regularly to the mortgage instalments or (c) pays off part of the mortgage or (d) makes a substantial financial contribution to the family expenses so as to enable mortgage instalments to be paid...

Thus, if an indirect financial payment was 'referable' back to the purchase price of the property or, for example, if one party paid the bills to free the other party up to pay the mortgage, then it could give rise to a common intent. The decision in *Le Foe*¹⁰⁸⁸ indicated that the courts could have a more holistic approach to the course of dealings as put forward in *Midland Bank v Cooke and Another* (1995) where the courts 'undertake a survey of the whole course of dealing between the parties'.¹⁰⁸⁹ This shift, Pawlowski notes, should be 'applauded in broadening the circumstances in which a wife (or cohabitee) may claim an equitable share in property.'¹⁰⁹⁰

¹⁰⁸² This can be to the mortgage as well as the purchase price *Lightfoot v Lightfoot – Brown* [2005] EWCA Civ 201 [23]

¹⁰⁸³ *Lloyds Bank v Rosset* (1991) AC 107 p 119 (Lord Bridge)

¹⁰⁸⁴ *Le Foe v Le Foe and Woolwich plc.* (2002) 1 FCR 107

¹⁰⁸⁵ *Gissing v Gissing* [1970] 3 WLR 255; [1971] 1 AC 886 HL

¹⁰⁸⁶ *Burns v Burns* (1984) Ch 317

¹⁰⁸⁷ *Burns v Burns* (1984) Ch 317

¹⁰⁸⁸ *Le Foe v Le Foe and Woolwich plc.* (2002) 1 FCR 107 (Waite LJ)

¹⁰⁸⁹ *Midland Bank v Cooke and Another* [1995] 4 All ER 562; [1995] 2 FLR 915; [1996] 1 FCR 442 CA

¹⁰⁹⁰ M Pawlowski, 'Family Home: Doing Justice to the Parties' (2006) *Family Law* 36, 40

This holistic approach was further supported by the Court of Appeal in *Oxley v Hiscock*¹⁰⁹¹ where Lord Justice Chadwick stated that the court was to have regard to the whole course of dealings which:

*...includes the arrangements which they make from time to time to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home.*¹⁰⁹²

In fact *Le Foe* has since then received support from the House of Lords in *Stack v Dowden* (2007), the first cohabitation trust case to reach the House of Lords. This concerned a 27-year cohabitation with four children. Their first home was in Ms Dowden's name until 1993 when they bought a new residence, where she contributed 65% of the purchase price and was the main breadwinner. Mr Stack had made a number of unquantifiable indirect contributions and improvements to the home and while they had both shared childcare, Stack had not undertaken to pay for food or childcare and throughout this period they had maintained separate finances. This, the courts found, meant that Stack was entitled to only 35% of a share in the family home. Ms Dowden received 65%. Here the majority took a broader view of what contributions are to be taken into account¹⁰⁹³ rather than the previous narrow direct contributions (although this is *obiter dicta* and thus unclear over exactly what the definition will be). Consequently, the courts can now *impute* an intention, considering 'what the parties must, in the light of their conduct, be taken to have intended'¹⁰⁹⁴ and potentially may be able to look at indirect contributions. Three of the Law Lords supported this contention and Lord Walker stated:

*...in my opinion the law has moved on, and your lordships should move it a little more in the same direction...*¹⁰⁹⁵

Yet the court in *Stack v Dowden* emphasised that mere payments towards household bills and outgoings, living together for a long time or having children would not establish a beneficial entitlement. Furthermore, these overlooked contributions are gendered given that evidence shows women are still largely responsible for the majority of household tasks,¹⁰⁹⁶ are more likely to not work because of looking after the family home¹⁰⁹⁷ and where women are in control of financial expenditures they are more likely to spend their income on the family and

¹⁰⁹¹ *Oxley v Hiscock* [2004] 2 FCR 295

¹⁰⁹² *Oxley v Hiscock* [2004] 2 FCR 295 [69] (Chadwick LJ)

¹⁰⁹³ *Stack v Dowden* [2007] 2 AC 432 [36] (Lord Walker)

¹⁰⁹⁴ *Stack v Dowden* [2007] 2 AC 432 [61] (Lady Hale)

¹⁰⁹⁵ *Stack v Dowden* [2007] 2 AC 432 [27] (Lord Walker)

¹⁰⁹⁶ R Breen and L Cooke, 'The Persistence of the Gendered Division of Domestic Labour' (2005) 21(1) *European Sociological Review* 4; R Crompton and C Lyonette, 'Who does the Housework? The Division of Labour within the Home' in A Park, J Curtice, K Thomson, M Philips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage Publications 2008) 52

¹⁰⁹⁷ National Statistics (2009) 'Labour market' *Social Trends* 39 (ONS 2009) 7

children.¹⁰⁹⁸ Thus, Fineman's care-dyad and the contributions that arise out of a care-giving relationship are neglected. Nevertheless, it is possible that making improvements to the property may give rise to a common intent, and *Stack v Dowden* indicated that substantial contributions may not even have to be linked to the purchase price. These improvements must be substantial; *Pettit v Pettit* emphasised that mere decoration, minor repairs, gardening, DIY jobs, etc. will not suffice. Rather, the courts are looking for the contributions to add financial value to the property. Yet, research has indicated the gendered divide between household chores with male work tending to add value to assets (building, DIY) and 'women's work' less so, being more responsible for day-to-day tasks.¹⁰⁹⁹ Thus, contributions more attributable to women are unlikely on their own to be enough to demonstrate implied common intent.

This new approach of 'imputing an intention' was supported in the Privy Council case *Abbot v Abbot*¹¹⁰⁰ and it seems has been approved again by the Supreme Court in *Jones v Kernott* (2011).¹¹⁰¹ Yet, the court in *Jones v Kernott* limited imputation to the quantification of shares. Consequently, it seems that the courts are able to engage in a process that attempts to determine 'fair' shares and that these beneficial shares can alter over time. Lady Hale and Lord Walker stated:

*...if [the court] cannot deduce exactly what shares were intended, it may have no alternative but to ask what their intentions as reasonable and just people would have been had they thought about it at the time.*¹¹⁰²

Yet, it is questionable whether this will apply in the single name context. Furthermore, 'fairness' in the cohabitation context is restricted in the convoluted Trust Law as still common intention is to be deduced objectively from the cohabitants' conduct having regard to the list of contributions set out by Baroness Hale in *Stack*.¹¹⁰³ The onus of this conduct, however, is still on financial and indirect financial contributions¹¹⁰⁴ and therefore the constructive trust continues to ignore traditionally gendered contributions to the detriment of those whose lives, for Fineman, are characterised by dependency.

¹⁰⁹⁸ J Pahl, 'Family Finances, Individualisation, Spending Patterns and Access to credit' (2000) 37 *Journal of Socio-Economics* 577, 584 - 585; S Sonnenberg, 'Household Financial Organisation and Discursive Practice: Managing Money and Identity' (2008) 37 *Journal of Socio-Economics* 533, 547

¹⁰⁹⁹ L Nock and M Brining, 'Weak Men And Disorderly Women: Divorce And The Division Of Labour' in A Dnes and R Rowthorn (eds), 'The Law and Economics of Marriage and Divorce' (Cambridge University Press 2002)

¹¹⁰⁰ *Abbott v Abbott* [2007] UKPC 53

¹¹⁰¹ *Jones v Kernott* [2011] UKSC 53

¹¹⁰² *Jones v Kernott* [2011] UKSC 53 [47] (Lord Walker and Lady Hale)

¹¹⁰³ *Jones v Kernott* [2011] UKSC 53 [51] (Lord Walker and Lady Hale)

¹¹⁰⁴ R Bailey-Harris, 'Dividing The Assets On Breakdown Of Relationships Outside Marriage: Challenges For Reformers' in R Bailey-Harris, *Dividing The Assets Of Family Breakdown* (Jordan Publishing 1998) 81, 82

For Deech, disregarding domestic contributions promotes financial independence and autonomy, recognising cohabitants' choice not to enter marriage.¹¹⁰⁵ Moreover, in this context, traditionally gendered roles are not attached to any value, cohabitation is a way that gendered practices can be avoided and a greater position for negotiation is available providing a space 'to define gender and personal identity in more liberating and non-traditional ways'¹¹⁰⁶ placing women in a better bargaining position.¹¹⁰⁷ Consequently, it avoids patriarchal dependence as it presumes and encourages financial equality between the partnership and for women to engage within the labour market because there is no recognition of domestic contributions in the private sphere.

Research has supported this position, demonstrating that cohabitants have a less gendered division of roles within their relationship and have a more equal division of housework.¹¹⁰⁸ Yet, while cohabitants tend to have a more egalitarian division of roles than married couples, this is actually attributable to life stages rather than relationship status. Crompton and Lyonette determined that age and employment status¹¹⁰⁹ were the predominant factors and other research has found a link between working hours¹¹¹⁰ and the presence of children¹¹¹¹ and the division of paid and unpaid labour rather than the relationship status.¹¹¹²

However, there are strong arguments that the approach in Trust Law fails to protect the vulnerable, and the case of *Burns*¹¹¹³ is frequently cited to demonstrate this. This case concerned a 19-year cohabitation relationship where Mrs Burns assumed the homemaker role raising her children who, at the time of the trial, had all left home. She had even changed her surname to match her partner's, redecorated the house, bought various chattels and paid for a substantial amount of the bills with a part-time job that she had in the later years of the relationship, although she did not really have any earning potential as the result of her homemaking role. Yet, in the absence of any direct financial payments which Lord Justice Fox

¹¹⁰⁵ R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 42

¹¹⁰⁶ C Hughes, *Women's Contemporary Lives: Within and Beyond the Mirror* (Routledge New York 2002) 127

¹¹⁰⁷ A Cherlin, 'Towards a New Home Socio-Economics of Union Formation' in L Waite and C Bachrach (eds), *The Ties That Bind: Perspectives On Marriage And Cohabitation* (Aldine de Gruyter 2000) 126, 131

R Crompton and C Lyonette, 'Who does the Housework? The Division of Labour within the Home' in A Park, J Curtice, K Thomson, M Philips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage Publications 2008) 52, 74 - 75; B Homann-Marriott, (2006) 'Shared Beliefs and the Union Stability of Married and Cohabiting Couples' (2006) 68(4) *Journal of Marriage and the Family* 1015, 1016

¹¹⁰⁹ R Crompton and C Lyonette, 'Who does the Housework? The Division of Labour within the Home' in A Park, J Curtice, K Thomson, M Philips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage Publications 2008) 52, 74 - 75;

¹¹¹⁰ T Greenstein, 'Husbands' Participation in Domestic Labor: Interactive Effect of Wives' and husbands' Gender Ideologies' (1996) 58 *Journal of Marriage and the Family* 585, 592; K Pyke and S Coltrane, (1996) 'Entitlement, Obligation and Gratitude in Family Work' (1996) 17(1) *Journal of Family Issues* 60

¹¹¹¹ K Dwenda, B Gjerdingen and A Center, 'First-time Parents' Postpartum Changes in Employment, Childcare, and Housework Responsibilities' (2005) 34(1) *Social Science Research* 103; T Greenstein, 'Husbands' Participation in Domestic Labor: Interactive Effect of Wives' and Husbands' Gender Ideologies' (1996) 58 *Journal of Marriage and the Family* 585; K Pyke and S Coltrane, 'Entitlement, Obligation and Gratitude in Family Work' (1996) 17(1) *Journal of Family Issues* 60

¹¹¹² R Crompton and C Lyonette, 'Who Does the Housework? The Division of Labour within the Home' in A Park, J Curtice, K Thomson, M Philips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th report* (Sage 2008) 52, 72 - 75

¹¹¹³ *Burns v Burns* (1984) Ch 317

emphasised should be referable to the purchase price or the mortgage on the property, Mrs Burns was left without a share in the home and without a remedy elsewhere so she was in effect left with nothing. Essentially, child-bearing and its effect on Mrs Burns' socio-economic status is of no value to the courts when establishing a beneficial interest and consequently a major concern is discrimination against the homemaker or primary care-giver as constructive trusts omit any consideration of 'home-making and parental contributions',¹¹¹⁴ a role predominantly held by the female.¹¹¹⁵ Thus, as Baird argues, 'it is women, usually, who are left high and dry after cohabitation'.¹¹¹⁶ Trust Law fails to recognise Fineman's care-dyad and therefore fails to protect the vulnerable by ignoring the contributions made within the family sphere.

Yet, for those who argue against the recognition of domestic contributions, to afford them a greater value in property disputes at the end of the relationship restricts personal freedom¹¹¹⁷ and for Deech especially, it 'retards the emancipation of women, degrades the relationship, [and] takes away [that] choice.'¹¹¹⁸ Consequently, to offer 'protection' for women by recognising these contributions undermines the notion of women as rational beings who can decide how to order their own lives. Instead she argues that 'there should be a corner of freedom where couples may escape Family Law with all its difficulties.'¹¹¹⁹ Furthermore, commentators have argued that in fact the Burns scenario does not portray the typical 21st century cohabiting woman¹¹²⁰ who is an economic equal of her partner. Yet Douglas'¹¹²¹ work indicated that in fact the Burns scenario still exists and again it is still the female partner who tends to be disadvantaged by the lack of recognition of her domestic contributions in Trust Law.

Consequently, while Trust Law may offer a chance to renegotiate roles for couples, the extent of that suitability may lie with couples who are young, are in short duration relationships, who are earning similar amounts of money and who do not have children. For those in longer-term relationships with children and with an inequality in bargaining power, the lack of regard for domestic contributions or indirect financial contributions leaves homemakers in a vulnerable position at the end of the relationship.

¹¹¹⁴ R Bailey-Harris, 'Law and the Unmarried Couple – Oppression or Liberation?' (1996) *Child and Family Law Quarterly* 137, 139

¹¹¹⁵ National Statistics (2009) 'Labour market' *Social Trends* 39 (ONS 2009) 53 – 90% fathers work, 67% women work.

¹¹¹⁶ Vera Baird, 13 June 2006, HC Deb vol. 447, col. 637

¹¹¹⁷ A Bottomley, K Gieve, G Moon and A Weir, *The Cohabitation Handbook: A Woman's Guide to the Law* (1st edn, Pluto 1981) 181

¹¹¹⁸ R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 43

¹¹¹⁹ R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 43

¹¹²⁰ R Probert, 'Trusts and the Modern Woman – Establishing an Interest in the Family Home' (2001) 13(3) *Child and Family Law Quarterly* 275, 283 - 286

¹¹²¹ G Douglas, J Pearce and H Woodward, *A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown* (Funded by ESRC, Cardiff Law School 2007) 138

6.3.2.2 *Detrimental Reliance*

Unless there was detrimental reliance based on the common intent, then the courts will not establish a constructive trust.¹¹²² Here, the courts look for behaviour that would not have happened except for the belief that they shared an interest. The courts have been willing to consider spending money on the property¹¹²³ or exceptional behaviour like paying the mortgage as evidence of detrimental reliance¹¹²⁴ although often this behaviour is gender stereotyping,¹¹²⁵ and the courts have not gone as far as recognising domestic contributions. What is interesting, as Gardner (2008) notes¹¹²⁶ and which can be seen in the cases of *Stack v Dowden*,¹¹²⁷ *Abbot v Abbot*¹¹²⁸ and *Jones v Kernott*¹¹²⁹ is that the courts do not mention a detrimental reliance element. Consequently, this may suggest that there is a lessening amount of importance placed on this part of the constructive trust or it may also possibly indicate that the distinction between common intention and detrimental reliance has become far more blurred.¹¹³⁰ Once again, the focus is financial or on behaviour not typically associated with the mother/child care-dyad.

6.3.2.3 *Quantification*

*Jones v Kernott*¹¹³¹ confirmed that the over-riding presumption is that equity follows the law and thus if the property is in joint names, then there is a rebuttable presumption of joint beneficial interest. Similarly if the property is in a sole name, then the presumption is that there is sole beneficial ownership.¹¹³² Where this presumption has been displaced through evidence of a different common intention, then the shares are to be divided in accordance with that common intention. However, if the shares intended cannot be ascertained, the courts are able to 'impute an intention, having regard to the whole course of dealing.'¹¹³³ To impute an intention, the courts are able to determine what their intentions would have been as reasonable and just people.¹¹³⁴ The courts therefore will consider things like financial contributions although the court recognised that other factors may be considered.¹¹³⁵

¹¹²² *Churchill v Roach* [2004] 3 FCR 744

¹¹²³ *Layton v Martin* (1986) 2 FLR 227, 237

¹¹²⁴ *Le Foe v Le Foe and Another* (2002) 1 FCR 107 indicated that direct mortgage payments could suffice.

¹¹²⁵ J Herring, *Family Law* (4th edn, Pearson Education 2010) 162. Contrast for example *Thomas v Fuller-Brown* [1988] 1 FLR 237 where the man had moved into her property and carried out DIY, it was held that this was the type of thing a man would do around the house! E.g. a woman using a sledgehammer *Eves v Eves* (1975) 1 WLR 1338

¹¹²⁶ S Gardner, 'Family Property Today' (2008) 122 *Law Quarterly Review* 422, 424

¹¹²⁷ *Stack v Dowden* [2007] UKHL 17

¹¹²⁸ *Abbott v Abbott* [2007] UKPC 53

¹¹²⁹ *Jones v Kernott* [2011] UKSC 53

¹¹³⁰ S Gardner, 'Family Property Today' (2008) 122 *Law Quarterly Review* 422, 424 - 425

¹¹³¹ *Jones v Kernott* [2011] UKSC 53

¹¹³² *Stack v Dowden* [2007] UKHL 17

¹¹³³ *Jones v Kernott* [2011] UKSC 53 [51] (Lord Walker and Lady Hale)

¹¹³⁴ *Jones v Kernott* [2011] UKSC 53 [51] (Lord Walker and Lady Hale)

¹¹³⁵ *Jones v Kernott* [2011] UKSC 53 [51] (Lord Walker and Lady Hale)

6.3.3 Proprietary Estoppel

This is rarely used,¹¹³⁶ and the courts generally accept that the requirements for proprietary estoppel and constructive trusts are very similar;¹¹³⁷ where someone has relied detrimentally on an agreement to share property this will 'give rise to a constructive trust or proprietary estoppel.'¹¹³⁸ There are four elements to the estoppel:

- 1) A believes she has or is going to be given an interest over B's property
- 2) A must act to her detriment on this
- 3) B is aware of his own interests in the property
- 4) B knew and encouraged A's belief¹¹³⁹

Proprietary estoppel is governed by conscionability or fairness and hinges on each case's facts.¹¹⁴⁰ Thus, if the cohabitant can prove an actual, unambiguous direct encouragement¹¹⁴¹ such as promising the partner that they will be 'financially secure in the future',¹¹⁴² which they have then detrimentally relied on¹¹⁴³ then the courts may protect their interest by way of proprietary estoppel. This allows the courts quite literally to stop someone's property rights if they consider it to be inequitable to the other party. Yet, once again, only financial contributions are recognised and therefore it does not afford any real protection for the financially weaker party who is primarily the homemaker or care-giver.

6.3.4 Children Act 1989, Schedule 1

While it is evident that Trust Law is extremely limited in the protection given to Fineman's care-dyad, some relief may come through the use of Schedule 1 to the Children Act 1989. This schedule permits the primary carer parent, regardless of marital status, (although rarely used by cohabitants as they do not tend to seek legal advice)¹¹⁴⁴ to apply for child support and, where granted, it can take the form of lump sums, periodical payments, or even property transfer for the benefit of the child. In its deliberations, the courts must have regard to a number of factors under s4.¹¹⁴⁵ This completely focuses on the needs of those children during minority or in education until 18. This consequently provides some maintenance for the welfare of the child, and indirectly the parent, and Deech argues that the *Burns* example of the

¹¹³⁶ *Wayling v Jones* [1995] 2 FLR 1029

¹¹³⁷ *Yaxley v Gotts* [2000] Ch 162, [1999] 2 FLR 941

¹¹³⁸ J Herring, *Family Law* (4th edn, Pearson Education 2010) 166

¹¹³⁹ J Herring, *Family Law* (4th edn, Pearson Education 2010) 164

¹¹⁴⁰ *Gillet v Holt* [2000] FCR 705

¹¹⁴¹ This cannot be inferred or imputed and should be made before witnesses.

¹¹⁴² For example stating that the partner will be 'financially secure in the future' (*Lissimore v Downing* [2003] 2 FLR 308)

¹¹⁴³ This once again cannot be through domestic contributions *Eves v Eves* [1975] 1 WLR 1338 and must be of a financial nature such as leaving a job, (*Jones v Jones* [1977] 1 WLR 438) or caring fulltime for the owner (*Campbell v Griffin* [2001] EWCA Civ 990.

¹¹⁴⁴ M Maclean, J Eekelaar, J Lewis and S Arthur, 'When Cohabiting Parents Separate – Law and Expectations' (2002) 32 *Family Law* 373, 375 – 37;6 Only 389 orders were made in 2004, see Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com CP No 179, 2006) 17

¹¹⁴⁵ See Appendix T

vulnerable homemaker is now covered by Schedule 1 of the Children Act although in fact it would not be as Mrs Burns' children were all over 18.

However, the courts, while not specifically considering the standard of living, will not disadvantage a child because of it.¹¹⁴⁶ Therefore the courts will often reflect the payee's circumstances in the award,¹¹⁴⁷ and often they will go beyond the bare minimum to include housing and schooling costs.¹¹⁴⁸ Moreover, considering that the courts cannot alter property rights, this timeframe places limitations on these orders as once the children reach majority, the care-giver is unprotected and the property reverts back in accordance with Property Law entitlements. Consequently, while there may be some indirect benefits and potentially this could act as a rehabilitative period, the child focus does not reflect the impact that dependency has on the primary care-giver and it is questionable how far Fineman would consider this to be a viable alternative to provide protection to the economically weaker spouse.

6.3.5 Cohabitation Agreements

In the absence of protection for the care-dyad from Trust Law, it is also possible for the couple to have a cohabitation contract, although there is some history of reluctance from the courts to support these contracts on grounds of public policy. Yet, the Law Commission (2007) indicated that as long as they meet the legal requirements of a contract, they seem enforceable.¹¹⁴⁹ Cohabitation agreements are Deech's preferred form of regulation between cohabiting couples. It gives the couple complete autonomy over their financial affairs without the paternalistic intervention of the law and also provides the couple with an opportunity to protect each other's interests throughout the relationship. However, just as with matrimonial agreements, there are concerns about the inequality of bargaining power that couples may have when making these contracts.

6.3.6 Domestic Contributions and Cohabitants

The approach in the cohabitation context in England and Wales is the scheme most strongly rooted in Deech's end of the spectrum as it fully recognises the autonomy of participants who choose not to marry and therefore avoids the gendered assumptions frequently seen in the marriage context. Yet, it seems that in direct contrast with the marriage context, the

¹¹⁴⁶ See *H v P (Illegitimate Child: Capital Provision)* [1993] Fam Law 515; *A v A (A Minor: Financial Provision)* [1994] 1 FLR 657

¹¹⁴⁷ *J v C (Child: Financial Provision)* [1999] 1 FLR 152

¹¹⁴⁸ *Re P (Child: Financial Provision)* [2003] EWCA Civ 837 [2003] 2 FLR 865 on which see S Gilmore, 'Re P (Child) (Financial Provision) – Shoeboxes and Comical Shopping Trips – Child Support From The Affluent To The Fabulously Rich' (2004) 16(1) *Child and Family Law Quarterly* 103

¹¹⁴⁹ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com CP No 179, 2006) para 3.19

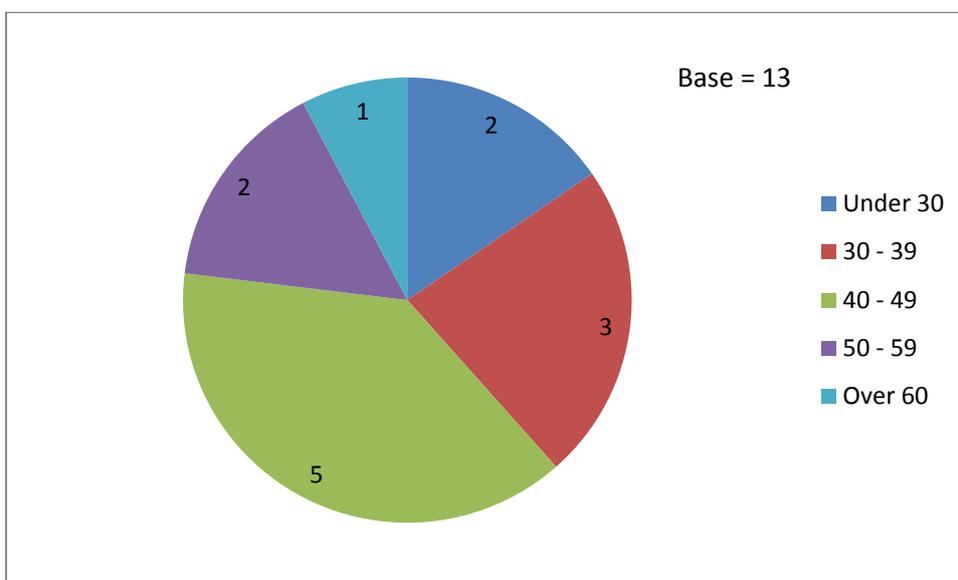
cohabitation framework in England and Wales completely ignores the care-dyad and consequently leaves them in precarious and vulnerable positions post-separation. Where there is some provision for children under the Children Act, this support is not granted with the care-giver's long-term needs in mind. While this may be appropriate where the relationship is between two financially equal parties, perhaps at similar life stages in similar professions, there is little consideration for relationships where the balance of power is not equal. Consequently, this option seems to fall short of Fineman's position.

6.4 Empirical Analysis

After considering the system of financial provision in the married and cohabiting context, the question now demanded is how do these schemes work in practice? This chapter considers the results from the interviews with lawyers practising in this jurisdiction to answer this question. Furthermore, it was possible in this section to draw direct comparisons between all of the jurisdictions that are explored within this thesis. Consequently, while primarily the focus is on the responses from England and Wales, the empirical analysis also draws out the key differences between the various jurisdictions.

6.4.1 Socio - Demographics of the Interviewees

Table 6.1: Ages of the respondents in England and Wales



Thirteen respondents took part which was a slighter smaller number than the other jurisdictions. Out of these, six were male and seven were female. The sample tended to have practised for a shorter period than the other jurisdictions, with five practising for under 11 years, four between 11 and 20 years, three between 21 and 30 years and only one above 30 years. This meant that the participants here had less experience in practice compared to the

other jurisdictions. Correspondingly, England and Wales had the youngest distribution of participants with 11 under 50 and six under 40.

6.4.2. Responses in the Marriage Context

After analysing England and Wales, the last jurisdiction explored in this thesis, it is now possible to draw comparisons between all the jurisdictions that this thesis examined. The first area of comparison relates to the lawyers' level of satisfaction in relation to the structure of each legal framework. Essentially, this explores whether the lawyers were happier having Deech's or Fineman's approach at the heart of their system. Table 6.2 (below) demonstrates, on a scale of 0 to 10 how rigid/discretionary the lawyers thought that their jurisdiction was (where 0 represented a completely rigid system and 10 signified that the system was completely discretionary).¹¹⁵⁰ Table 6.2 has collapsed this scale into 0–3, 4–6 and 7–10. It is evident that New Zealand was depicted as being the most rigid jurisdiction. This is unsurprising given that New Zealand, out of all the jurisdictions, is the closest to Deech's position due to its strong formulaic principles. What was surprising was that Australia was portrayed as having the highest level of discretion out of all the jurisdictions. It had been anticipated that England and Wales would be the most discretionary system because this jurisdiction had appeared closest to Fineman's end of the feminist spectrum. It is possible that England and Wales displayed a higher level of rigidity than Australia because there are more guidelines for the application of discretion under s25 MCA through the yardstick of equality in comparison with s79 FLA (Australia).¹¹⁵¹

However, there appears to be a visible link with how satisfied lawyers were with the level of discretion in their jurisdiction. The lawyers had to select a number on a scale of 0 – 10, where 0 indicated that the system was far too rigid, 10 indicated that their system was far too discretionary, and '5' represented that the lawyers thought the approach was about right. As Table 6.3 below demonstrates, New Zealand lawyers most commonly selected '5' suggesting that they felt that their system's framework was 'about right,' and this was followed by Scotland, England and Wales and finally by Australia. Therefore when Tables 6.2 and 6.3 are directly compared, it seems that the higher the level of discretion is within the jurisdiction, the less frequently 'about right' was selected by the respondents.

¹¹⁵⁰ Appendix A

¹¹⁵¹ Through the case of *White v White* [2000] 2 FLR 981 and *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186

Table 6.2: How rigid/discretionary the lawyers believe each jurisdiction to be

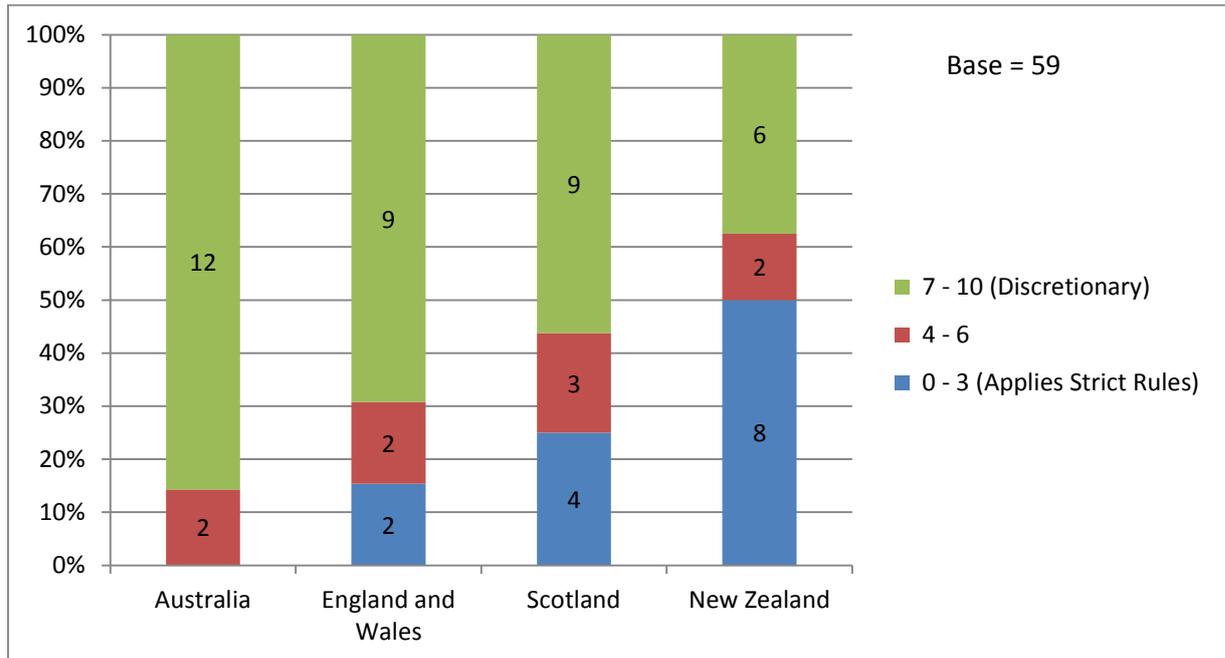
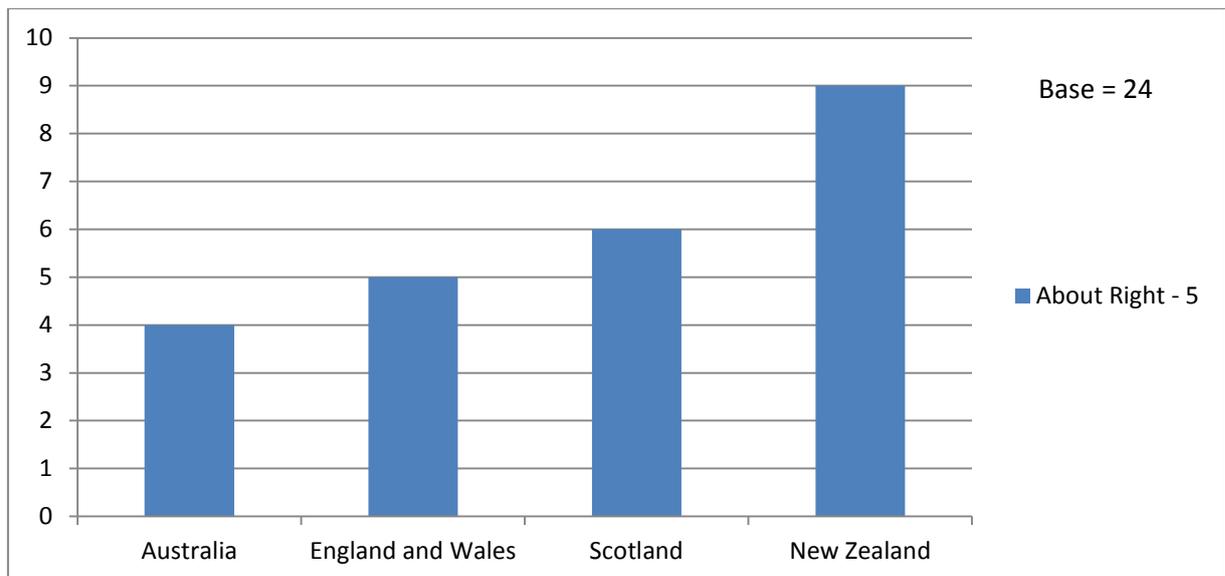


Table 6.3: Attitudes of the lawyers from each jurisdiction on how rigid/discretionary their jurisdiction is.



This visual relationship between rules and satisfaction was unsurprising given that both New Zealand and Scotland have prioritised procedural justice over individual justice. Consequently, the lawyers in those jurisdictions had emphasised the extensive procedural benefits that came with a system based on certainty and predictability, whereas Australia had indicated that there were a number of procedural problems associated with the level of discretion in that jurisdiction. England and Wales also mirrored these difficulties in the qualitative analysis as the themes demonstrate in Table 6.4.

Table 6. 4 Themes in the married context in England and Wales

Overarching Themes	Themes	Sub-Themes
Structural considerations	Limited procedural difficulty	Inconsistency Uncertainty Advising clients Complexity More litigation - limited
	Benefits of discretion	Flexibility Fairness Satisfaction
Pro-Fineman	Equality avoids evaluation	Pragmatism Private choice
	Reconceptualised partnership	Contingent formal equality Substantive, not formal equality Ongoing support Child-centric
Impact of caring	Dissatisfaction	Compensation

Some of the lawyers were concerned (as the lawyers had been in Australia) that there were some inconsistencies between the courts, and therefore that the judges' approaches were causing uncertainty. There was further indication from the lawyers in England and Wales (again reflecting the problems that had been identified in Australia) that this inconsistency made it difficult to advise clients:

...it leads to um different courts coming out with slightly different orders which make it very difficult to advise people precisely as to what they expect to get... (EWLaw3)

In Australia, the lawyers indicated that the complexity of the system and the struggle to give advice led to an increased amount of litigation. However, despite the level of complexity within England and Wales, only one lawyer from this last jurisdiction, compared to four in Australia, was concerned that the discretion was leading to more cases going to court¹¹⁵² and only two lawyers specifically wanted to be able to give their clients more advice. In actual fact, the participants stated that a high number of cases were prevented from going to court because the approach in England and Wales avoided an examination of the parties' contributions. This could indicate that in Australia, it is the examination of contributions (and the evidence problems that follow) rather than the discretionary nature of the framework which causes a greater level of litigation, or at least a greater concern about the amount of litigation. Furthermore, in England and Wales, there was no mention of an imbalance against those in a weaker bargaining position as there had been in Australia. While it does not mean

¹¹⁵² EWLaw11

that this concern is not present within the system, it demonstrates that it is not a concern that was at the forefront of the participants' minds throughout this study. The absence of this criticism in England and Wales could be related to the focus that the courts have on need at the end of the relationship and the theme of 'substantive equality' which is expanded below. The courts are fundamentally focused on meeting the needs of the parties, rather than first focusing on the past contributions that have been made in a relationship.

In fact, generally, the discourse that surrounded procedural difficulties raised in both discretionary jurisdictions was much lower in England and Wales than in Australia. This may be because of the greater level of 'rigidity' within England and Wales¹¹⁵³ (see Table 6.2) and therefore the link between 'satisfaction' and certainty, when Tables 6.2 and 6.3 are compared, seems to relate to the fact that there are less procedural problems with more certainty: Deech's approach therefore appears to be the preferred starting point.

However, just like the Australian interviewees, the respondents in England and Wales emphasised the need for discretion to cover the large amount of variance found in relationships. The consensus was that the one-size-fits-all approach was unrealistic because it would be impossible for the legislator to conceive every form of relationship dynamic:

...very rarely are two cases quite alike...without discretion, you can't achieve fairness.
(EWLaw9)

Consequently two lawyers¹¹⁵⁴ emphasised that a more rigid approach would cause more injustice:

...I think there's far more injustice in jurisdictions where you have to stick rigidly to a community-of-property for example. (EWLaw8)

To some extent, this was reflected in the empirical analysis of New Zealand and Scotland, where it was evident that one-size-did-not-fit-all. In these exceptions to equality, the criticism that both jurisdictions raised was that the courts stuck too rigidly to the equality provision and this led to unfair results, particularly for the primary care-giver.¹¹⁵⁵ While this criticism was not generally directed at either jurisdiction's framework,¹¹⁵⁶ it still demonstrates that too much rigidity produces results that lawyers in this study perceived to be unfair.

In comparison, despite the procedural problems that arose out of discretion, the lawyers from England and Wales emphasised that judges on the whole get the right outcome and nearly all

¹¹⁵³ *White v White* [2000] 2 FLR 981 introduced the principle of fairness as the new rationale for s25 interpretation

¹¹⁵⁴ EWLaw8,9

¹¹⁵⁵ See New Zealand Chapter 3, Section 3.5.2.2 and Scotland Chapter 4, Section 4.5.2.2

¹¹⁵⁶ Rather it was the judges' application of the discretion

the participants were satisfied with the approach within their jurisdiction, that it works the best for most people:

...[it] is pretty fair and reasonable. District judges decide the majority of these cases and um they know how to do it, they're doing it on a day to day basis and it does work for most people. (EWLaw12)

Therefore, the participants generally believed that the level of discretion within England and Wales was suitable and necessary to deal with the varied dimensions that exist in different relationships and nine were satisfied with the principles at work within the system. Consequently, the empirical analysis relating to the structure of England and Wales' framework may suggest that this starting point is perhaps closer to achieving a balance between Deech's and Fineman's positions than Australia. England and Wales had far less reference to procedural problems and yet the lawyers did not perceive the level of discretion to have been sacrificed for this greater level of certainty. Furthermore, the analysis in England and Wales also demonstrates the importance of having some guidelines for the application of discretion. This desire for greater guidance had been voiced in all the previous jurisdictions: in Australia, this was because the discretion was applied too unpredictably and in Scotland and New Zealand it was because the discretion had not been used in a wide enough manner. While there were also calls for greater guidance in England and Wales, these calls were not as vocalised by the lawyers as they had been in the other jurisdictions. Consequently, where there is a use of discretion, the use of guiding principles (as in England and Wales) may be the most successful way of applying that discretion effectively.

6.4.2.1 Pro-Fineman Themes

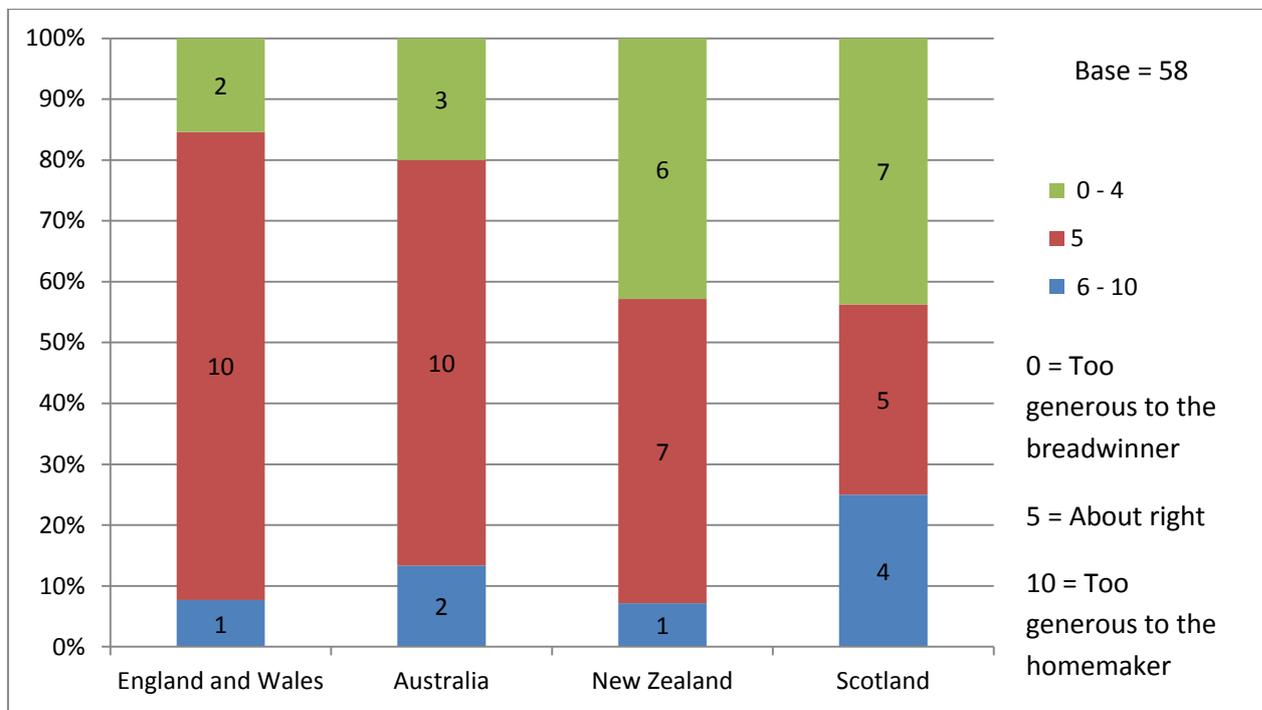
The majority of the themes that emerged from the data analysis in England and Wales were pro-Fineman (as the themes in Table 6.4 above demonstrate) and more so than the previous jurisdictions. Generally, the lawyers were in favour of equal treatment between the homemaker and breadwinner. Nine lawyers thought that the breadwinner and homemaker contributions were treated equally and ten thought that this approach was about right, which was as high as Australia and much higher than Scotland and New Zealand. In fact as Table 6.5 (below) shows, England and Wales had the highest percentage of those who thought it was about right ('5').¹¹⁵⁷ From the qualitative analysis, most of the lawyers thought that treating contributions equally was fair:

...Well, it simply seems to me right to treat them both the same whatever contribution both has made. (EWLaw7)

¹¹⁵⁷ 0 – 4 too protective towards the breadwinner, '5' about right, 6 – 10 too protective of the homemaker.

However, the lawyers seemed to be happy with ‘equality’ between homemaker and breadwinner because ‘equality avoids evaluation’. There were two sub-themes that developed out of the data which justified the lawyers’ position for preferring an approach which did not value the parties’ contributions: ‘pragmatism’ and ‘private choice’.

Table 6.5: Homemaker/breadwinner: attitudes towards how each jurisdiction balances domestic and financial contributions.



On a pragmatic level, the respondents in England and Wales spoke of similar benefits which arose from avoiding the valuation of contributions as had been expressed by the interviewees in the previous jurisdictions. Some of the lawyers stated that it helped avoid evidence issues:

Not many people keep years and years and years’ worth of bank statements, receipts, uh invoices, uh whatever else there is so there are very real questions, this doesn’t crock up in the married context... (EWLaw13)

Furthermore, evaluation was seen to essentially antagonise the relationship between former spouses, encouraging them to score points against one another. Not evaluating contributions prevents the parties from undervaluing each other’s roles and overvaluing their own roles. In fact, the lawyers generally believed that it was impossible to attribute a value to domestic contributions and therefore equality avoids judging contributions, and subsequently prevents unnecessary litigation. Consequently, when the respondents discussed whether additional contributions should be valued in a dual earner relationship model (where one party was predominantly responsible for the majority of homemaking contributions) the view was that it was unfeasible to value domestic contributions:

...it's easier for the court to try and avoid quantifying the value of the parties' interests and just say that they're always equal. So I don't think that it adequately reflects what that person is putting into the relationship, but I understand why it's never going to change because it's just too hard for it to be quantified in anyway. (EWLaw2)

The other sub-theme related to avoiding the evaluation of contributions was 'private choice'. Here, England and Wales was quite different from the other jurisdictions. The data from the previous three systems had revealed 'pragmatism' and 'partnership' themes as the reasons for such an overwhelming preference for equality. However, in England and Wales, there was an absence of 'partnership' dialogue in the discussions of equality. Rather, the focus was on choice; that it was either the individual's choice within that relationship to make additional contributions or to become the primary care-giver:

...it would be unfair to the other party because maybe that person chooses to do that extra, you know, and the other person wouldn't have realised that they'd get a better settlement for that. (EWLaw10)

...people make arrangements during their marriage and they should live with those arrangements when they separate. (EWLaw3)

The lawyers were demonstrating, to some extent, Deech's position that an individual chooses to take on that extra burden around the household. Furthermore, the lawyers did not view formal equality as an entitlement. Consequently, some of the lawyers felt that the way in which domestic contributions were valued hinged on the length of the relationship. Therefore, those in shorter marriages were not entitled to equal treatment between homemaker and breadwinner. Instead it seemed that the participants wanted to see the spouses return to the positions that they were in prior to the marriage:

...The longer the relationship, I think, the more important the homemaker should be given more protection than they are. But if it's a short relationship then I don't really see that that's merited. (EWLaw12)

Consequently, in England and Wales there was little discussion of partnership and entitlement. This appeared most likely due to a reconceptualised notion of partnership. In the previous jurisdictions, the respondents indicated that formal equality between the breadwinner and homemaker's roles should flow from the partnership as this was an entitlement. In England and Wales, it seems that the lawyers interpreted equality not to be formal equality, but rather that it referred to substantive equality between the homemaker and breadwinner and thus the courts should attempt to rebalance the 'impact of caring':

...the homemaker can't continue with the dual earnings position because they have to restrict their hours because they're caring for children, then that would be reflected in the settlement or at least should be. (EWLaw12)

Consequently, the themes that emerged were very protective towards Fineman's care-dyad and most of the respondents indicated that there should be a difference where children are present. Furthermore, the respondents recognised that clean break was not always possible particularly in relationships where there was a higher degree of dependency, namely homemaker/breadwinner relationship models, longer relationships or relationships with children (particularly younger children). It was in the discussion of spousal support that, interestingly, the lawyers raised the concept of partnership; protecting the financially vulnerable was a necessary duty:

...it seems to me that in principle if you recognise marriage as an obligation for life, then you have to um recognise the possibility that the financial dependency will continue if it's unable to be broken. (EWLaw7)

This was extremely different from the empirical analysis within the other jurisdictions. The other jurisdictions had all indicated that in similar situations, particularly where there were children, maintenance would be necessary. Yet, this had been qualified with the perception that this maintenance should only have a rehabilitative function: the aim was to make the primary care-giver self-sufficient. However, in England and Wales, there was no mention of rehabilitative maintenance by the respondents. Rather, there was the underlying perception that the financially stronger spouse had a responsibility to support the care-dyad in the long-term. Consequently, this suggests that the lawyers from England and Wales have a reconceptualised concept of partnership in comparison to the other jurisdictions, where partnership equates substantive, not formal, equality. The lack of formal equality or entitlement from within the data perhaps justifies why the lawyers thought that short marriages should return to the position that they were in before they were married.

On a scale of 0 – 10, where 0 was agree and 10 was disagree, the interviewees were asked how far they agreed with the statement that their jurisdiction does not protect those who are financially dependent on their partners. It is evident in Table 6.6 that England and Wales had the highest percentage of those who disagreed with this statement, and Scotland had the highest number of those who agreed with this statement. Additionally, the lawyers were asked how far they agreed that their jurisdiction should not protect those who are financially dependent on their partners (Table 6.7). All the lawyers' responses for this second question demonstrated that they wanted a higher level of protection for the financially dependent post-separation. Scotland's shift was most dramatic, demonstrating that the lawyers felt more protection was needed.

Consequently, it seems that the lawyers from England and Wales aligned far more with Fineman’s position. This is because a far less dramatic shift towards protecting the financially dependent was needed in comparison to the other jurisdictions.

Table 6.6 How far do the lawyers agree that their own jurisdiction does ‘not protect’ those who are financially dependent on their partners?

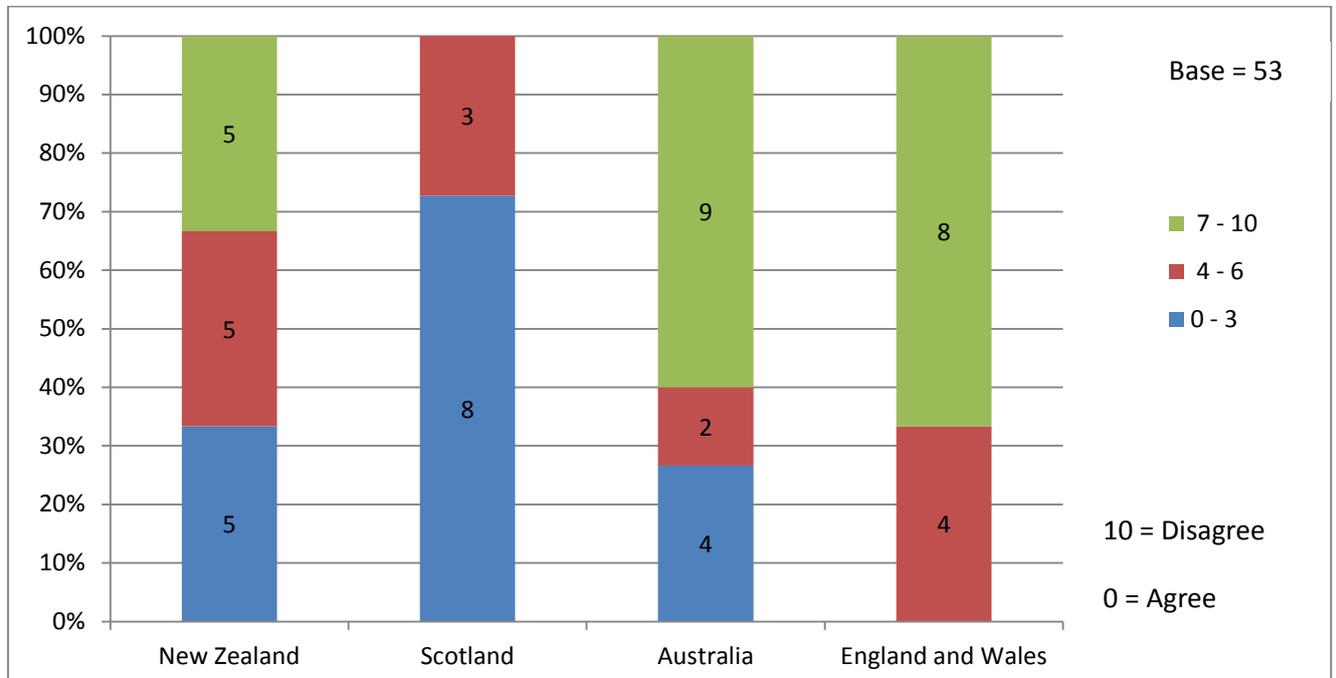
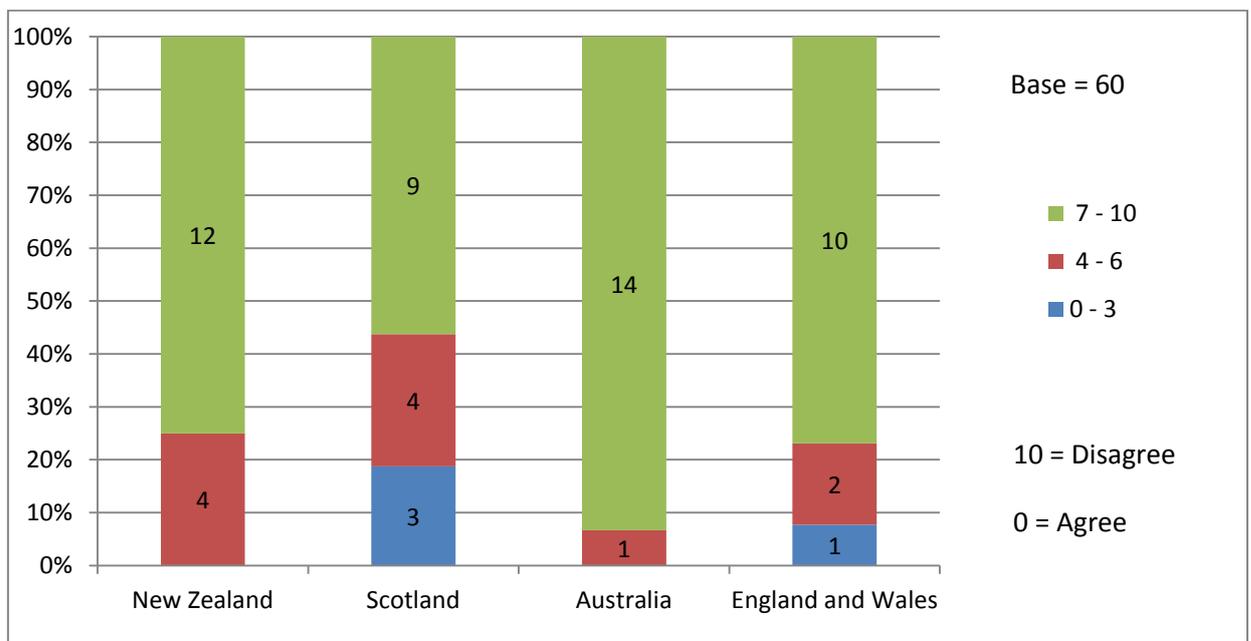


Table 6.7 How far do the lawyers agree that their own jurisdiction should ‘not protect’ those who are financially dependent on their partners?



In fact, the data from England and Wales' system indicates that it was the most child-centric jurisdiction of all and thus had Fineman's care-dyad closer to its heart. Much like Australia, there were varying approaches when ordering the principles listed in Schedule B¹¹⁵⁸ and the lawyers also listed 'child's welfare' and needs as most important, followed by fairness. Therefore, both Australia and England were child-centric with Fineman's discretionary principles ranked at the top of the list. Interestingly, all the female lawyers in England and Wales bar one placed child's welfare as the most important consideration of the courts, whereas most male participants placed fairness at the top (see Table 6.8 below). In comparison, 'child's welfare' in Scotland was ranked at 7th and in New Zealand, it was last. Yet, while equal sharing, needs and compensation have been viewed in England and Wales as being the three strands of fairness, compensation was second to last in its average score, indicating that in actual fact it is not as prevalent, perhaps due to the majority of cases involving low assets. In fact, this was the lowest ranking of compensation out of all the jurisdictions demonstrating that even though it is an exception to equal sharing, in practice it is seldom used.

Table 6.8: Order of principles ranked by importance

Ranking by Average Score	Principle	Number of Times the Principle was Omitted from the List
1	Child's Welfare	0
2	Needs	0
3	Fairness	0
4	Equal Sharing	0
5	Economic Burden of Caring	4
6	Clean Break	1
7	Retention of Property Interests	4
8	Compensation	1
9	Reward for Past Contributions	3

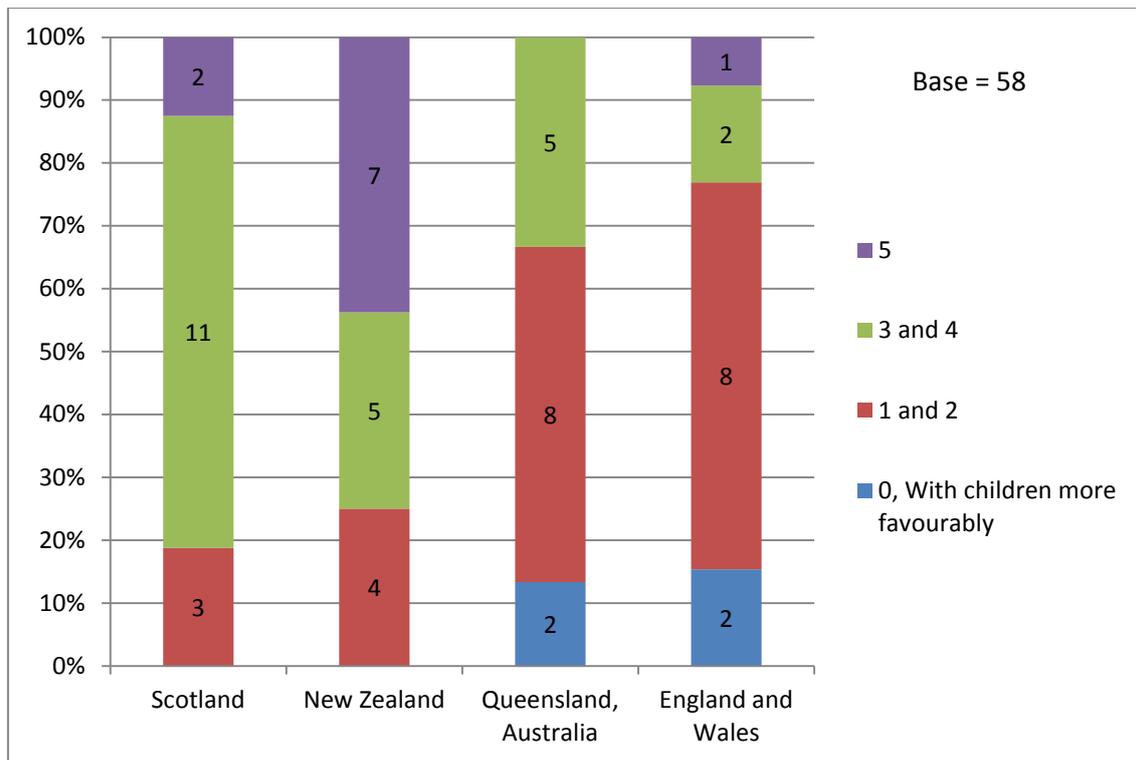
England and Wales' child-centric approach was reflected in Table 6.9 and 6.10 below. Lawyers were asked to select a number on a scale of 0–10 to indicate whether having children made a difference to the way that domestic contributions are valued, where 0 signified that these contributions should be valued more favourably with children and 10 denoted that they should be valued more favourably without children. Five indicated that these contributions should be valued the same for couples with and without children and none of the lawyers selected a number above 5. As Table 6.9 demonstrates, lawyers from Australia and England and Wales

¹¹⁵⁸ See Appendix A for the principles

felt most strongly (and closely followed by Scotland), that where there were children, homemaking contributions should be treated more preferentially. Lawyers from New Zealand indicated that having children would not necessarily make a difference.

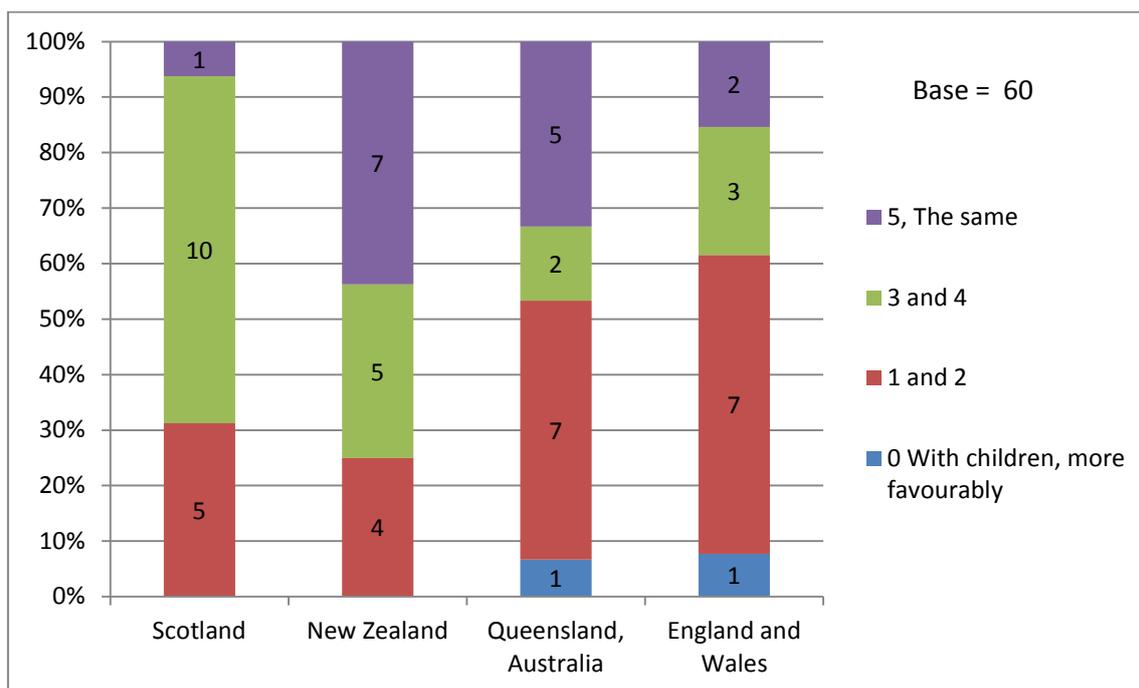
The results of whether the lawyers thought that children should make a difference outlined in Table 6.10 had a similar distribution to Table 6.9. However, more interviewees from Australia indicated that couples with and without children should be treated in the same manner, thus it seems that the lawyers in England and Wales were the most child-centric out of all the jurisdictions. Interestingly, despite Scotland and New Zealand seemingly more Deech-centric, the results were hugely different. Most Scottish lawyers thought that children should make a difference whereas most interviewees from New Zealand thought that those with and without children should be treated the same.

Table 6.9 Children v no children: How domestic contributions are valued across all four jurisdictions



The most prevalent reason for a child-centric approach in England and Wales was attributed to need, or to the actual cost of child-rearing; some participants felt that the primary care-giving role had a detrimental impact on the child-carer's career and therefore the individual's ability to be autonomous.

Table 6.10 Children v no children: How domestic contributions should be valued across all four jurisdictions



6.4.2.2 Impact of caring

However, despite the theme of ‘substantive equality’ and the apparently more child-centric approach of the lawyers in England and Wales, the participants demonstrated some dissatisfaction with the way that the courts dealt with the impact of caring. Consequently, as Table 6.8 displayed above, compensation was the principle ranked the lowest, despite it being one of the three strands of fairness within the English system. Yet the lawyers indicated that quantifying loss for compensation was in actual fact unfeasible (as had been identified in New Zealand):

I don’t think it would fully rebalance future disadvantages, because no one has a crystal ball... (EWLaw6)

This seemed to be linked to the accusation that the judges only paid lip service to the compensatory provision:

...the courts have put the lid back on that box [compensation] so unless in exceptional cases and I haven’t had one yet, it doesn’t recognise it at all. It pays lip service to it but the district judges in my experience have shied completely away from it”. (EWLaw9)

Table 6.12 also shows that the English lawyers were the least satisfied out of all the jurisdictions. Australia (closely followed by Scotland) seems most content with the way that dual-earner couples are treated. Thus, there seems to be a trend that the more recognition is given to additional contributions, the more satisfied the lawyers are. Yet, the lawyers in

England and Wales are not as content with this outcome and it seems that a greater recognition of these additional contributions is desired.

Out of all the jurisdictions, the lawyers in this jurisdiction gave the lowest score when asked how far their jurisdiction treats the additional domestic contribution in dual earner couples as demonstrated in Table 6.11. None of the lawyers indicated that the system fully rebalances past, present and future disadvantages (as in New Zealand). Twelve indicated that the additional contribution was disregarded. The frequency with which the English lawyers selected 0–3 was surprising given that this was even more frequent than Scotland and New Zealand. A similar trend was identified where there was a relationship model where one party worked full-time and the other worked part-time while carrying out the majority of the homemaker/care-giving contributions.

Table 6.11: How far each jurisdiction treats the additional domestic contribution in dual earner couples

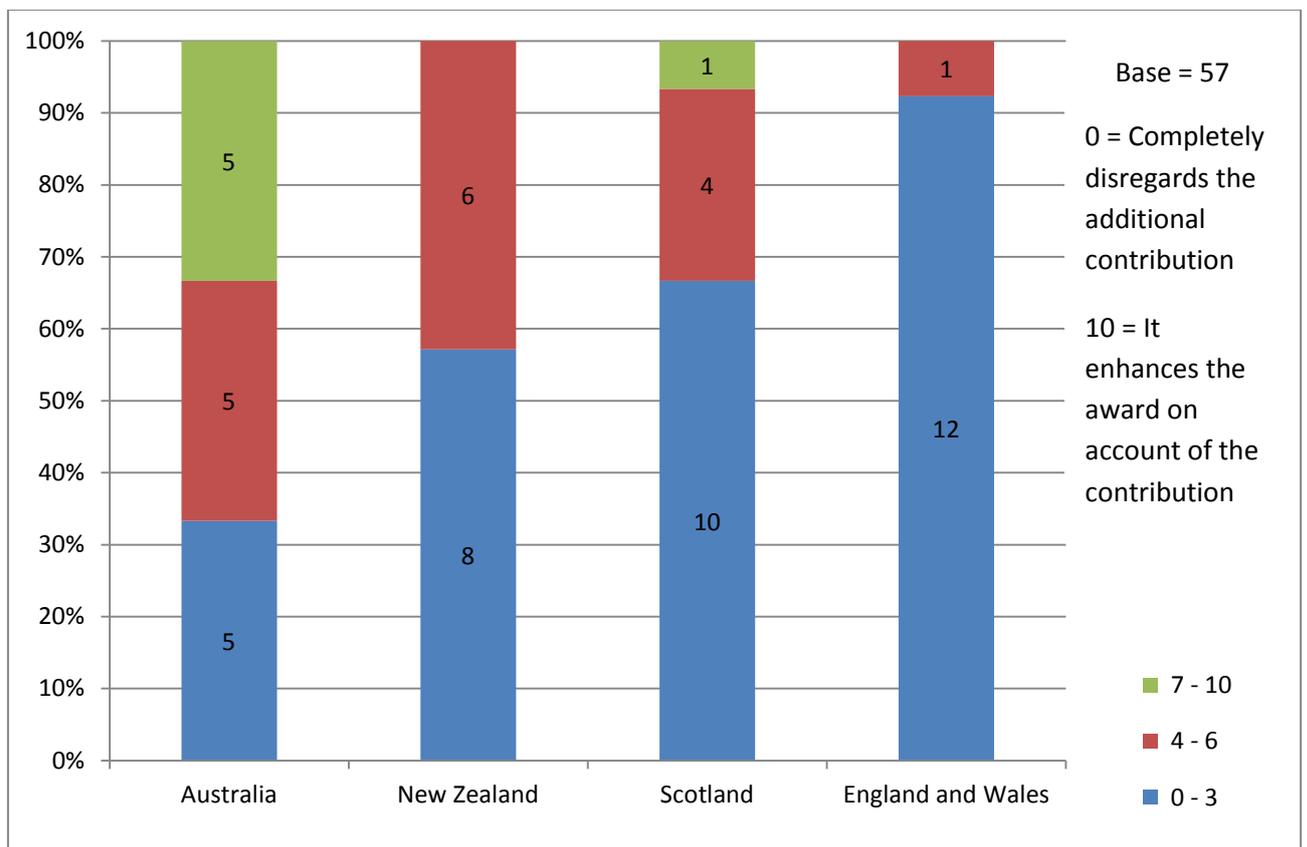
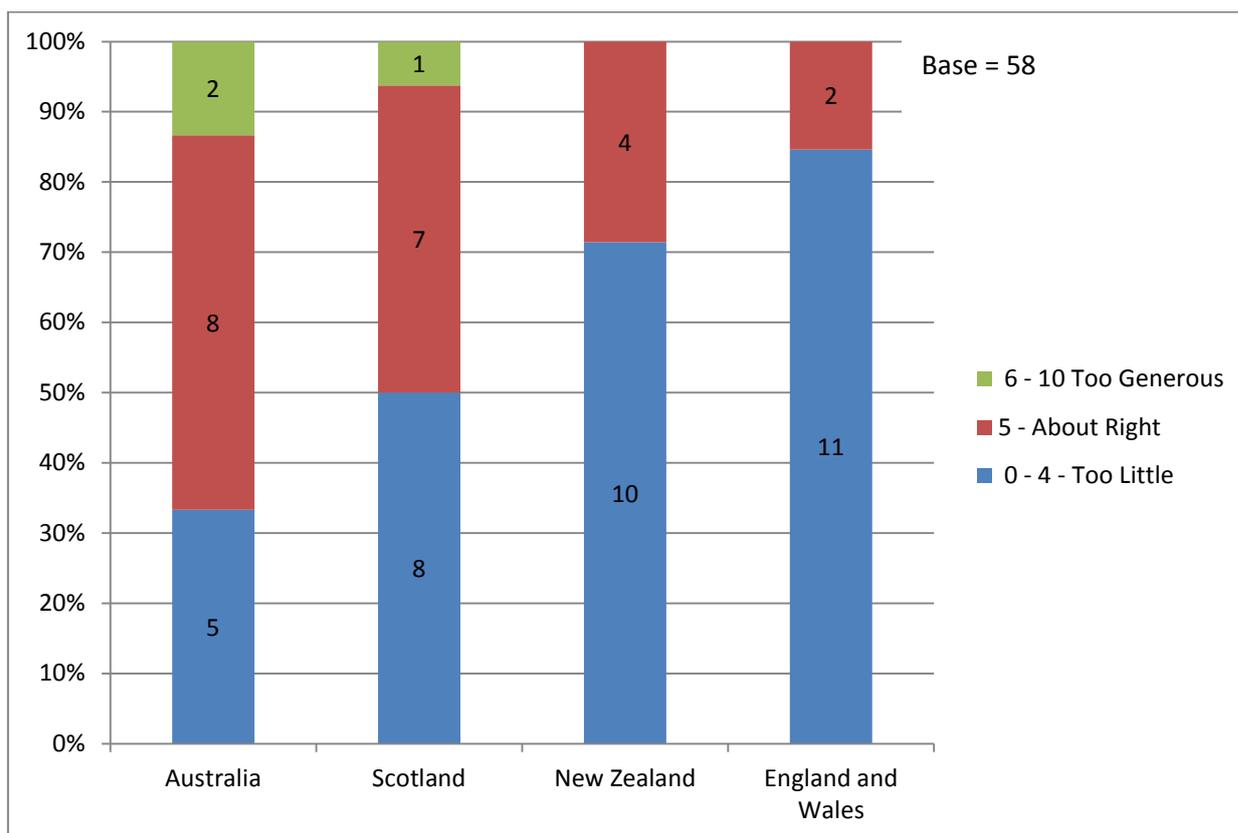


Table 6.12: Lawyers' attitudes towards how their jurisdiction treats the additional domestic contribution in dual earner couples



Again, out of all the jurisdictions, as demonstrated in Table 6.13 below, England and Wales had the highest number of respondents between 0–3,¹¹⁵⁹ when asked how the law compensated for any relationship generated disadvantage that arose in a full-time/part-time relationship model (where the part-time earner had made a career sacrifice in the interests of the relationship). Thus it seems that relationship-generated disadvantage is not considered as much as the other jurisdictions. However, the differences between the other jurisdictions were not as extensive as they had been in Table 6.11. Yet, when the respondents were asked how satisfied they were with this approach, England and Wales had by far the highest number of those who selected answers under five and the lowest number of those who thought that it was about right. It seems that, out of all the jurisdictions, lawyers from England and Wales felt their regime was the least generous, with Scotland being the most overly-generous. This was despite the fact that Table 6.13 had indicated that the lawyers throughout all the jurisdictions had similarly ranked how far each jurisdiction recognised any relationship generated disadvantage.

¹¹⁵⁹ 0 - disregards it completely, 10 – fully rebalances any past, present or future disadvantages

Table 6.13: Fulltime/part-time: how each jurisdiction recognises relationship-generated disadvantage

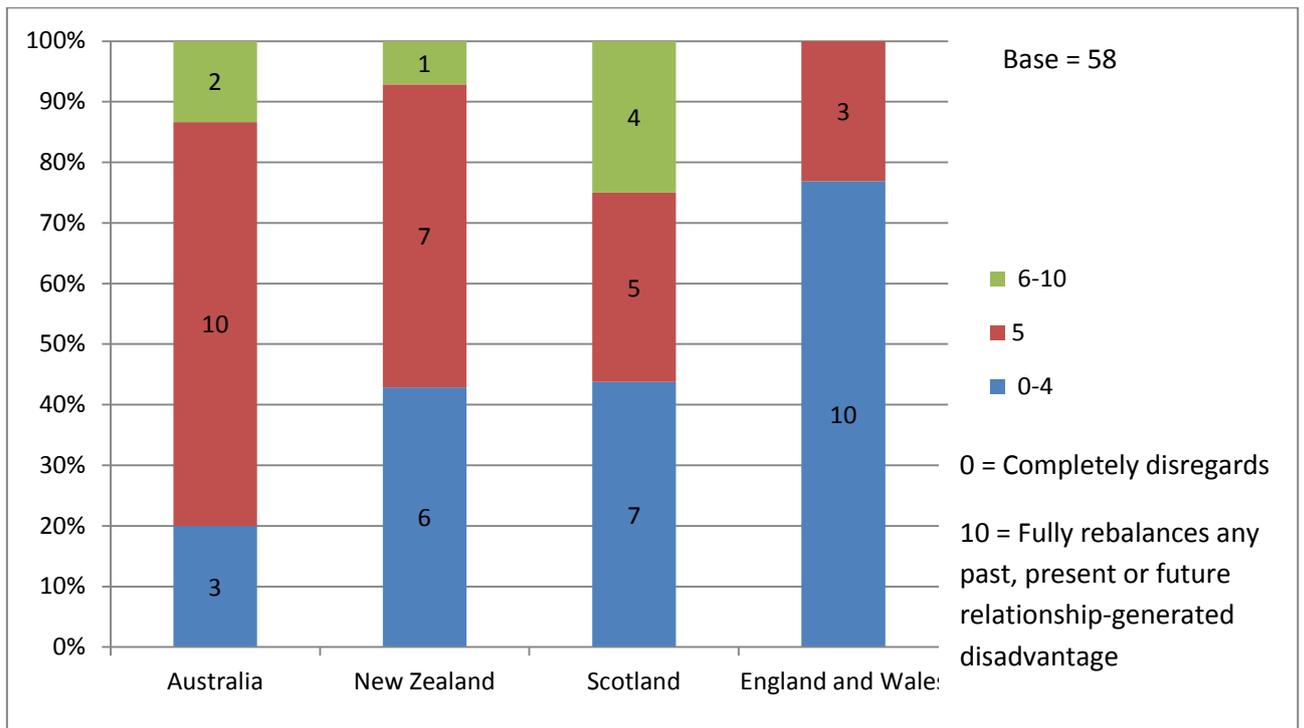
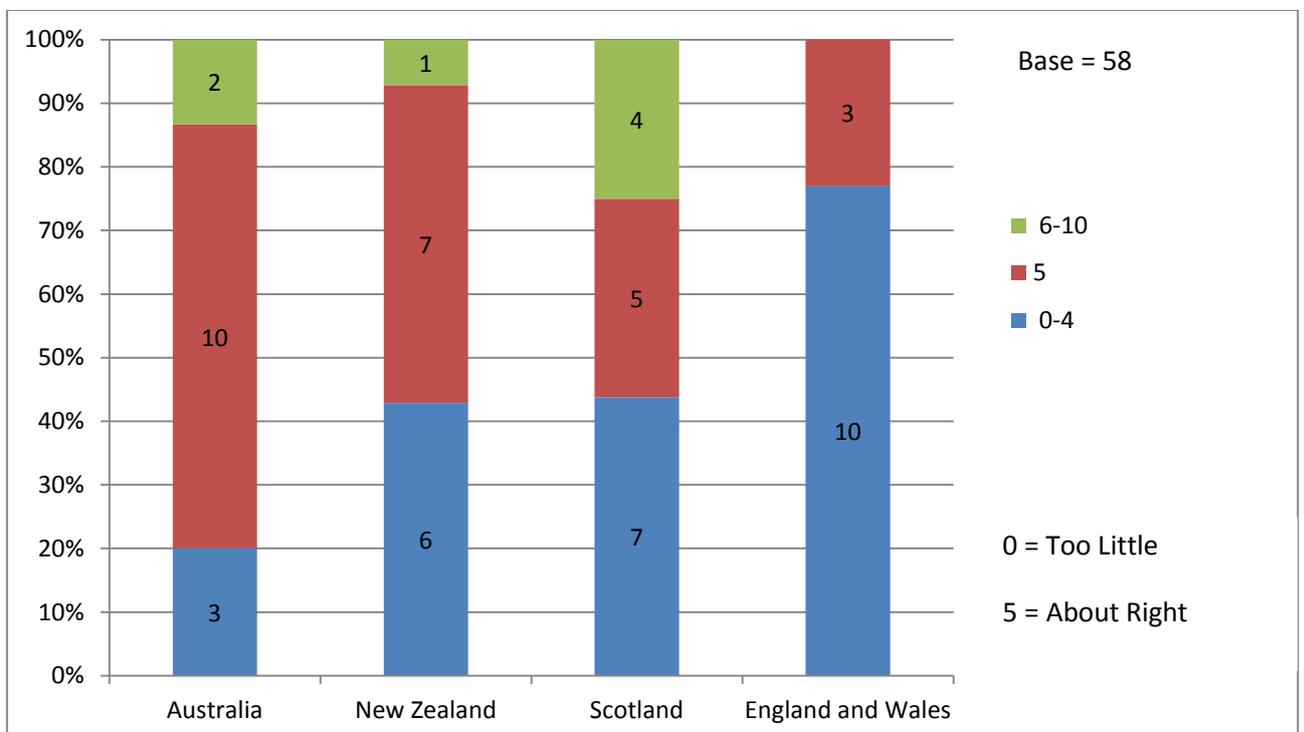


Table 6.14: Fulltime/part-time: lawyers' attitudes towards how each jurisdiction recognises relationship-generated disadvantage



When asked to expand on their answers, the lawyers in England and Wales who felt the current approach was too limited towards the primary care-giver indicated that this was

because the judiciary does not sufficiently assess compensation; the courts only address it superficially:

...the courts have put the lid back on that box so unless in exceptional cases and I haven't had one yet, it doesn't recognise it at all. It pays lip service to it but the district judges in my experience have shied completely away from it. (EWLaw9)

Furthermore, this disadvantage was felt to be gendered. For some relationship generated disadvantage was not rebalanced and EWLaw11 also thought this was true for small asset pools:

If there's more money than is required to meet the parties' needs then I think the homemaker/breadwinner result, it tends towards fairness. In limited money cases then very often the person left with the children will in the long-term fair far worse. (EWLaw11)

For two lawyers,¹¹⁶⁰ the courts were doing the best that they could do; it would never be possible to be able to account for all future needs and EWLaw2 felt that the courts' difficulty in rebalancing these disadvantages was largely due to the provisions' infancy and thus they may not currently be as satisfactory as they could be, which suggests that the full extent of the provision remains to be seen:

I think that [there's been] a recent movement towards the relationship generated disadvantage type claim, but I think it's...in its infancy so I don't think it's gone as far as it could yet. (EWLaw2)

However, given the higher satisfaction rates in the other jurisdictions (even in New Zealand with its very hard-line approach), perhaps a greater level of attention can be given to these contributions. Yet, it is possible that the lower level of satisfaction from the lawyers in England and Wales might come from the focus of the jurisdiction: it is forward looking (at needs and also substantive equality) whereas Australia is more retrospective and Scotland and New Zealand focus on the present (entitlement and equality from the assets). Therefore perhaps the lawyers in England and Wales have a greater expectation that the scheme should rebalance the needs of the parties whereas in the other jurisdictions similar approaches are considered to be a greater step to meeting the needs than in an already needs-based framework.

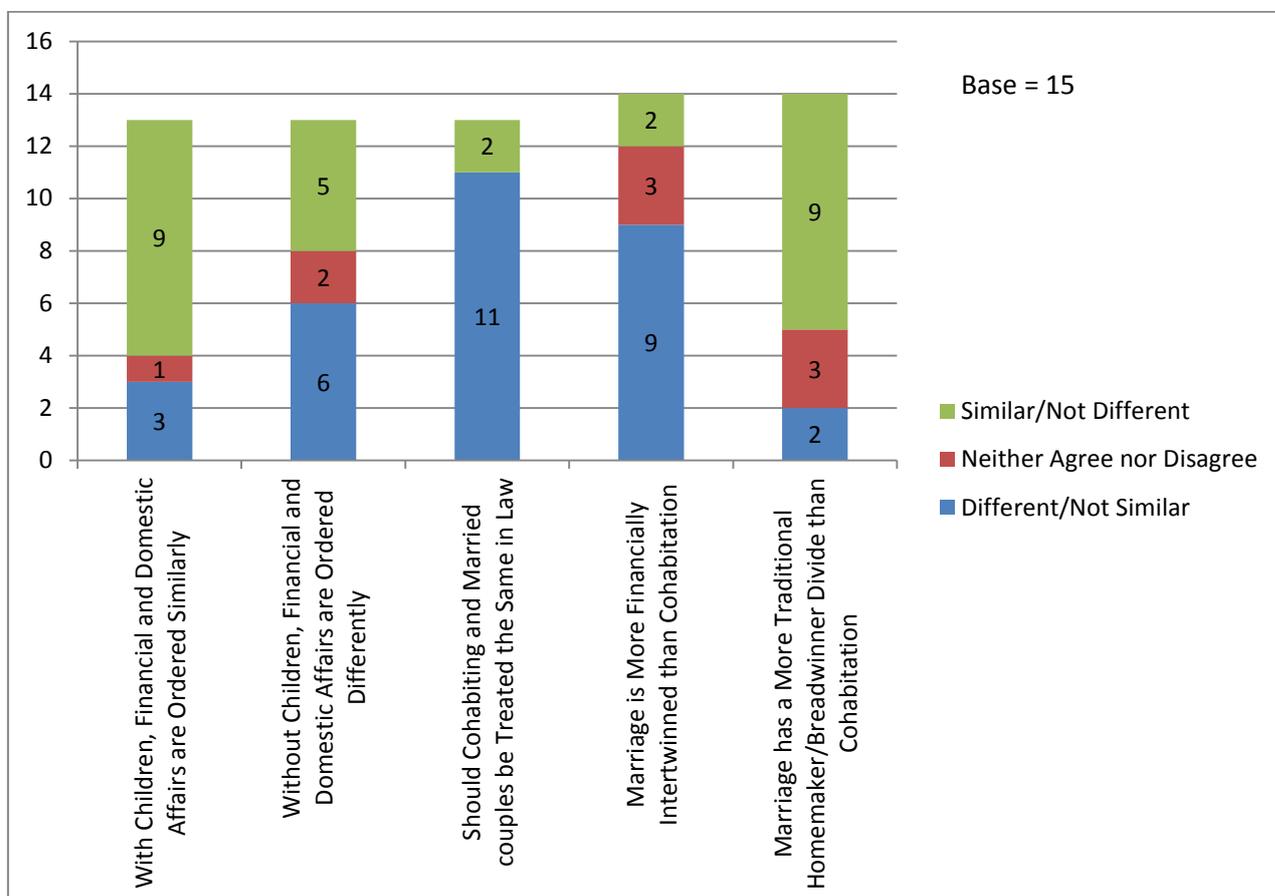
6.4.3 Responses in the Cohabitation Context

Just as in Scotland, the majority of the themes raised in this section of analysis concerned whether cohabitation should be treated differently from married couples. Similarly to

¹¹⁶⁰ EWLaw5,6

Scotland, most respondents from England and Wales felt that cohabiting and married couples were different and 11 (as shown in Table 6.15) felt that they should be treated differently too.

Table 6.15 How domestic contributions are valued in cohabiting couples compared to married couples in England and Wales



Furthermore, as Table 6.15 demonstrates, six agreed that married couples without children organise their financial and domestic affairs differently from cohabiting couples without children, although nine respondents disagreed with the statement that marital unions organise their affairs more traditionally than cohabiting couples. Yet, given that nine also agreed that married couples were more financially intertwined than cohabiting couples, it seems that perhaps the difference between these two relationship styles is not being attributed to the division of household responsibilities, but rather the financial enmeshing between the couples. However, where there are children, the consensus was that the relationships are similar (nine agreed). This reflected the distribution in Scotland¹¹⁶¹ although fewer Scottish respondents agreed that all relationships with children were similar regardless of relationship style in comparison to England and Wales.

¹¹⁶¹ See Table 4.18

Table 6.16 Themes in the cohabitation context in England and Wales

Themes	Sub-Themes
The scheme	Inadequate
Different from marriage	Choice Commitment
Similar to marriage	Function Children Length
Future Reform	Uncertainty Theory and practice

The themes from the qualitative analysis (outlined in Table 6.16) reflected these quantitative observations and the interviewees suggested (to a greater degree than the Scottish participants) that relationship function may be a key factor in the way that cohabiting relationships should be treated. Thus, the views were more pro-Fineman than had been expected. Nearly all of the participants acknowledged that the current state of affairs was ‘inadequate’ as it left cohabitants in a vulnerable position at the end of a relationship:

It’s a disaster! Very dissatisfied. (EWLaw5)

Well the law relating to cohabitees is an absolute mess, everybody knows that. It’s extremely difficult to apply and...that can lead to a high degree of unfairness... (EWLaw12)

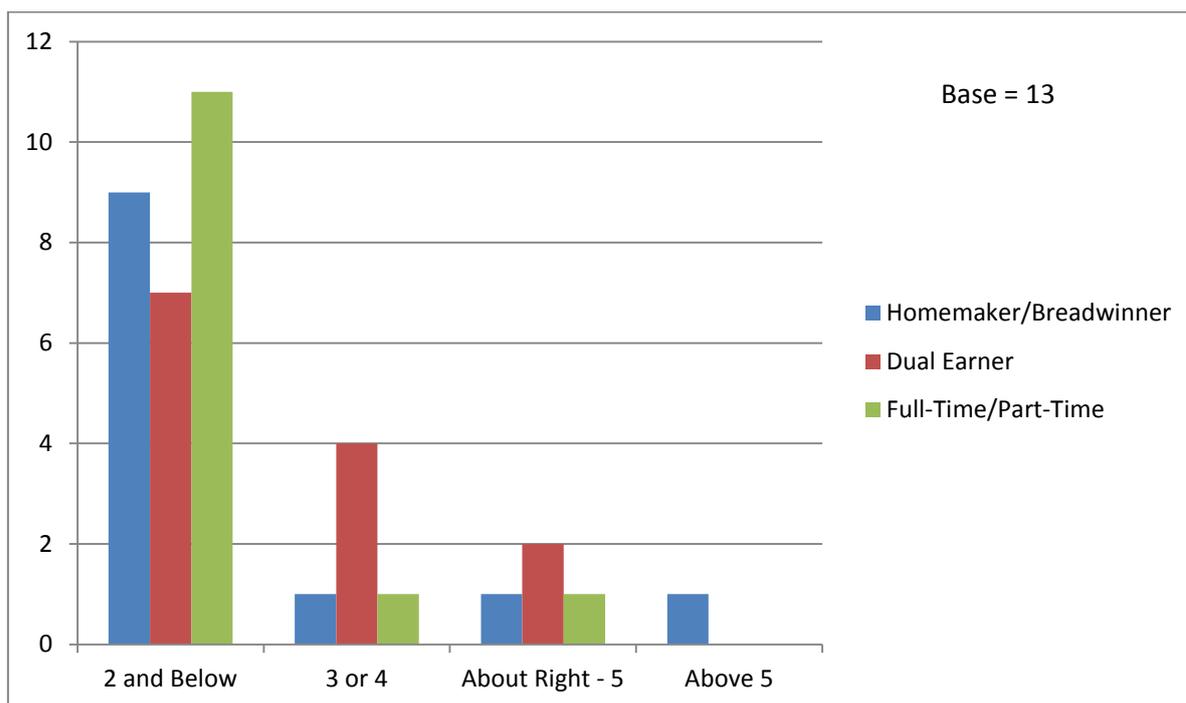
Out of all the jurisdictions, the lawyers demonstrated that they were the least satisfied with the way that the law treated the homemaker/breadwinner model, how the law recognised any additional contributions made in a dual earner relationship model (where one party is predominantly responsible for the homemaking activities) and how the law compensated for any relationship generated disadvantage that arose in a full-time/part-time relationship model (where the part-time earner had made a career sacrifice in the interests of the relationship). Table 6.17 demonstrates how dissatisfied the lawyers were on a scale of 0–10 (where 0 equated with domestic contributions being recognised too little in each relationship model).

This jurisdiction has the highest frequency of scores of ‘2’ or below out of all the jurisdictions. Yet, out of the three relationship models, the interviewees from England and Wales appeared to be least dissatisfied with the dual-earner relationship model as two¹¹⁶² believed that recognising additional contributions would be impractical and a further two¹¹⁶³ deemed that this was the least of the cohabitants’ concerns; bigger issues need addressing.

¹¹⁶² EWLaw1,2

¹¹⁶³ EWLaw5,6

Table 6.17: Comparison of attitudes towards different relationship models in England and Wales



Yet, while most believed that the current state of affairs needed to be reformed, the majority of respondents felt that cohabiting and married couples should be treated differently on relationship breakdown. This was generally attributed to the themes of ‘choice’ and ‘commitment’: some of the lawyers believed that cohabitants had actively chosen not to marry and this choice should therefore be respected. The interviewees who believed that cohabiting couples were not as committed as married couples consequently argued that these cohabitants should not have as many ongoing responsibilities post-separation:

...It seems to be much...stronger the case in unmarried couples because they haven't taken on a lifetime commitment, so it seems to me that if they separate, there shouldn't be a continuing uh a continuing responsibility. (EWLaw7)

On the whole the lawyers felt that clean break was more appropriate than ongoing financial responsibility and two lawyers¹¹⁶⁴ felt that it is not the law's functions in these scenarios to protect cohabitants in such a way:

Yeah I don't think that's the function of the law of relationship breakdown. (EWLaw8)

Yet, the discussion over difference was far less thorough than it had been in Scotland, and instead the lawyers were concerned with the lack of protection that the homemaker was receiving. Consequently, this theme of ‘difference’ did not appear to mean that the

¹¹⁶⁴ EWLaw6,8

interviewees agreed with Deech's position that cohabitants should have no protection at all. Instead the lawyers were dissatisfied with the fact that cohabiting disputes fell under Property Law rather than Family Law:

Um, yes because the law isn't based on the people, it's based on the property and I think that's completely inappropriate to Family Law. (EWLaw8)

...because the court when dealing with property and trusts looks at what each party brought financially to the party, then that could adversely affect the homemaker because she was at home and not contributor... (EWLaw6).

This adds weight to the findings in Australia that Family Law is far more suitable than Property Law for a cohabitation regime and therefore questions Deech's argument that cohabitants should be able to 'escape' the confines of Family Law. The current property-based approach in England and Wales was felt to be too rigid, and some of the lawyers wanted to see a greater amount of discretion in the courts so that a wider range of contributions could be taken into consideration:

...you pull together and you do things for the family and any family wealth as a result of you pulling together [should] be recognised on distribution. (EWLaw6)

Furthermore, the lawyers criticised the current provisions for not being child-centric enough:

...the law is still inadequate under Schedule 1 of the Children Act when you are providing for children where there are cohabitantes...The capital applications under the Children's Act are very rarely used and they, it ought to be easier to use and I also think applying strict property rights in that situation is probably wrong where you're raising children... (EWLaw12)

Therefore most of the lawyers wanted more protection to be given to Fineman's care-dyad by having child welfare as the most important principle of a cohabitation regime.

While most lawyers wanted different relationship styles to have different regimes, the theme of 'function' also emerged. Just over a third of the lawyers felt that where cohabiting couples were functionally similar to married couples, they should also be treated similarly:

I think they should be the same and I suppose that's the opportunity to say if you take the view that cohabitation is functionally the equivalent of marriage, then why should marriage be treated any differently in terms of what provisions are available on breakdown. (EWLaw13)

It seemed that for some participants, being faced with the practical reality of the relationship often overtook the abstract campaign for difference between relationship styles:

I think that I would say they're the same...[but] when you actually think through the different scenarios, I don't think there should be much of a distinction. (EWLaw13)

Relationships were identified as being functionally similar according to 'length' and 'children'. Four lawyers suggested that where there were children, married and cohabiting couples should be treated similarly:

...[it] should be more similar to marriage where there's a child. (EWLaw4)

The justifications for this were because of the inevitable dependency that arose from care-giving: the care-giver will have greater needs and will often be financially weaker than the other party. Some of the respondents felt that relationship length and children meant that maintenance or a greater degree of support should be available at the end of the relationship.

Yet, this more protective approach was only in reference to these exceptions of children and relationship duration. Thus, for those in shorter relationships without children, the lawyers indicated that a difference should be maintained between relationship styles, with cohabiting couples less entitled to maintenance provisions. However, the lawyers were torn on the approach that should be taken here: how far should a cohabitation regime respect the autonomous decision not to marry?

...this is one where again I feel a bit torn about it because it seems to me that you've got couples who have not chosen to commit to one another in marriage, so not chosen a lifetime commitment. On the other hand, that can produce some real hardship in some cases. And I do, uh, question whether something should be done to address that hardship. (EWLaw7)

As a result of this internal conflict there was 'uncertainty': none of the respondents could determine how the law should intervene for those without children. Some specifically referred to their confusion over the shape that any reform should take:

I think it probably should differ, I think there should be some differentiation between those who commit themselves to marriage and those who don't. I hope you're not going to ask me what that is because that's much more difficult. (EWLaw9)

This is perhaps indicative of a gap between 'theory and practice'; the lawyers believe cohabitants should be treated separately, but when faced with the practical reality of relationship dynamics there is little differentiation with married couples. This difference between theory and practicality was reflected (although with more force) in Scotland. Thus it seems that while the lawyers generally believed that cohabiting and married couples should be treated separately, it appeared that this was with less fervour than in the Scottish context. Instead, the respondents' focus in England and Wales was on the function of the relationships and the need to give greater protection to the care-dyad.

6.4.4 Same-Sex Relationships

Table 6.18 Themes in the same-sex context in England and Wales

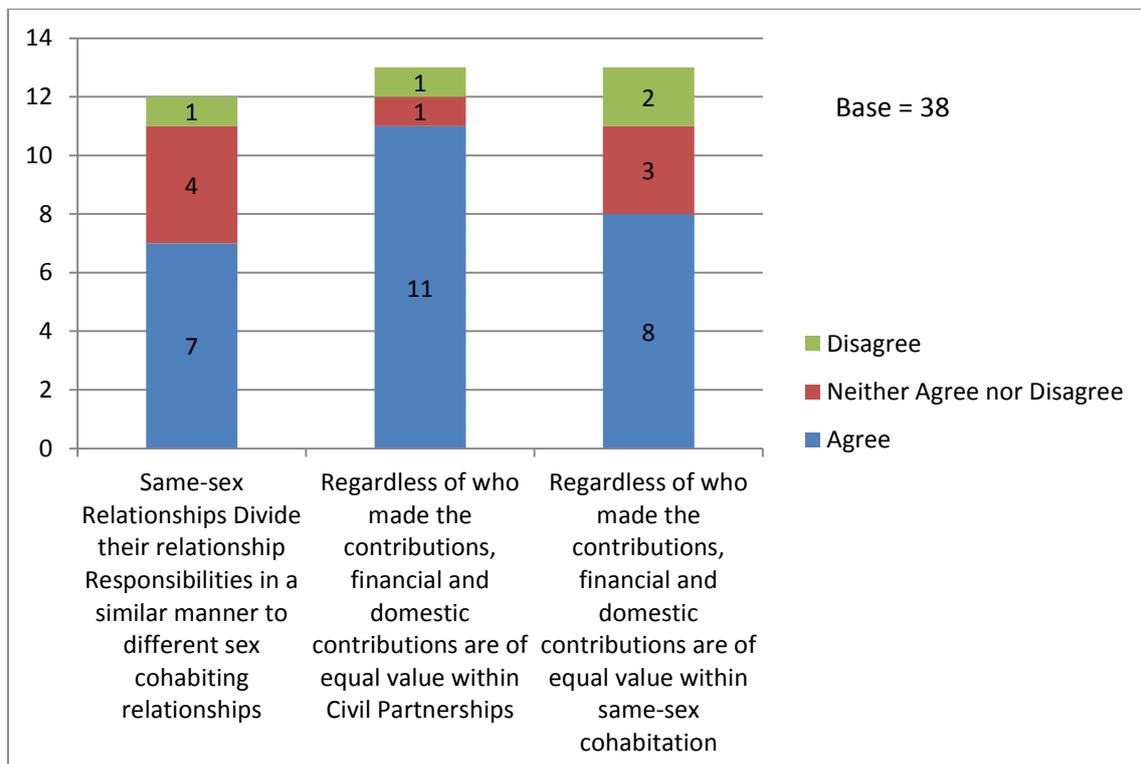
Themes	Sub-Themes
Uncertainty	Lack of experience
	Presumed Similarity

In the same-sex context, similar themes to all the other jurisdictions were raised. Firstly, most lawyers emphasised that they had not had a great deal of experience over same-sex relationships, particularly civil partnerships. However, despite this, the respondents generally felt that the relationships would be treated in the same way:

I think generally the courts are very careful not to discriminate against civil partners and so... I think a civil partnership would more than likely follow the marriage model. (EWLaw1)

For each question, the respondents, although uncertain, gave the same responses in the same-sex context as they had done in the different-sex context. When the respondents were specifically asked how domestic contributions were valued in same-sex relationships (both civil partnerships and cohabiting relationships) compared with different-sex relationships (both marriage and cohabiting relationships) all the respondents agreed that the couples were and should be treated the same.

Table 6.19: Attitudes towards same-sex relationships in England and Wales

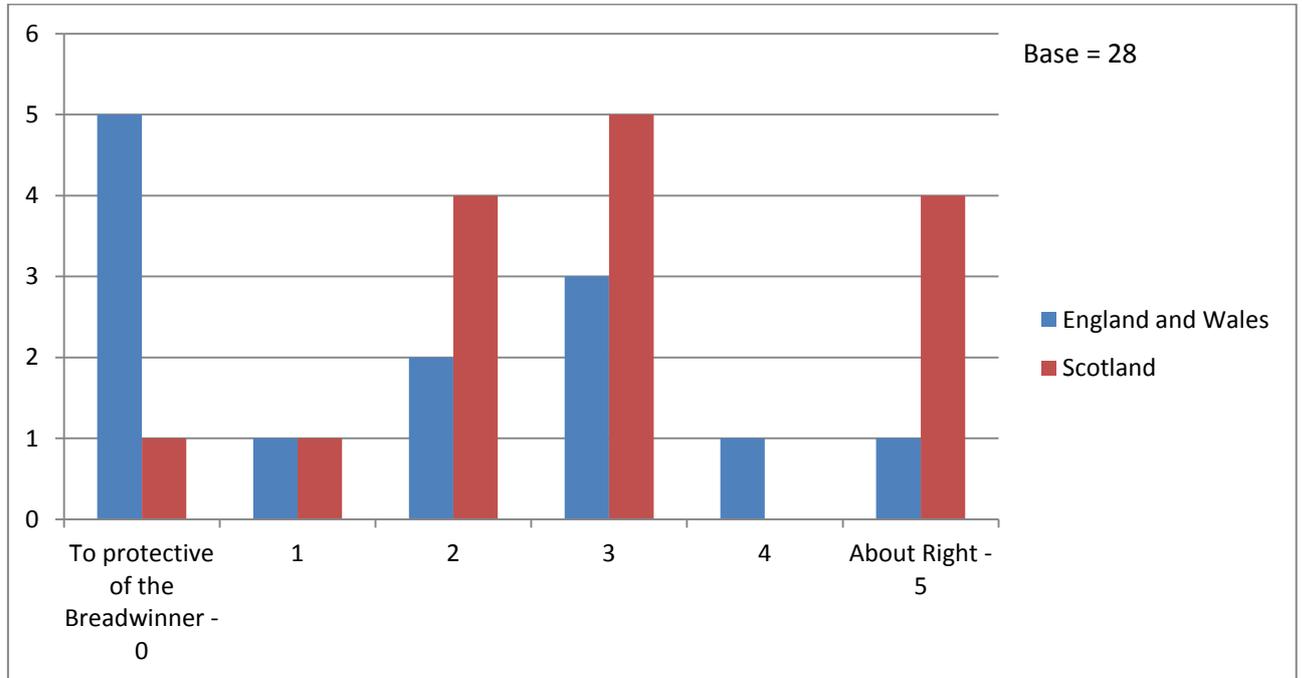


Similarly, as Table 6.19 shows, the majority of respondents agreed that same-sex relationships divide their relationship responsibilities in a similar manner to different sex relationships.

6.4.5 The Vignettes

6.4.5.1 Scenario A

Table 6.20: Attitudes to England and Wales' outcome in Scenario A - responses from England and Wales compared with Scotland



When presented with Scenario A's outcome which was based on *Burns*,¹¹⁶⁵ the mode response was '0', that the outcome was too protective of the breadwinner as demonstrated in Table 6.20. Scotland's lawyers selected much higher answers indicating a higher level of satisfaction with the approach and were a lot closer to '5', 'about right' suggesting that the Scottish respondents preferred a more restrictive approach than the respondents in England and Wales.

The New Zealand responses (Table 6.21) most frequently indicated that this was far too protective of the breadwinner out of all the jurisdictions. Five lawyers in England and Wales wanted the approach to be a little more generous and five wanted it to be much more generous. Only three wanted it to be similar to marriage and three respondents felt there should be an equal share of the assets, that is to say the award should be an entitlement.¹¹⁶⁶

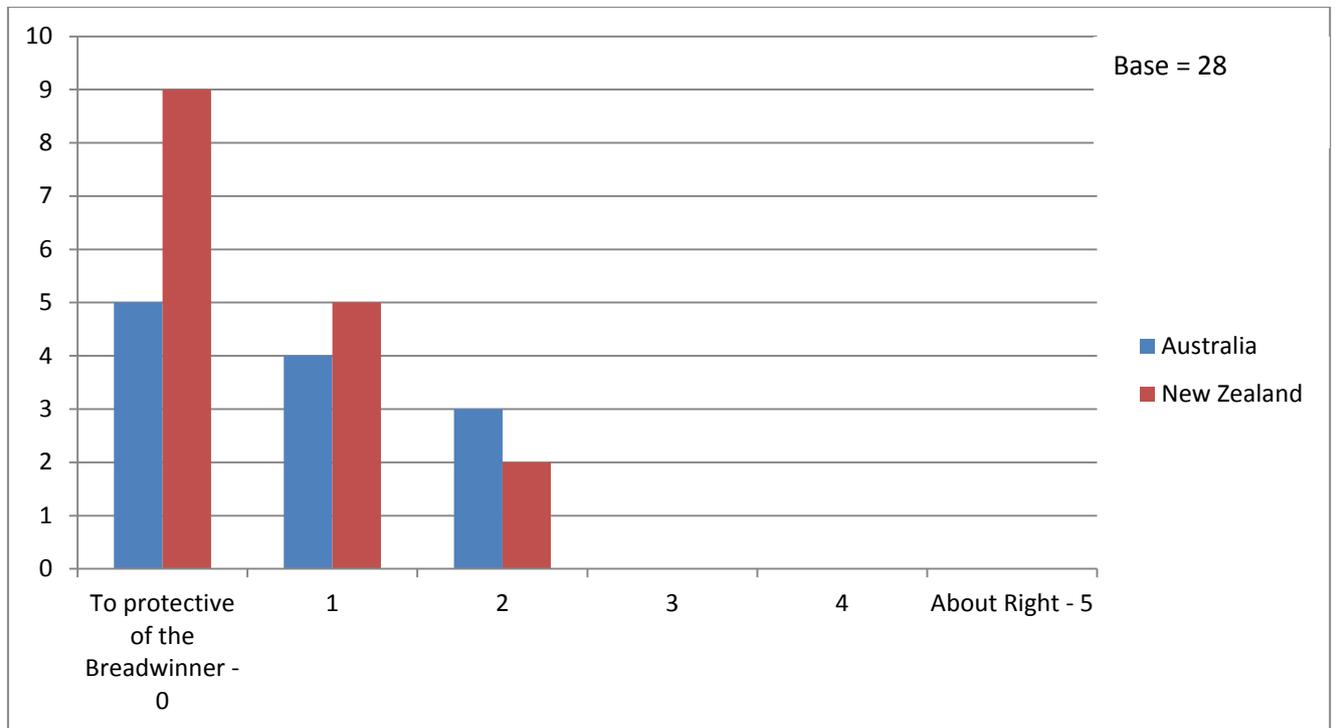
¹¹⁶⁵ Based on *Burns v Burns* (1986) Ch 317

¹¹⁶⁶ EWLAW6,12,13

The majority of respondents wanted there to be greater financial support either through a lump sum or limited maintenance¹¹⁶⁷ to help Miss Jones get back on her feet.

...well frankly it would be entitled to some form of finance, but not housing for however many years it would be. Oh, actually I'd make it a little more generous. (EWLaw1)

Table 6.21: Attitudes to England and Wales' outcome in Scenario A - responses from Australia compared with New Zealand



6.4.5.1.1 Scenario A – The Variables

The lawyers were then asked about how the law would alter its response for four different variables.¹¹⁶⁸ It is clear in Table 6.22 that the lawyers felt that the same outcome would occur where there were no children and also where it was a same-sex relationship. Marriage unsurprisingly would make the outcome much more generous. Continued employment affected answers depending on where the money was placed: if it was added to the property then it would increase the settlement, if not then it would either stay the same or even be less generous.

¹¹⁶⁷ EWLaw1,3,4,5,7,10

¹¹⁶⁸ Appendix A or New Zealand, Table 3.18

Table 6.22: How Scenario A's outcome in England and Wales would vary for each variable

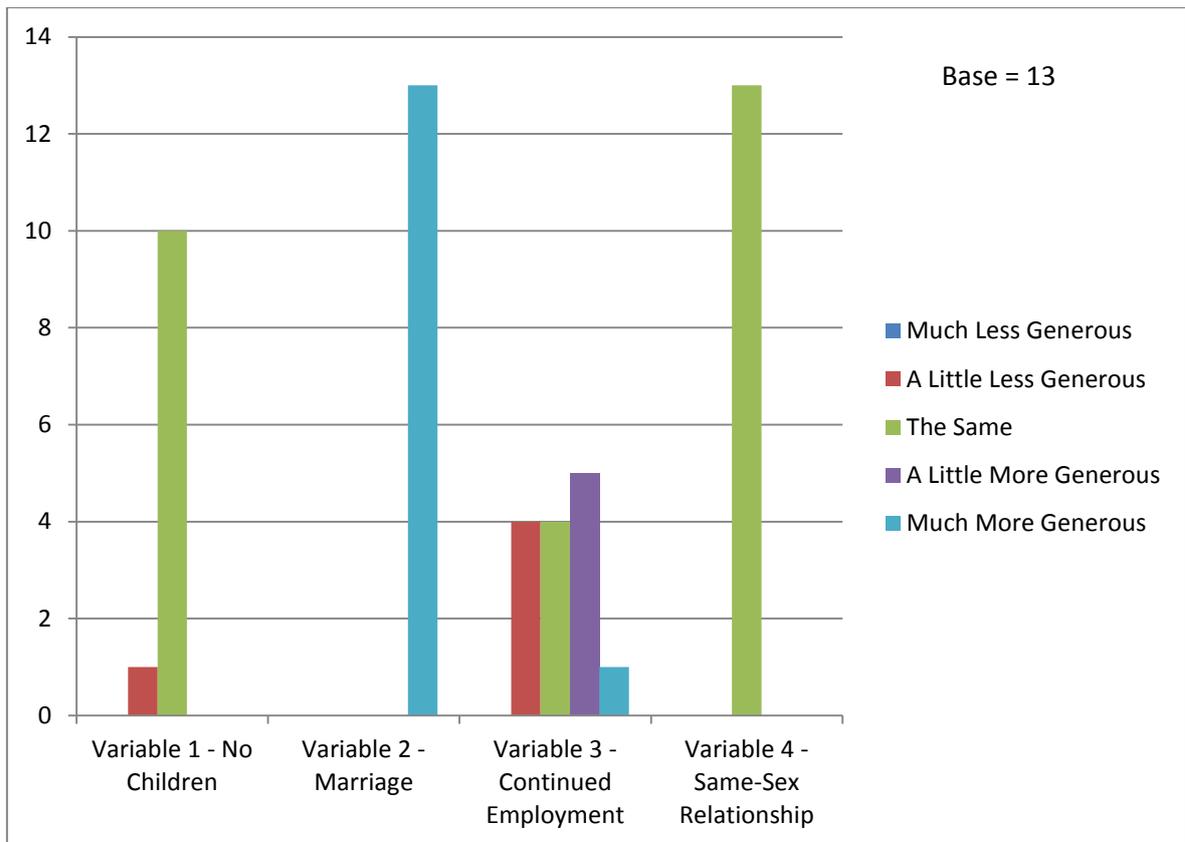
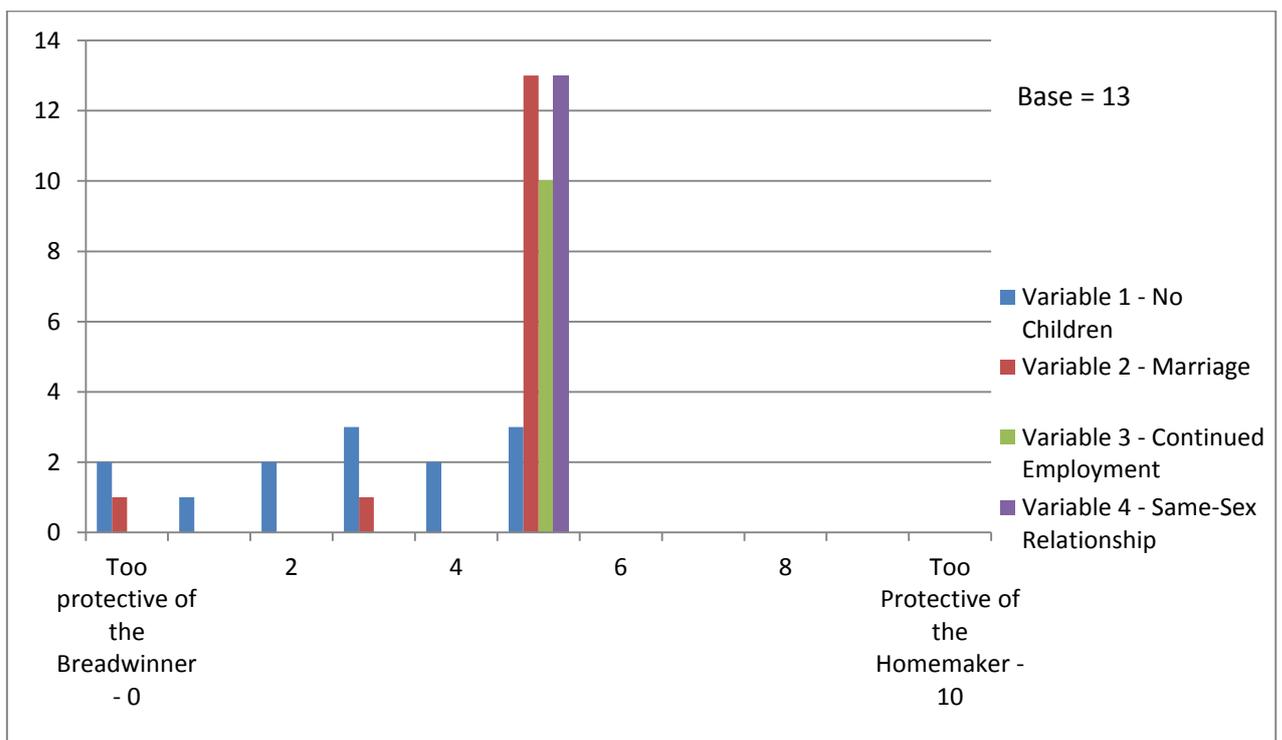
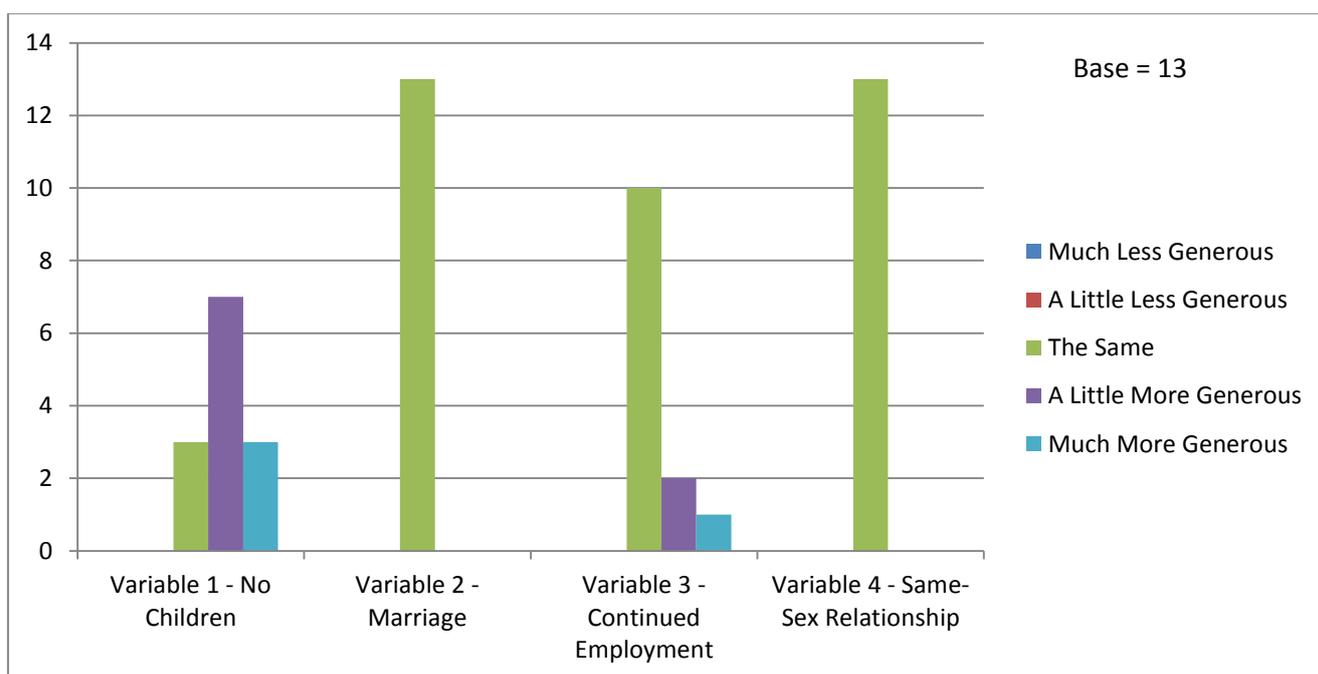


Table 6.23: how satisfied the lawyers are with Scenario A's outcomes in England and Wales for each variable.



As Table 6.23 shows, the outcome was deemed about right for most of the variables except where there were no children; the lawyers believed that it was too protective of the breadwinner. This perhaps reflects the impact that the Children Act has on settlements for cohabiting couples with children. In the absence of children, there is no recognition for the homemaking role. Furthermore, in Table 6.24 the majority of lawyers indicated that they wanted to make the scenario without children more generous, followed by the scenario where there was continuous employment.

Table 6.24: How the lawyers would alter England and Wales' approach to Scenario A



6.4.5.2 Scenario B¹¹⁶⁹

When asked how satisfied the lawyers were with the outcome in Scenario B based on *Miller*,¹¹⁷⁰ nine selected '5' that the outcome was about right and, following this, eight would not change the outcome but three would make it a little less generous. Given the criticism that has followed *Miller*¹¹⁷¹ for being overly-generous, this was a surprise as it seems that in fact the lawyers are satisfied with the approach taken.

6.4.5.2.1 Scenario B – The Variables

The lawyers were then asked about how the law would alter its response for four different variables.¹¹⁷² Table 6.25 shows that the lawyers felt civil partnerships would be treated the same. If the marriage had been longer, 11 felt it would be much more generous and the

¹¹⁶⁹ Based on *Miller v Miller*; [2006] UKHL 24, [2006] 1 FLR 1186

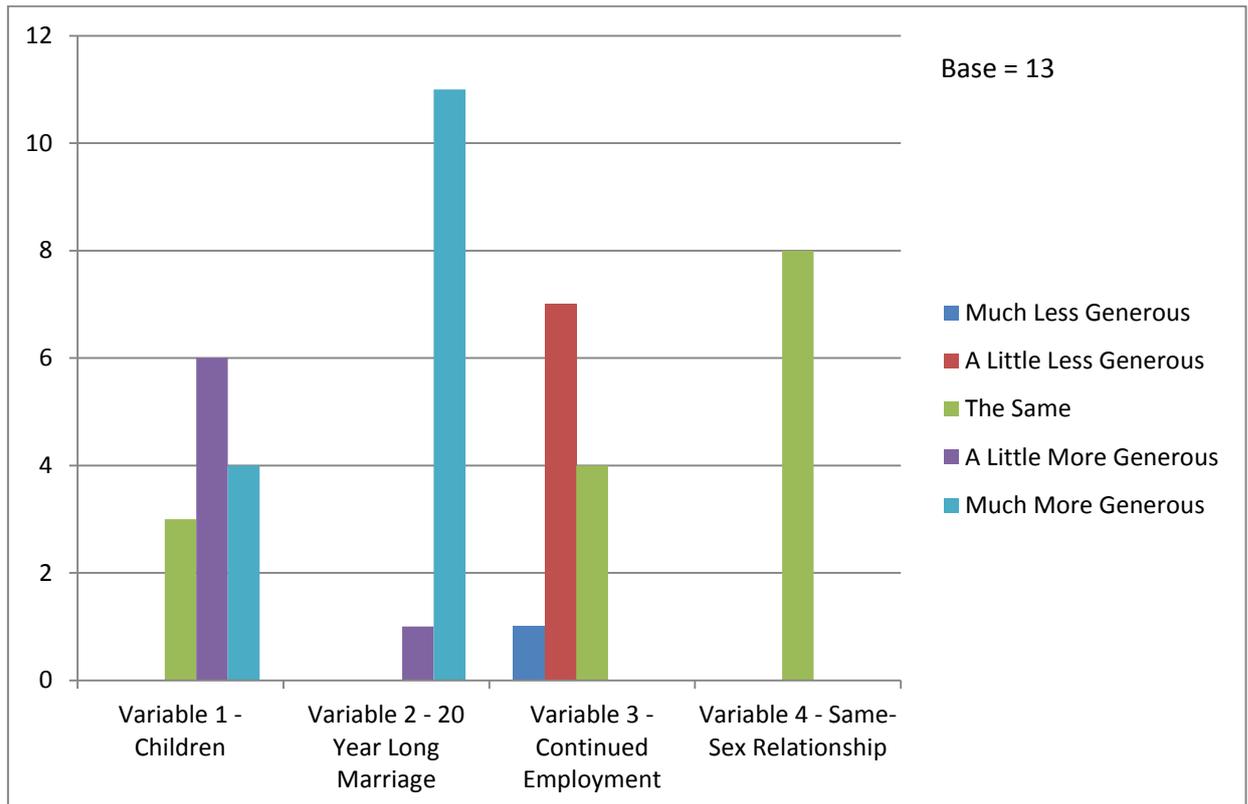
¹¹⁷⁰ *Miller v Miller*; [2006] UKHL 24, [2006] 1 FLR 1186

¹¹⁷¹ *Miller v Miller*; [2006] UKHL 24, [2006] 1 FLR 1186

¹¹⁷² Appendix A or Chapter 3, table 3.13

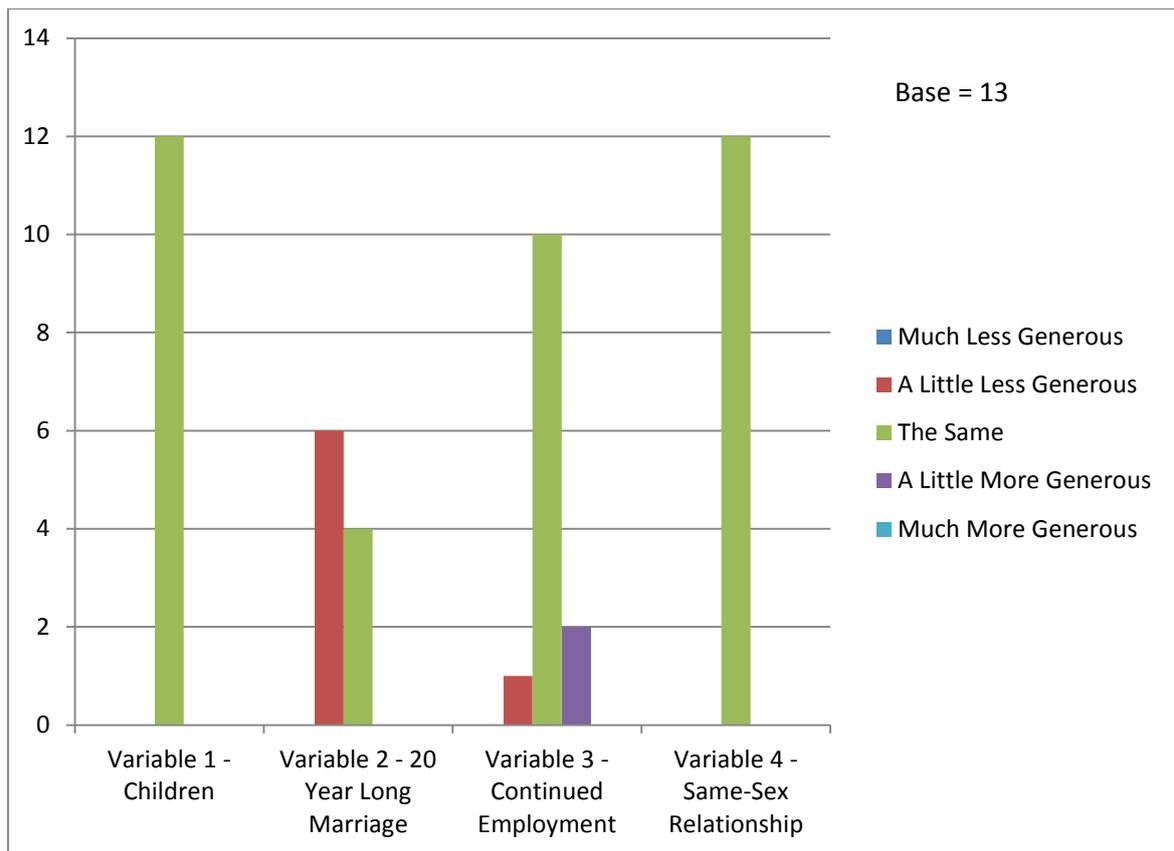
lawyers indicated that the award would be much closer to equality most likely at around 40%. Most lawyers felt that if there had been children the award would become more generous, although where Mrs Higgins had carried on in employment, seven felt that the award would be less generous, and that she would receive a lower settlement attributable to the lower level of maintenance that she would be entitled to on account of compensation for giving up her career.

Table 6.25: How Scenario B's outcome in England and Wales would vary for each variable



Yet, overall the lawyers felt that the outcome was about right in all the scenarios which is reflected in Table 6.26 where the majority of respondents indicated that they would keep the outcome the same for the variables. However, six respondents wanted it to be less generous in a longer marriage.

Table 6.26: How the Lawyers would alter England's and Wales' approach to Scenario B



6.5 England and Wales' System of Financial Provision: A Conclusion

This jurisdiction has offered an opportunity to explore regimes that sit at the polarised ends of the Deech-Fineman spectrum. It is therefore unsurprising that from the doctrinal and feminist analysis, both the married and the cohabitation regime only appeared to be satisfactory from one feminist position. In the married context, the needs-based approach clearly was the jurisdiction that provided the most protection for Fineman's care-dyad as England and Wales was the only jurisdiction that essentially defined equality as being substantive rather than formal. This was also reflected in the themes that emerged from the empirical analysis, and the lawyers demonstrated a 'reconceptualised partnership' where they emphasised the importance of rebalancing economic disadvantages and supporting the economically weaker party at the end of the relationship.

Consequently, this system (and the discretion that is used) is forward looking, and seeks to redress the full economic impact of caring. Yet, the lawyers evidently felt that the approach in England and Wales was not protective enough as the participants here had the lowest levels of satisfaction out of all the other jurisdictions for the other two models of a dual-earner and full-

time/part-time earners. This finding was surprising given that England and Wales was so pro-Fineman in its approach. The lawyers indicated that this may be because of the inherent difficulty that the courts face when quantifying relationship generated disadvantage; no-one has a crystal ball. However, this overall dissatisfaction with a Family Law approach that is so pro-Fineman may also reflect the limitations of private law being used to meet Fineman's aims. Fineman clearly set out that to fully achieve equality of resources it is necessary to have a substantial overhaul of the public/private boundaries as well as a shift in social and legal definition of the family so that it is based around care-giving rather than sexual relationships.¹¹⁷³ Thus, perhaps the lawyers' frustration with this approach represents the fact that private law has been stretched as far as it possibly can go to accommodate Fineman's care-dyad. Greater satisfaction may only now come from more substantial changes to the social contract.

Still, it was surprising that the lawyers were the least satisfied out of all the jurisdictions given that the approach was mostly pro-Fineman. This anomaly may potentially be explained through the lawyers' (in England and Wales) expectations. The respondents defined partnership as meaning substantive rather than formal equality which therefore centred on rebalancing needs and economic disadvantages. Consequently, their expectations may have been higher in terms of achieving 'equality of resources' than the participants from the other jurisdictions. As a result of this needs-based approach, the respondents may therefore have been more critical of the way in which needs were being met. In comparison, the other jurisdictions did not have needs as a central focus and therefore may not have been so conscious of the way in which their jurisdiction's approach dealt with this issue; the lawyers from England and Wales may have expected more from their jurisdiction. Nevertheless, in both the doctrinal and empirical analysis, needs appeared overall to be a successful rationale for interpreting the s25 provisions particularly in smaller asset cases. Yet, in big money cases, the rationale appears to become much more complex, and the courts seem to be unsure over how far the sharing provision should apply to substantial assets owned by one party. Consequently, the approach to be taken towards matrimonial property, the doctrine of special contributions and pre-nuptial agreements is not overly certain, and there appears to be a mixture of conflicting approaches which reflect both Fineman's and Deech's positions. The courts therefore do not appear to have definitively committed themselves to one approach or another and it is unclear whether or not property will be classified as non-matrimonial, business acumen as a special contribution, and whether pre-nuptial agreement will carry

¹¹⁷³ M Fineman, *The Autonomy Myth: A Theory Of Dependency* (New Press 2004)

weight. Further clarity over how the courts should approach big money cases is evidently needed. Therefore, from Deech's perspective, the married context is wholly unsatisfactory in its current format. The lack of certainty surrounding the equal sharing provision means that in effect there is little to no real protection for financial autonomy and financial assets, and consequently this may perpetuate wives' economic dependency on their husbands. Therefore, there is the danger that this current approach, combined with the broad interpretation of needs may not respect (nor encourage) the financial autonomy of the parties particularly in short marriages without children. This is especially heightened by the generous maintenance provisions available that do not focus on rehabilitation in the way that such provisions do in the other jurisdictions.

In complete contrast, in the cohabitation context the opposite is true. While the cohabitation framework most strongly espouses Deech's belief in autonomy, independence and privacy, for Fineman it completely ignores the care-dyad and the dependency that frequently exists in such a relationship. Consequently, this approach seems to be suitable for couples with complete financial independence, yet at the same time it seems dangerously unsupportive for the economically weaker partner where the balance of power is not equal and particularly where a care relationship exists. The lawyers were evidently dissatisfied with this approach, and a large proportion of the participants from other jurisdictions had been shocked at the level of protection in England and Wales. Furthermore, the participants in this jurisdiction indicated that Property Law (much as Australia confirmed) was not the appropriate forum to regulate cohabiting couples at the end of their relationship, and it was clear that more family-based remedies were desired instead. This criticism towards this regime also demonstrates that an approach which is the most 'pure' from Deech's position is in actual fact the model which has the lowest rates of satisfaction, and evidently, therefore, the respondents do not align themselves with Deech's position. Therefore, on the whole, the participants were in agreement that something needs to be done and a greater level of protection is needed; Property Law is not the appropriate forum through which to decide matters post-separation. More lawyers than expected were pro-Fineman in their suggestion that financial provision at the end of a relationship should be based on function, and thus cohabiting and married couples with children should be treated in the same way. Yet, the majority believed that there should be some difference between these relationship styles (although with less fervour than the Scottish lawyers). While it was difficult to identify a coherent way in which these relationships should be treated differently, it seems that the lawyers wanted maintenance to be limited.

While neither of these approaches has achieved a balance between Deech and Fineman, each framework presents a thorough picture of how these feminist positions would operate in reality. Furthermore, the empirical stage in this chapter has allowed the positive and negative aspects of this system to be tentatively compared with the other jurisdictions that have (differing) approaches which blend these two feminist positions together. Consequently, it is possible to compare the effects of essentially 'watering down' these approaches in different manners. One thing that appears certain from all the jurisdictions is that an evaluation of contributions always disadvantages the homemaker. Secondly, the operation of discretion requires clear guidelines, regardless of whether Fineman or Deech is the starting point of the scheme. The three strands of fairness that guide discretion in England and Wales appear to be the most successful mix of discretion with guidelines. The lawyers from England and Wales did not voice as many procedural criticisms as the Australian lawyers had in reference to the use of discretion, and at the same time it avoided the overly-rigid application of discretion which had been present in both Scotland and New Zealand.

However, before it is possible for this thesis to address reform options in light of examining these jurisdictions, the next chapter considers a fundamentally important element that feeds into this matter: how do members of the public think that the law should approach domestic contributions. Consequently, Chapter 7 presents the findings from the focus groups to consider how these various methods of valuing domestic contributions, raised in the previous chapters would be received by the affected community in England and Wales. Which options are preferred by those who would be directly affected by such change?

CHAPTER 7: IMPLEMENTING DEECH OR FINEMAN?

FOCUS GROUP ANALYSIS

7.1 Introduction

The last four chapters have tested out how the approaches of Fineman and Deech work in practice by critiquing the systems of financial provision in New Zealand, Scotland, Australia and England and Wales which differentially reflect the positions between these two feminist commentators. The detailed empirical and feminist analysis conducted in the past few chapters has therefore examined the implications that these stances would have on (usually female) homemakers and further considered whether a balance between these two polarised feminist positions can be achieved. This chapter now considers the possibility of implementing these two different positions in England and Wales by exploring a range of views that some non-lawyers in this jurisdiction have on issues relating to the valuation of domestic contributions. In particular this part examines whether these views lean towards Deech's or Fineman's position to provide insight when considering the shape of future reform.¹¹⁷⁴

To gather this information, this thesis used a small number of focus groups. However, due to the time constraints and also the scope of this project it was not possible to do this on a larger scale and thus the sample selected is modest in its size, but appropriate for a qualitative thematic analysis. Consequently, although the sample was purposively selected to include an appropriate range of participants as discussed below, the views that arise here are not being held out as nationally representative as it is not possible to say whether they reflect broader trends within the general public in England and Wales. Yet, given the dangers of legal transplanting that were identified in Chapter 2¹¹⁷⁵ (especially those voiced by Cotterrell on the 'affected community')¹¹⁷⁶ it was felt that it was necessary to give some contextualisation to the findings so far made in the previous chapters, before considering the impact that the results from this project may have on reform considerations. Therefore, this chapter serves as the first step towards examining how Deech and Fineman's respective approaches might serve families in England and Wales; how viable or indeed desired such schemes are, and how these different formulations of domestic contributions would be received by the affected community. While

¹¹⁷⁴ These two views are summarised in Appendix I and Chapter 2, Section 2.2.2.4

¹¹⁷⁵ See Chapter 2, section 2.2.2

¹¹⁷⁶ R Cotterrell, 'Is There A Logic Of Legal Transplants' in D Nelken and J Feest (eds), *Adapting Legal Cultures* (Hart 2001) 71, 83; E Örüçü, 'Law as Transposition' (2002) 51(2) *International and Comparative Law* 205; R Probert, 'From Lack of Status to Contract: Assessing the French Pacte Civil de Solidarite' (2001) 23(3) *Journal of Social Welfare and Family Law* 257, 266 - 267

this chapter provides some insight into these matters, this insight is necessarily limited by the scale of the project and thus further research is necessary to explore this in greater detail.

7.2 Sample and Methodology

With this limitation in mind, this thesis sought to ground the findings from the previous chapters by using focus groups that consisted of non-lawyers in England and Wales. The sample, as previously emphasised, was not intended to be statistically representative. However, it was felt that there were certain viewpoints that were important to reflect and therefore participants with these socio-demographic characteristics (including relationship experience) were purposively selected. Given the contentious debate on whether married/civil partners and cohabiting couples should be treated similarly or differently, and considering the gendered nature of domestic contributions,¹¹⁷⁷ this project therefore tried to recruit an even number of men and women, an even number of married and cohabiting participants as well as a number of respondents who were in same-sex relationships (either cohabiting or civil partnered).

Altogether, 23 participants took part (12 respondents were men and 11 were women) with groups of between four and six people, each focus group lasting between 45–60 minutes. The groups were divided according to relationship and gender with one additional group that had participants who were in same-sex relationships as it was felt that these relationships would not carry the same gendered hierarchy that different-sex relationships may. Thus altogether five focus groups were held and divided into relationship category groups as follows: married women; married men; cohabiting women; cohabiting men; and same-sex relationships.

Given the importance that age, gender, children and employment play in the division of relationship responsibilities,¹¹⁷⁸ this project also sought to include a range of those socio-demographic characteristics. There was a large range of ages, but most fell between 25–44¹¹⁷⁹ and the majority of cohabitants were under 30.¹¹⁸⁰ Of those who took part, eight had children¹¹⁸¹ (none of the same-sex respondents had children) and there was a spread of

¹¹⁷⁷ See Chapter 1 section 1.3

¹¹⁷⁸ R Crompton and C Lyonette, 'Who does the Housework? The Division of Labour within the Home' in A Park, J Curtice, K Thomson, M Philips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage Publications 2008) 52, 74 - 75

¹¹⁷⁹ The biggest category in Crompton et al.'s survey out of their four age categories, 18 – 24, 25 – 34, 35 – 44, and 45+: R Crompton and C Lyonette, 'Who does the Housework? The Division of Labour within the Home' in A Park, J Curtice, K Thomson, M Philips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage Publications 2008) 52

¹¹⁸⁰ This corresponds with research that has shown that cohabiting relationships tend to be between younger couples: J Haskey, 'Cohabitation in Great Britain: Past, Present and Future trends and attitudes' (2001) 103 *Population Trends* 4

¹¹⁸¹ Of these, only one had children from a previous relationship and only one had children who had all left home

employment statuses (fulltime, part-time and those who were not employed)¹¹⁸² and correspondingly of incomes. Interestingly 11 participants were in a dual-earner¹¹⁸³ relationship model, three in a full-time/part-time model and nine in a homemaker/breadwinner¹¹⁸⁴ relationship model. Women were more likely than men to have the part-time or the homemaker role and so were financially weaker than their partners, whereas the men were more likely to be in the fulltime or breadwinner role and so were financially stronger than their partners. This reflects research which demonstrates that women tend to be responsible for the majority of household tasks¹¹⁸⁵ and work part-time more frequently than men.¹¹⁸⁶

The focus group schedule¹¹⁸⁷ was designed to determine how the respondents felt regarding specific issues relating to how domestic contributions should be valued. Therefore, the schedule asked participants how domestic contributions should be valued alongside financial ones and how to define relationship property. Furthermore, the groups were asked to discuss their preference of a range of models based on the differing approaches in the previous jurisdictions, and were then presented with two scenarios¹¹⁸⁸ which had a number of potential outcomes based on these differing approaches, where they were asked to select which outcome they preferred.

Each focus group was recorded on an MP3, and thematic analysis was used to analyse the qualitative data. As outlined in section 2.2.4.2.3, this approach to analysis meant that the transcripts were repeatedly read until a familiarity with the texts was achieved and codes were developed, given conceptual labels and then themes. Theoretical thematic analysis¹¹⁸⁹ was used, generating themes by analysing the data through the lens of Deech and Fineman's opposing stances.

7.3 Data Analysis

The thematic analysis of the data revealed four main substantive themes with a number of sub-themes relating to the way that domestic contributions should be valued on relationship breakdown demonstrated in Table 7.1 below.

¹¹⁸² This included participants who identified themselves as homemakers, students and retired

¹¹⁸³ This included couples where the roles were equal, for example student and student

¹¹⁸⁴ This was determined as couples where one party was working and one was not even if they were in education

¹¹⁸⁵ R Crompton and C Lyonette, 'Who does the Housework? The Division of Labour within the Home' in A Park, J Curtice, K Thomson, M Philips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage Publications 2008) 52;

¹¹⁸⁶ There are nearly five times as many part-time women as men. National Statistics (2009) 'Labour market' *Social Trends* 39 (ONS 2009) 7

¹¹⁸⁷ Appendix B

¹¹⁸⁸ Based on *Burns v Burns* (1984) Ch 317 and *Miller v Miller* [2006] UKHL 24, [2006] 1 FLR 1186

¹¹⁸⁹ V Braun and V Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77, 84

Table 7.1 Themes generated from the Focus Group Data Set

Themes	Sub-Themes
Contingent autonomy	Choice
	Autonomy myth (children)
	Needs
	Sacrifice (relationship-generated disadvantage)
Limited partnership	Mutual dependency
	Entitlement
	Unjust enrichment
	Relationship property as 'family assets'
Evaluation (specifically valuing contributions)	Effort
	Financial
	Asset size
	Relationship length
Equality between relationship styles	Qualifying period (children/length)

7.3.1 Autonomy

The concept of autonomy was a theme raised by a number of the respondents throughout the focus groups and it emerged from the sub-themes that essentially there was a divide present between autonomy which reflected Deech's notions of responsibility for a person's actions and choices¹¹⁹⁰ and Fineman's autonomy myth which argues that in fact dependency is inherent in caretaking relationships.¹¹⁹¹ Deech's concept of autonomy received a great deal of support from the focus group participants and there is considerable emphasis placed on the significance of 'choice' behind decisions made within the domestic sphere:

I was wondering whether it was...having to take responsibility for protecting yourself a little bit as well. I don't know whether that sounds a bit harsh, but if a woman chooses to be with a man who pays for absolutely everything...she's left herself with nothing and is no way protected (Kes, cohabiting women group)

...I find it a bit uncomfortable about paying for a decision that they've made really. In a way it's like you make your choices. (Julian, cohabiting men group)

¹¹⁹⁰ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140, 1142

¹¹⁹¹ M Fineman, *The Autonomy Myth: A Theory Of Dependency* (New Press 2004) 193

As a result it seems that the fear is that the parties will be unjustly enriched if responsibility is not given to their own independent decisions. However, the vast majority of respondents considered that this ability to make a choice was in fact severely limited by the presence of care-giving relationships:

It's only when they have kids it's normally there's a sacrifice, otherwise as you've said, there's no excuse! (Leonard, married men group)

This sub-theme of the autonomy myth was linked directly with that of 'needs':

...and obviously whoever is going to do the majority of the parenting is going to require financial support for that and is going to be unable to work because of that. (Geordie, same-sex relationship group)

This trend towards aligning more with Fineman's conception of an 'autonomy myth' in care-giving relationships was most prevalent when the respondents were discussing sacrifice or relationship generated disadvantages and whether or not they should be recognised as contributions made in a relationship. Generally, career changes and care-giving were recognised mostly as sacrifices, and many of the respondents who clearly felt that there was a choice believed that sacrifices should not be recognised. Here there was a sense of Deech's position of taking responsibility for one's decisions:¹¹⁹²

...because at the time when you're in a relationship you do make sacrifices and that's part of a relationship and you're not being forced to do something for the benefit of the relationship, you're doing it because of your relationship as a whole. (Will, same-sex relationship group)

Those who felt it should be recognised referred to situations (often involving childcare) where choice was absent; so compensation should only be for those sacrifices that *had* to be made:

I think if you're sacrificing something like to care for a disabled child or something, then that should be quite highly recognised. But general domestic...everything is equal so. (Will, same-sex relationship group)

The respondents further demonstrated this perception that children reduced the ability for parties to attain financial autonomy when they were asked their opinions on five models of property settlement based on the jurisdictions explored in this thesis and outlined in Table 7.2 below.¹¹⁹³ Model five (presented to the respondents as considering needs and compensation) was preferred by almost half the respondents as they felt it produced a fairer outcome. However, it was clear that this was only in the context of couples with children:

¹¹⁹² R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1142

¹¹⁹³ See Appendix B

I agree, but I like model 5 for if someone has a child. (Beth, same-sex relationship group)

Table 7.2: Model number with corresponding jurisdiction

Model Number	Jurisdiction
1	England and Wales' Approach to Cohabitants
2	Scotland's Approach to Cohabitants
3	Australia's General Approach and New Zealand's Approach to Short Marriages
4	Scotland and New Zealand (equality)
5	England and Wales's Approach to Marriage/Civil Partnership

Thus it seems that while the respondents did fundamentally believe that where decisions made out of choice should not be considered sacrifices and a level of accountability should be placed on one's own actions, in fact children and the presence of a care-dyad essentially reduced a party's autonomy in a relationship, with dependency instead intrinsic. Consequently, the respondents seemed to reflect that on relationship breakdown, greater recognition should be given to sacrifices and also to the resulting needs that arise from this circumstance. Model five, the approach in England and Wales, was considered the most appropriate mechanism for doing so.

7.3.2 Partnership

Partnership was the biggest theme that was collated during the thematic analysis and consisted of the most sub-themes. The majority of participants referred to mutual dependency as a factor that was fundamentally important in a relationship and should subsequently be given recognition. Nearly all of the respondents highlighted the importance of 'emotional support' in times of difficulty or supporting a difficult job, suggesting a mutual emotional co-dependency between couples:

...there's a role to cry on each other's shoulders; emotional support. I don't know how you quantify that but I should have thought that was particularly important...that emotional support, particularly when the going gets tough. (Jim, married men group)

Furthermore, many participants indicated how a homemaking role worked to support a breadwinning role, suggesting the social bargain that 'the wife should perform domestic functions, and in return she should receive protection and support from her husband'¹¹⁹⁴ identified by Eekelaar.

¹¹⁹⁴ J Eekelaar, 'Uncovering Social Obligations: Family Law and the Responsible System' in M MacLean (eds), *Making Law for Families* (Hart 2000) 16

...if you're running a business, if you're earning a salary whatever, you're enabled to that by your other, by your relationship like someone who is looking after the kids or worked for two years through the training. (Montgomery, married men group)

In fact the roles and decisions made in the relationship were seen as a partnership decision overall:

Well, it comes down to the things that they've decided as a couple... (Montgomery, married men group)

From this, it could be said that in fact there is an expectation therefore of mutual support at the end of the relationship and an equally strong theme that was established throughout the analysis was a sense of entitlement. This seems to imply that Fineman's care-dyad should therefore receive financial support as a result of the domestic contributions made.

I suppose when you go into a relationship you go into it on an equal basis emotionally don't you and when you come out of it...on a financially equal basis. You wouldn't go into it saying okay well I have more than you have. (Miles, cohabiting men group)

...but if you get married I suppose that's what it is. You're supposed to be a team and you enter into that knowing [that] legally. (Anna, cohabiting women group)

...so if we did break up, I would, as the main earner, I wouldn't see why he wouldn't get any because he's been part of the relationship and he was there at the time when we were sharing.'(Christine, married women group)

However, while the sense of entitlement perhaps first implies that it will be accompanied by some level of equality, another sub-theme indicated that the respondents were concerned that formal equality could lead to unjust enrichment and 'gold-digging', reflecting a concern from Deech's position.¹¹⁹⁵

I mean it would encourage all kinds of abuse...once you get that ring on your finger you're entitled to half. (Mark, married men group)

This was a particular concern where there was an uneven distribution of financial income or where one party's contributions were financially 'special' in their nature.

Sue: *...if you get divorced then if you've had a husband who's been earning right round the clock while you've been, which some women can be doing which is also socialising and enjoying the money...*

Lou: *Yeah, painting their toenails*

Sue: *...then actually in a way it does seem unfair that they're entitled to whole or half...*

(Sue and Lou, married women group)

Many of the participants indicated that formal equality was only suitable where roles reflected a greater level of equality or joint enterprise partnership, matching earlier discussions of equality:

¹¹⁹⁵ R Deech, 'What's a Woman Worth?' (2009) 39 *Family Law* 1140

Presumably if you're both equal then it's kind of less of an issue...It's when there's unequalness then it becomes more...that's when it becomes difficult. And you have to find out what's fair really. (Jake, cohabiting men group)

Thus it seems that this would mean that there is little to gain by way of unjust enrichment. Consequently, a sub-theme indicated that the participants felt that reflecting the concept of partnership on relationship breakdown through formal equality (as in New Zealand) should not be automatic. Instead a number of qualifying factors for equal sharing to be present were suggested where the couple were not on an equal financial footing therefore limiting unjust enrichment. Firstly, there was the presence of children reflecting again the impact that Fineman's care-dyad should have on relationship breakdown:

...bringing up children [while] the husband's making loads of money on the stocks and shares...[is different to just] two independent people living in the same house. Perhaps there's less of an entitlement to his talents and the money he can make from that. I think it depends on the situation. (Sarah, cohabiting women group)

Secondly where there is a 'nexus' between the wealth and the special contribution such as a family business built from scratch compared to the talent of one party, then equality (similar to the concept in Australia) was suggested to be contingent:

Ben: *'...well in that instance that's a couple that have been together a while and they accumulated their vast sums individually and together...then why shouldn't they both get half each. It would seem unfair to...weigh it on one person.'*

Wilfred: *'I agree, yeah'.*

Ben: *'That's one case. But...[with] a Rooney and Coleen, erm, he's... propelled her into the limelight so everything she's got is because of him effectively you would say really. So to then split his assets over hers...would that be fair?'*

(Ben and Wilfred, cohabiting men group)

The majority also felt that formal equality should thirdly hinge on the length of the relationship:

I think it would depend on the length of time, say if it were 20 year marriage there will be a...greater...emotional investment in it rather than one year. (Naomi, cohabiting women group)

Therefore, while it was evident that the respondents seemed to align more with Fineman's position in recognising a partnership and the mutual dependence that arises from it, it is evident that there is considerable worry that a partnership approach on relationship breakdown will lead, as Deech fears, to 'gold-digging'. This was further reflected when the respondents considered preferred models of property settlement (see Table 7.2) and only one participant selected model four while the other participants felt that formal equality is only suitable for those in financially similar positions. Where parties faced financial imbalances, the triggering circumstances should be children, considerable length or nexus.

The extent by which the participants viewed partnership at the end of a relationship was demonstrated also through their definition of relationship property. Some believed that all property should be considered to be relationship property and thus awards should be made on the grounds of fairness. However, the majority felt that it should be more restrictively defined and generally that inheritances, gifts, business assets and initial contributions should not automatically be included within the relationship's asset pool. This advocates Baroness Hale's approach in *Miller*¹¹⁹⁶ and the definition in New Zealand¹¹⁹⁷ which looks at 'family assets' as relationship property subject to division on relationship breakdown.

While generally the participants wanted to see a narrower definition of this property, it was evident that the respondents felt non-family assets should become relationship property if there was either a nexus (as in Australia)¹¹⁹⁸ between a contribution and the asset or as a result of usage. This is akin to the approach currently taken in Scotland.

...if you're running a business, if you're earning a salary whatever, you're enabled to that by your other, by your relationship like someone who is looking after the kids or worked for two years through the training (Mark, married men group)

Categorising it with heirlooms or business you could say has it contributed to your relationship, have you both benefitted from it... (Christine, married women group)

It seems that this definition is a balance between Deech's and Fineman's position between protecting the breadwinner's assets and encouraging 'self-dependency' and 'caring for the care-giver' where it would impinge on their lifestyle to a greater degree, based on the use of that asset.

In fact, overall while the respondents wanted to promote and protect the idea of partnership, it was clear that there was the concern that this would lead to unjust enrichment. Consequently the themes of limiting factors that the participants felt would prevent this from occurring were children, length and nexus. These factors seem to be aimed at a higher level of commitment and both financial and emotional mutual dependence by their very nature.

7.3.3 Evaluation

Evaluation was a common theme that the focus group participants raised, that is to say that they advocated to some degree an approach similar to that in Australia¹¹⁹⁹ which analyses the contributions made by the parties during the relationship:

¹¹⁹⁶ *Miller v Miller; McFarlane v McFarlane* [2006] 2 FCR 213

¹¹⁹⁷ See Chapter 3, section 3.4.1

¹¹⁹⁸ See Chapter 5, section 5.3.2.1

¹¹⁹⁹ See Chapter 5, section 5.3.2.1

I think that shared effort is what should be valued...because if somebody is fantastic, successful granted or even just plain lucky, they could bring in a whole load of money, but if they're doing their job making 80,000 a week and someone's putting in a lot more effort as a cleaner and bringing 80 a week, they're still putting the same amount of effort in... (Montgomery, married men group)

For the female participants as well as the same-sex relationships group, evaluation involved a far closer examination of the relationship roles and physical exertion:

...there's a difference between the situation you're describing if someone had a life of leisure and that sort of thing, and a person who works really hard as a stay at home mum... (Anna, cohabiting women group)

In comparison for the male participants, evaluation was an actual quantification of contributions and their direct market value. Yet it was felt that this approach would be too difficult and unfair for the homemaker and thus was an unsuitable way of comparing contributions:

You could put a notional value, so how much does the average child-minder earn and how much does the average cleaner earn... (Wilfred, cohabiting men group)

Overall, the majority of participants identified evaluation as an inappropriate way of valuing domestic contributions as it was seen not only as unsuitable, but that it could potentially be open to abuse:

It seems like because you can't really quantify it, it could easily be manipulated which could be dangerous to others. (Anna, cohabiting women group)

Despite this general consensus that evaluation was not a desired method of valuing domestic contributions, it seems that again this may depend on whether or not there are children of the relationship. The above dissatisfaction of the approach was also made in relation to couples with children and it was clear that where there were no children, the participants themselves were more critical on the evaluation of contributions.

I would question why they're not working if they don't have children, even if they can't have children then actually why aren't you working? (Sue, married women group)

This was attributed by many to the level of work associated with care-giving:

I suppose it gets very different if there are children involved...it's very difficult to decide who's going to be at home and sort of decide not to have a job and be home for them sort of you've got your children being looked after by someone else, there's possibly a higher value on that than if someone's just chosen to stay at home or look after the house. (Miles, cohabiting men group)

Thus it seems that evaluation is considered inappropriate where there is a care-dyad, but necessary where there is no care-giving and the party is still within the domestic sphere. Given the analysis in the partnership context, it seems to imply that domestic contributions are only

as equally valuable as financial contributions where there are children, and where there are no children there is an expectation that both parties will be self-dependent and contributing financially to the relationship.

This perhaps is attached to the aforementioned concept of 'choice' in a bid to avoid 'gold-digging' and preventing unnecessary (and perhaps here, considered reprehensible) financial dependence on the other partner where it is at all possible.

Furthermore, asset size and relationship length seemed to give rise to situations where the respondents believed an evaluative approach would be fitting. Most prominently, it seemed to fall on those categories where the respondents believed the partnership model to be inappropriate. Evaluation is evidently seen by the respondents as a device to prevent unjust enrichment on relationship breakdown. Therefore, as alluded to in the above theme of 'partnership' where assets were significantly large then a nexus or an evaluation approach was preferred by the majority of respondents:

...say that someone married someone who was a superstar at football or something like that, the person married to that person could never do a job of that income of that wealth, so is it fair that fifty-fifty split...it's your talent for earning...money. (Leonard, married men group)

This combination of evaluation and partnership was also demonstrated in the choice of suitable models for financial provision on relationship breakdown. On its own, model three (an evaluative approach, see Table 7.2) was felt to be open to abuse and in practice difficult to implement, working against Fineman's care-dyad. In contrast, whereas the partnership approach could be seen to give rise to unjust enrichment, the participants demonstrated that in actual fact it would serve the interests of a primary care-giver well. It provides an opportunity to care for the care-giver. Consequently, the majority of respondents preferred a combination of model three and four and therefore a combination of an evaluative and a partnership approach. Thus, for shorter relationships, an evaluative approach was more suitable where model four comes in after a time period or where there were children:

*Mark: Starts with model three and then moves on to model four, something like that
Leonard: Yeah, that's what I would have thought; it starts there and moves to number four.*

(Mark and Leonard, married men group)

This therefore gives rise to the questions of whether there should be a differentiation in the way that the law approaches couples with children and those without children.

7.3.4 Equality between Different Relationship Styles

Not one of those who took part felt that same-sex relationships should be treated any differently from different-sex ones. There were a number of participants who felt that cohabitants and married couples/civil partners should be treated differently which was largely attributed to their choice not to marry and that they were less committed:

Yeah, but the bottom line is the decision not to marry...So there must be a difference. There has to be a difference if they're not married. (Lou, married women group)

However, the majority of respondents indicated that they thought that cohabiting and married couples should be treated identically:

I think for the law to make an assumption that marriage somehow brings with it a different level of commitment is mad. (Naomi, cohabiting women group).

Nearly all of those who thought there should be a parity of treatment between cohabiting and married/civil partner relationships felt that there needed to be a qualifying period on the relationship's length before that occurred:

I think that it should be the same irrespective of the sort of legal status of the relationship if it's a long term relationship such as where people are committed to, whether its legal marriage partnership or just an arrangement, (Jake, cohabiting men group)

Furthermore, many of those respondents indicated that couples with children, no matter what the length of the relationship, should be treated the same regardless of relationship status:

If you've got children, then you're as good as married really and if you've been together a long-time and you've got a financial commitment then you're as good as married. (Sue, married women group)

Thus, it seems that on the whole the respondents felt that cohabiting couples should be treated the same as married couples with children and if there were no children, they should be treated the same as married couples after a period of time although how long was not expanded on in the group. This seemed to support Fineman's position more than Deech's, basing regulation on the presence of a care-dyad and dependency.

7.3.5 Practical Considerations of Property Settlement:

7.3.5.1 Scenario A

Here the participants were asked to consider a scenario based on *Burns*¹²⁰⁰ and to select a preferred outcome from seven choices.¹²⁰¹ No-one selected Outcome A or B, the approaches

¹²⁰⁰ *Burns v Burns*(1986) Ch 317

¹²⁰¹ See Appendix B

towards cohabitation in England and Scotland respectively with the married men feeling that it was 'brutal'.¹²⁰² Thus out of seven outcomes, only C (which was based on the evaluative approach in Australia where she would be given 50% of the home as a lump sum, 40% for her contributions and 10% for future needs), E (50% of the house and pension with a maximum of three years' maintenance) and F (similar to New Zealand's approach of 50% of house and pension plus maintenance for over three years) were selected.¹²⁰³

The reasoning behind the choice of outcomes here essentially settled on the different conceptual stances that maintenance should take for Miss Jones post-settlement. The entire same-sex relationship group selected outcome C. Here, the group focused on Mr Smith's initial contribution, feeling uneasy that Miss Jones had not made one herself and the fact that the children had grown up, feeling that (similar to Deech's perspective) maintenance should only be for the children:

...I'm not really sure why anyone would get maintenance when the children are all grown up. That seems a bit bizarre... (Will, Same-sex relationship group)

...Part of the problem is...that she didn't bring anything into that situation, um, which you assume her role as homemaker was just a natural, organic move for her. (Joe, same-sex relationship group)

In comparison, the married groups felt that outcome C was unduly harsh:

...if one thinks it through very brutally and logically without valuing other contributions, you would automatically come to C. But when you take other contributions, my personal view would be E...' (Kira, married women group)

Outcomes E and F both had maintenance provisions for less than three years and over three years respectively.

The most popular outcome was E which resembled the outcome for married couples in Scotland. The reasoning behind this choice for all the participants was its rehabilitative nature that it gave her a chance to pick up a career. This reasoning demonstrates that for the participants it was her age and need rather than the length of the relationship and entitlement which influenced the decision:

Well that seems fair and then the maintenance for the three years to give her a chance to catch up. (Mark, married men group)

Those who selected 'E', echoed Deech-like concerns about 'gold-digging'; maintenance for any longer than three years would deter Miss Jones from becoming financially independent:

¹²⁰² Leonard, Jim, Mark and Simon, Married Men Group

¹²⁰³ See Appendix H

...at 43 she could then live off her ex for the next 20 years unless she enters another relationship and there's no proviso for her actually getting a job. (Jake, cohabiting men group)

In comparison, those who selected option 'F' focused on the impact that the relationship had on Miss Jones' financial position and to some degree seemed to discuss a compensatory approach:

Sarah: *...if the children are kind of older I think it's different. She could work.*

Anna: *But then she couldn't have a career now, it's too late for her, she can't she's given up all the income she could have made, so I think it...*

Naomi: *Plus, it's probably changed now, but she could have affected her pension, whether she gets a full state pension...*

(Naomi, Sarah and Anna, cohabiting women group)

Overall it seems that the same-sex group were most evaluative and the rest selected 50% with rehabilitative maintenance. However, most cohabiting participants felt that it does not reflect the full long-term impact of financial disadvantages.

7.3.5.2 Scenario B

Table 7.3: Scenario B - outcomes selected¹²⁰⁴

	Outcome B	Outcome C	Outcome D	Outcome E	Outcome F
Cohabiting Men Group	-	4	1	-	-
Cohabiting Women Group	5	1	-	-	-
Married Men Group	1	1	-	1	-
Married Women Group	3	-	-	-	1
Same-Sex Relationship Group	-	-	1	2	1

Here the participants were asked to consider a scenario based on *Miller*¹²⁰⁵ and then select a preferred outcome from seven choices as displayed in Table 7.3.

The most popular outcome for this scenario was outcome B, which was the lowest possible settlement out of all the outcomes.¹²⁰⁶ The reasoning here was based on Mrs Higgins' choice and autonomy compared to Miss Jones' sacrifice: reflected in earlier discussions that there

¹²⁰⁴ See Appendix B for an outline of the outcomes

¹²⁰⁵ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186

¹²⁰⁶ Based on weighing up economic advantages and disadvantages on Scotland's approach to cohabitation, Mrs Higgins would receive nothing.

would be an expectation to work and more of an evaluation of domestic activities without children:

Kira: [Miss Jones had] given up all, given up her potential to get a proper career.

Kerry: Whereas Mrs Higgins has given up her career to swan about and have lunch.

(Kira and Kerry, cohabiting women group)

In fact only one cohabitee referred to her sacrifice in the workplace.

...but she gave up her job which was high income and even if it is the short marriage of time it could make a difference in the field she was in (Naomi, cohabiting women group)

However, if there was evidence that it was a joint decision she would be entitled to more and it was felt that given her age and that the relationship was only five years' long that she was not entitled to anything greater.

Outcome C was the second most selected outcome. The reasons behind this seemed to be a desire for greater recognition of contributions made in the relationship. Yet, this recognition of contribution should involve an evaluation not only of the quality, but also the nexus these have to the increased wealth of Mr Higgins:

So maybe she should be entitled for something for [homemaking] as well, whatever the homemaker to a multimillionaire involves. (David, cohabiting men group)

I agree sort of what he has brought into the marriage shouldn't come into it as much here with both high income individuals, but then to what extent has she then contributed to his increase in wealth? (Miles, cohabiting men group)

The two married men who chose B and C appeared to evaluate Mrs Higgins' domestic contribution fearing that anything greater would lead to unjust enrichment, reflecting earlier themes that big money cases should avoid the partnership approach altogether and settle for something akin to evaluation:

...she was only on 80,000 a year, you know now she's going to get millions...I think that is totally unfair, three years of marriage and she's profited. (Leonard, married men group)

However, Simon felt that she was entitled due to marriage to half of everything and Mr Higgins should take some responsibility for that commitment:

Once they become married then what's his is hers and hers is his and that's how it should be and if they're not prepared to do that then they shouldn't get married. (Simon, married men group)

The same-sex relationship group were more generous in this scenario than the other groups in complete contrast to the approach in Scenario A. Even with this generous approach the group

still felt that Mrs Higgins' contributions should be evaluated¹²⁰⁷ and Joe felt that there would be a nexus between her contributions which would entitle her to more:

I would tend to think that F was probably the fairest. It seems to be the most balanced and I think...the term homemaker is probably undervaluing her contribution, she's probably doing quite a lot backing up the business, um, in effect she's being a dies partner in the business. Without extensive evidence it's hard to. (Joe, same-sex relationship group)

Overall, 'B' (Scotland's economic advantage/disadvantage) was most popular amongst the respondents for the cohabitation scenario.

7.4 Discussion

This chapter aimed to provide some contextualisation of the findings from the previous chapters before considering options for reform in Chapter 8. Thus it sought to get a sense of how well either Fineman or Deech's approaches might be received by families in 21st Century England and Wales. However, as this chapter has emphasised, it is not possible to say whether these trends are representative of the general public in England and Wales and therefore further research is needed to determine how such schemes would be received by the affected communities. Nevertheless, it is the first step towards achieving this aim and provides some valuable insight to ground the findings of this project so far.

Four broad themes were identified in the data set: autonomy, partnership, evaluation and equal treatment of relationship styles. Within these themes it was evident that there was a range of participants who agreed with Deech and Fineman's positions. This last theme seemed to show respondents' views leaning towards Fineman's end of the spectrum as (while all believed that same and different sex relationships should be treated identically) most participants felt that there should not be any difference between cohabiting and married couples/civil partnerships. Yet, there was a general consensus that this should come in after a time period and automatically with the presence of children.¹²⁰⁸ This seemingly disagrees with Deech's contention that Family Law should not interfere with cohabiting couples' domestic affairs and suggests an approach towards cohabitants that is similar to Australia's and New Zealand's (although not necessarily in content) with a time limitation period in place.

The other themes seemed to fluctuate between Deech's and Fineman's positions without a definite preference at either end of the spectrum. On the whole, the theme of autonomy

¹²⁰⁷ Will and Beth, Same-Sex Relationship Group

¹²⁰⁸ This reflects the Law Commission's proposal for a minimum duration period should be placed for cohabiting couples. See The Law Commission, *Cohabitation: the Financial Consequences of Relationship Breakdown* (Law Com No 179, 2007)

demonstrated how many respondents felt that (as Deech contends) where sacrifices were the result of a lifestyle choice they should not be recognised. However, at the same time it was recognised that the ability to make a choice was limited by care-giving and Fineman's care-dyad. It seems that from these focus groups the general sense was that relationship-generated disadvantage should only be recognised where it arises out of necessity and not from the parties' own free will. A scheme which recognises needs and compensation is preferred only in the context of having children.

In the theme of partnership, it was evident that participants recognised the existence of mutual dependency in a relationship suggesting that financial and non-financial contributions should not be weighted differently. Thus there was a sense of entitlement to financial support on relationship breakdown which offers greater protection for Fineman's care-givers. Yet again, it was equally recognised that formal equality and equal sharing could lead to much unjust enrichment and again the majority of respondents felt that equal sharing should only be implemented in relationships that have children, or are of significant length. In fact it seems that the respondents preferred an evaluative approach for shorter relationships without children, yet it was evident that an evaluative approach serves to disadvantage the homemaker. Consequently the respondents seemed to want to combine an evaluative approach with formal equality, arguably similar to Scotland's approach. This combination had a strong influence over discussions on how property was to be divided, with participants preferring a narrow approach which could be modified according to usage and evaluation of contributions (similar to Scotland's approach). Consequently evaluation was felt to be far too harsh for the homemaker who equally contributed, and formal equality was felt to be far too dangerous as it opened the avenue for 'gold-diggers' and when presented with the models, the majority selected a combination of three and four (Australia and New Zealand), a combination of evaluation and equality, to compensate for this.

So, what, if anything, can be taken from this analysis? Most notably across these themes were two trends characterising the pull between the positions of Fineman and Deech: length of relationship and the presence of a care-dyad. Children led to a change in approach towards relationship-generated disadvantage with a greater focus on needs and compensation; couples with children were more suited for the partnership approach and not evaluation. Even those who felt that cohabitation and marriage should be treated differently indicated that, with children, there should be no difference, and that children added more weight to the value of domestic contributions and the homemaker role. Similarly, relationships of considerable length were also felt to be more suited to a partnership approach and to a wider division of

matrimonial assets. It seems that there is some similarity in these discussions to New Zealand's approach of separating between short and long marriages.

The relationships that caused concern and a Deech style approach were short relationships without children (particularly where there was an unequal distribution of financial contributions). It was felt necessary to treat these differently to prevent 'gold-digging' and unjust enrichment. Thus it seems that the presence of children and the length of a relationship are in fact being used as indicators of commitment and emotional intertwining. This potentially indicates also that both Deech and Fineman's positions work for different styles of relationships; short, childless relationships for Deech, and longer relationships with children for Fineman.

The next chapter concludes by considering the analysis both from this chapter and the earlier jurisdictional analyses to determine how domestic contributions should be approached and valued in England and Wales and whether a balance can be achieved between Deech's and Fineman's positions.

CHAPTER 8: CONCLUSION

8.1 Introduction

Given the schizophrenic nature of the law of financial provision on relationship breakdown in the married and cohabiting context, and the subsequent heavy criticism that it has received for respectively overvaluing¹²⁰⁹ and undervaluing domestic contributions,¹²¹⁰ the aim of this thesis has been to explore how the law might in future better value these sorts of contributions at the end of a relationship. However, the way in which the law should quantify these inherently gendered contributions¹²¹¹ is debated amongst feminist commentators and a divide exists over whether the law should promote the financial autonomy of women and remain out of the private sphere by ignoring domestic contributions;¹²¹² or whether it should value these contributions to give greater public recognition to this relationship role and therefore greater protection for women who undertake homemaking and child-rearing.¹²¹³ Consequently, the objective of this project has been to consider how domestic contributions should be recognised in light of these feminist positions, and whether a balance or a middle ground between the two can be achieved. To do so, the polarised positions of Ruth Deech – who promotes autonomy - and Martha Fineman – who argues for greater protection and appreciation of the value of the care-dyad (as set out in Chapter 2) - have been used as a heuristic device to explore these dichotomous theories.

In particular, this project has sought to establish the merits and disadvantages of how these different feminist approaches might work in practice. This has been undertaken with reference to the legislative frameworks of financial provision in New Zealand,¹²¹⁴ Scotland,¹²¹⁵ Australia¹²¹⁶ and England and Wales.¹²¹⁷ Each of these jurisdictions appeared to exemplify key aspects of these feminist positions in differing ways. This thesis therefore used the Deech and

¹²⁰⁹ R Deech, 'The Principles against Maintenance' (1977) 7 FL 229

¹²¹⁰ A Barlow, 'Configuration(s) of Unpaid Caregiving within Current Legal Discourse in and around the Family' (2007) 58(3) *Northern Ireland Legal Quarterly* 251, 260

¹²¹¹ R Crompton and C Lyonette, 'Who does the Housework? The Division of Labour within the Home' in A Park, J Curtice, K Thomson, M Philips, M Johnson and E Clery (eds), *British Social Attitudes: the 24th Report* (Sage Publications 2008) 52; R Breen and L Cooke, 'The Persistence of the Gendered Division of Domestic Labour' (2005) 21(1) *European Sociological Review* 43

¹²¹² R Deech, 'The Principles Against Maintenance' (1977) 7 *Family Law* 229

¹²¹³ A Diduck, 'Fairness and Justice for All? The House of Lords in *White v White* [2000] 2 FLR 981' (2001) 9(2) *Feminist Legal Studies* 174, 180 - 182; R Bailey-Harris, 'The Paradoxes of Principle and Pragmatism: Ancillary Relief in England and Wales' (2005) 19 *International Journal of Law, Policy and the Family* 229, 234 - 235

¹²¹⁴ Chapter 3

¹²¹⁵ Chapter 4

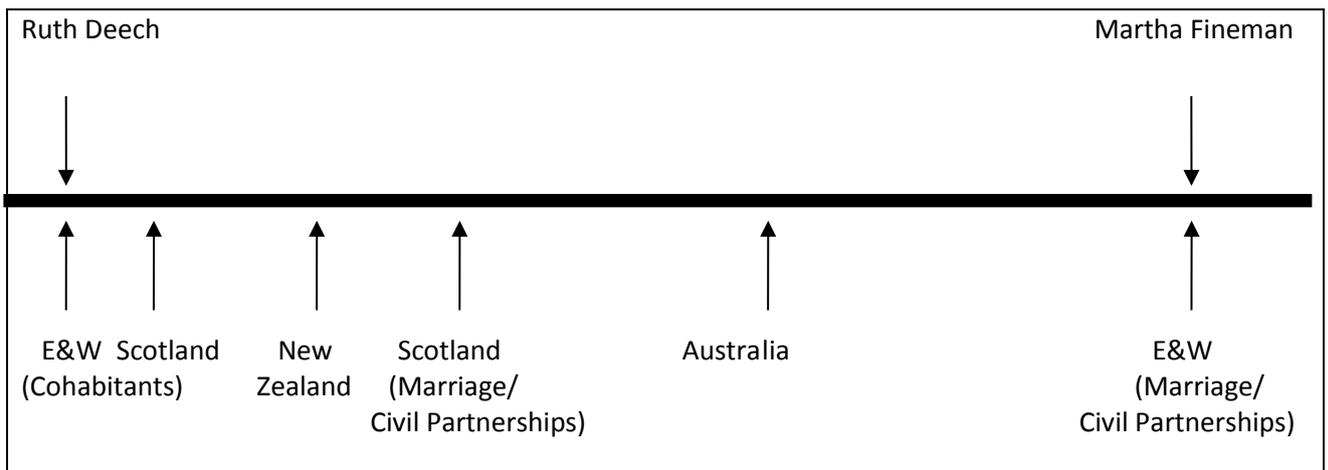
¹²¹⁶ Chapter 5

¹²¹⁷ Chapter 6

Fineman lenses to explore how far these schemes actually reflect either of these positions and their alignment is demonstrated in Table 8.1. Additionally, structured interviews (with additional room for free-form comment) with lawyers from each jurisdiction have been used to determine how effectively these differing frameworks function in practice and, more specifically, how they affect women. Finally, focus groups were used to consider a range of views on different approaches from members of the affected community in England and Wales.¹²¹⁸

Another aspect of this research has been to consider (using insight gained from the differing approaches used in these jurisdictions) how cohabiting couples should be treated in comparison with married couples and furthermore whether different-sex and same-sex couples should be treated identically post-separation. This chapter now draws these different aspects together to consider in light of the research findings how the law should value domestic contributions in the married, cohabiting and same-sex context in England and Wales.

Table 8.1 The jurisdictions' position on a spectrum between Deech and Fineman



8.2 How to Value Domestic Contributions

8.2.1 Differing Approaches: Care-Dyad vs. No Care-Dyad

Each of the schemes aligned to varying degrees with Deech's and Fineman's positions as Table 8.1 above shows. Yet to what extent can these aid reform considerations in England and Wales? How well do these approaches value domestic contributions and do they achieve a balance between the two polarised positions? The first measure that this thesis had intended

¹²¹⁸ Chapter 7

to use to help this reflection was a comparison between the levels of satisfaction of the lawyers from each jurisdiction. However, surprisingly, the majority who took part in this investigation were overwhelmingly satisfied with their jurisdiction's legal framework for financial provision on divorce, despite there being such disparities in the theoretical underpinnings of the differing approaches. While the lawyers recognised and were keen to voice difficulties within their systems, it was evident that the general perception was that each of the approaches 'worked the best it could' and that 'things could be a lot worse'. This fits in with Dewar's notion of the normal chaos of family law;¹²¹⁹ that legal professionals make sense of the system they are in, inevitably making it work in practice.

Nevertheless, the overarching finding from this project demonstrated that none of the legal frameworks analysed achieved a perfect balance between Fineman's and Deech's positions, as demonstrated in Table 8.1. Furthermore, this project clearly shows that where a legal framework aligned with one feminist position, it would then conflict with the other. Consequently, balancing Fineman's and Deech's stances is an arduous task because both positions are appropriate in different circumstances. Nevertheless, this study has illustrated that one appropriate dividing line in choosing which stance to apply appears to be between those relationships with and without children (or a care-dyad). For example, in New Zealand and Scotland, the lawyers were generally content with their jurisdiction's Deech-like approach when there were no children. Yet, it was evident that these jurisdictions were inadequate for dealing with Fineman's care-dyad; by sacrificing substantive fairness for procedural fairness in both these systems, the lawyers argued that manifest (substantive) unfairness followed, especially for relationships with children. Ten respondents from New Zealand felt that their jurisdiction's approach was too narrow and did not really consider the future impact of relationship generated disadvantage and that s15 P(R)A had 'failed' at its objectives, and 10 in Scotland felt that s9(1)(b) FL(S)A was inadequate. In both these jurisdictions, it was the judiciary's rigid application of statutory discretion which produced the homemaker's (and therefore a gendered) disadvantage. While, procedurally, a formula-based approach has reduced the potential for inequality of bargaining power in out-of-court settlements, the level of rigidity in the system may actually act to deter parties from accessing the courts on costs grounds, rather than because the tensions between parties have been reduced or a resolution fair to both parties achieved. The New Zealand employment statistics also challenge Deech's position that a more liberal approach will encourage women to engage more with the labour market, as these figures show that even with a scheme based on formal equality, only 58% of

¹²¹⁹ J Dewar, 'Reducing Discretion in Family Law' (1997) *Australian Journal of Family Law* 309, 348

women in New Zealand are employed in comparison to 70.2% of men.¹²²⁰ Consequently, Deech's prioritising of financial autonomy and clean break in place of protection and fairness at the end of a relationship, appears to be most suitable for relationships without children (or a care-dyad), and where it is therefore more possible for both parties to be equally autonomous.

At the same time, the pro-Fineman jurisdictions of England and Wales (in the married context) and (to a lesser degree) Australia, have a much greater level of discretion in their systems allowing for greater consideration of substantive justice, and thus these frameworks offer awards that are tailor-made to Fineman's care-dyad. Therefore, lawyers from both jurisdictions were the most satisfied with how the homemaker/breadwinner relationship model was treated, with 10 lawyers in each system indicating that, overall, equality was achieved between these two roles. However, both systems lack a clear rationale or mechanism through which the owning spouse could protect their property which has led to a conflicting and complex use of discretion to limit awards in large asset cases.¹²²¹ Furthermore, the level of discretion within these jurisdictions was linked to a number of procedural difficulties like greater litigation, greater conflict and inconsistency. In both jurisdictions lawyers were concerned that the judges' approaches were inconsistent, which caused difficulties when advising clients (although this was far more prevalent in Australia, perhaps due to the relative, if far from perfect, clarity of interpretation of s25 after *White*¹²²² in England and Wales). Therefore, there were calls for a greater level of predictability or guidelines to be able to give better advice to clients to prevent cases unnecessarily going to court, while preserving the pursuit of individual fairness to protect the most vulnerable members of the post-separation family – a pro-Fineman position in direct conflict with Deech's thinking. Consequently, this leads to the conclusion that Fineman's and Deech's positions are each most suitable where children are and are not present respectively, and that neither position is more suitable than the other in the reverse circumstances. Therefore, to truly balance these two feminist positions, this study concludes that it is necessary to separate out the legal approaches to those relationships with and without children as a minimum, and potentially to separate those with and without any form of care-dyad. While the care-dyad may include other relationships such as caring for the elderly, for the purposes of this conclusion and for reasons based on

¹²²⁰ C Ashley-Jones, Acting Government Statistician *Household Labour Force Survey: September 2011 Quarter* (Statistics New Zealand, 2011) 4

¹²²¹ See for example Australia Chapter 5, section 5.2.2 and England and Wales Chapter 6, section 6.2.1.1

¹²²² *White v White* [2000] 2 FLR 981

practicality, this thesis focuses specifically on a divide between relationships with and without children.¹²²³

Nearly all the lawyers who took part in this study made it clear that children made a difference due to the on-going needs and dependency that arose from the presence of children:

...you simply can't compare a situation where somebody's got childcare obligations and has dedicated a life to doing that as opposed to ... enjoying a slightly more luxurious lifestyles... (Scotlaw16)

Even where lawyers from Scotland and England and Wales wanted cohabiting couples to be treated differently from married couples, in practice, both sets of lawyers wanted greater protection for cohabiting couples than existed in these jurisdictions, especially where there were children. It is suggested that perhaps there is a gap between theory and practice; that while the lawyers feel that some difference ought to exist, in actual fact when faced with the practical realities of the financial implications of relationship breakdown (as was tested in the scenario questions), there is far less weight placed on this difference. Thus it is concluded an approach more similar to that found in the marriage context will in practice achieve the more protective awards that the data show they desire for cohabitants (with Scotland's 'half way house' approach deemed not protective enough in practice particularly where there were children).

The focus groups in England and Wales also demonstrated a division in the participants' preference between a Deech-like or pro-Fineman approach according to whether there were children; a higher proportion selected a needs-based remedy only for where children were present:

I think children should be central to the whole decision making process. I think relationships before there's children are different to relationships after in terms of how money should be split up because someone's going to end up looking after the children and that's going to have huge financial consequences for them (Katherine, cohabiting women group)

Moreover, the results from the focus groups clearly emphasised that there should be no difference in the legal treatment of cohabiting and married relationships where couples have

¹²²³ Children also includes children of the family as defined under s105 Children's Act 1989 to include step-children as well as children of both the parties. While further consideration where children are not of a cohabiting relationship may be needed, it is feasible that this could be extended to step (cohabiting) parents under the test established in *D v D (Child of the Family)* (1981) 2 FLR 93 (CA) p. 97 (Omrod LJ); 'does the evidence show that the child was treated as a member of the family'. It may be necessary, however, to impose a (flexible) time limitation period on this qualifier for cohabiting couples.

children, and perhaps more surprisingly even where they do not (subject here to a qualifying period):¹²²⁴

I think that it should be the same irrespective of the ... legal status of the relationship if it's a long term relationship ... (Jake, cohabiting men focus group)

Thus the overwhelming consensus from the Australian and New Zealand lawyers, as well as from members of the general public within England and Wales is that cohabitants without children should be treated (after a length of time) in the same manner as married couples.

While more research is needed to capture the views of the same-sex community on future reform options, this project indicates that nearly all who took part (including the focus groups in England and Wales) agreed that same-sex couples should be able to enter a relationship at least functionally equivalent to marriage, and that same- and different-sex relationships should be treated in the same manner on relationship breakdown. However, nearly all the lawyers indicated that the presence of children was a reason to treat same- and different-sex couples dissimilarly, therefore confirming the impact that children were perceived to have on relationship dynamics. Consequently, a dividing line based on the presence of children should also apply in the same-sex context.

Therefore, the fundamental conclusion of this thesis is that there needs to be a distinction between the legal treatment of those relationships with and without children rather than a distinction based wholly on relationship status. By re-drawing the dividing line in this manner, the law will be able to both respect and promote financial autonomy, and at the same time recognise the limitations that having children places on the primary care-giver's ability to engage with the labour force and become financially independent. This now begs the question of what shape a system of financial provision should take, and how it should distinguish between those with and those without children. What elements of the jurisdictions studied (and therefore from the pro-Fineman and Deech-like approaches) can be taken away from this comparative investigation to feed into future reform? This conclusion now tentatively considers what shape reform could take.

8.2.1.1 The Same Starting Point

Formal equality on its own fails to protect Fineman's care-dyad and therefore relationships with children. At the same time, wide discretion was inappropriate for Deech's imperative of promoting and achieving financial autonomy post-separation. Yet, this study concludes that having a starting point that embraces formal equality has great merits for relationships both

¹²²⁴ This qualifying period is discussed below.

with and without children. The procedural benefits that are associated with a rule-based system were evident in both Scotland and New Zealand: reduced costs through out-of-court settlements, simplicity and consistency, all of which would help relieve the English courts from a backlog of cases which are both costly and often heavily delayed. If realisable, these benefits of far greater certainty would be of value to any form of relationship upon separation provided perceived fairness is not sacrificed to over-rigid notions of formal equality.

Given that certainty does not necessarily mean formal equality,¹²²⁵ are there good reasons why formal equality should be the starting point for asset division post-separation in all or some relationships? While the findings of this study indicated that couples with and without children should be treated differently, the fact remained throughout all the empirical analysis that the lawyers considered relationships with children to be an equal partnership regardless of relationship status¹²²⁶ and thus to represent this, relationship assets should be divided equally. This was supported too by the focus groups in England and Wales. However, in the cohabiting context without children, the Scottish and English lawyers did not refer to cohabiting relationships without children as a 'partnership'.¹²²⁷ Yet, given the gap demonstrated above between their views in theory and in practice on the treatment of cohabitants as well as the overwhelming empirical findings which indicate that the other lawyers and focus group participants believe that relationships even without children are still a joint venture, it is concluded that these relationships should also be considered as a partnership:¹²²⁸

...because it's a partnership; whatever you contribute in your relationship should count equally. (NZLaw1)¹²²⁹

Consequently, formal equal sharing of relationship property¹²³⁰ (rather than a scheme based solely on separate property) as a starting point will reflect this conception of partnership as it allows for equal entitlement. Similarly, this entitlement to equal sharing is also the most appropriate starting point for relationships with children to recognise equally homemaking and breadwinning contributions. The approach pre-*White* in England and Wales demonstrated that only meeting needs does not place the care-relationships central to the system, and instead a solely needs-based approach placed a 'glass-ceiling' on the awards that the primary care-giver

¹²²⁵ For example a one third rule would similarly achieve certainty.

¹²²⁶ The lawyers from Scotland and England and Wales referred to relationships with children as being functionally equivalent to marriage. Discussions on qualification periods and the potential differences that may arise between different relationship statuses.

¹²²⁷ Lawyers from both jurisdictions referred to the fact that cohabiting relationships with children are functionally equivalent to marital relationships with children.

¹²²⁸ However, see below discussions on qualification periods and the potential differences that may arise between different relationship statuses.

¹²²⁹ Also, see Jake's quote above (Cohabiting Men Group). Furthermore, see the discussion below on qualification periods for cohabiting couples.

¹²³⁰ Relationship property shall be defined below

could achieve.¹²³¹ Instead, to avoid effectively what was gender discrimination pre-*White*,¹²³² the court in *White* recognised that the approach should be based on entitlement:

*...whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party...*¹²³³

Therefore, the entitlement of the primary care-giver to an equal division of relationship assets at the end of the relationship (as a starting point) can be seen as an important step towards Fineman's position by signalling that care-giving is equally important to financial contributions. Thus, it is argued, starting from a position of formal entitlement both recognises the relationship as a partnership and promotes the idea that domestic contributions are of equal value to financial contributions and this stance should be clearly adopted within the legislative framework in England and Wales. Furthermore, given that certainty (in the form of a starting point of entitlement to formal equal sharing of relationship property) will ostensibly provide greater equality of bargaining power, formal equality seems particularly appealing in light of the substantial cuts that are being made in legal aid in England and Wales for family disputes over ancillary relief where domestic violence is not present.¹²³⁴ If more people are consequently unable to access the courts due to financial costs then a more certain approach through formal equality would allow parties to settle their disputes outside of the courts more readily, aid speedy settlements and reduce tension by placing the parties on a more equal bargaining level.¹²³⁵

8.2.1.2 The Default Regime - Defining Relationship Property

Yet what should be subject to equal sharing? Deech's fundamental criticism of England and Wales' approach can be said to amount to the lack of provision within the jurisdiction to protect the proprietary interests of the financially stronger party. A wide definition of relationship property, from Deech's perspective, encourages dependency and also enables 'gold-digging'.¹²³⁶ Consequently, an entitlement to equally share all property would be counter-productive to promoting and achieving financial autonomy post-separation.¹²³⁷ Therefore, it is important to define relationship and non-relationship property and therefore which property is subject to equal division.

¹²³¹ C Butler, *Newslines: Miller and McFarlane* (2006) 36 *Family Law* 512, 516

¹²³² *White v White* [2000] UKHL 54, [2001] 1 AC 596

¹²³³ *White v White* [2000] UKHL 54, [2001] 1 AC 596 [24] (Nicholls LJ)

¹²³⁴ Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales* (Consultation Paper, CP12/10, 2010) 178. This is now the Legal Aid, Sentencing and Punishment of Offenders Bill 2011

¹²³⁵ J Dewar, 'Reducing Discretion in Family Law' (1997) 11 *Australian Journal of Family Law* 309, 349

¹²³⁶ See, for example, R Deech, 'The Principles Against Maintenance' (1977) 7 *Family Law* 229

¹²³⁷ Also note the qualification period discussions below

One notable result from this research was that any actual valuation of contributions should be avoided as much as possible especially where it is used to identify what is and is not relationship property. Australia was the only jurisdiction where valuing domestic contributions was fundamental in its approach where parties (particularly the homemaker) must demonstrate that they have earned a share in the property, although most of the lawyers from Australia felt that the homemaker and breadwinner were treated equally post-separation. Evaluating contributions protects the owning spouse's property and is therefore a mechanism through which the jurisdictions attempted to give greater recognition to any substantial financial contribution made by one spouse and therefore it may protect the breadwinner from an 'undeserving wife'. Yet, every jurisdiction that embodied elements of evaluation consistently gave weight to financial contributions at the expense of domestic ones. Homemaking and care-giving were never seen to be enough to be determined as 'extraordinary' or 'special' and it seemed that an additional negative burden was required from the homemaker in order to be 'a superwoman' in the eyes of the court. In these jurisdictions, domestic contributions are effectively taken for granted and a requirement of suffering is necessary in comparison to the success or indeed financial luck for the breadwinner. Therefore, any evaluation of contributions seems to work against Fineman's care-dyad (a theme reflected in the focus group analysis) and undermines the societal value of care-giving; although for Deech, this arguably gives greater protection towards the breadwinning spouse especially given that usually the non-owning spouse must prove a nexus to the asset.

However, the empirical interviews with practitioners all emphasised the difficulties associated with valuing domestic contributions, claiming that it was like comparing apples with oranges; or that there were huge difficulties with evidence and proof which fed into earlier concerns that discretion would increase litigation. It is perhaps this approach which raised so many criticisms about discretion in Australia: Australian lawyers made far greater reference to procedural difficulties such as increased litigation, whereas England and Wales' lawyers made few references to these difficulties. This leads to the conclusion that the difficulties that arise with discretion are really to do with its focus which affects the level and type of evidence that is required to establish a claim and that may affect the impact that this has procedurally. Having a focus which requires the parties to prove their respective contributions is inevitably biased in practice against the homemaking contributions as these are harder to prove and thus may rely more on hearsay, provoking conflict, as compared with needs or compensation, which can be measured in economic terms. The lawyers from England and Wales, New Zealand

and Scotland clearly championed the fact that, on the whole, they avoided valuing contributions as it was too difficult to quantify or gather evidence:

“...it’s one of those notorious areas where it is the tendency for the client to overstate their contribution and understate that of the other” (NZLaw6)

Similarly the focus groups raised concerns that the evaluation approach may be open to abuse, and eight respondents¹²³⁸ had a problem with having to prove contributions, feeling that the burden of proof and evidence would be far too difficult. Consequently, a clear recommendation of this research is that evaluating contributions should be avoided at all costs as it provokes conflict and only ever serves to disadvantage the homemaker, which is predominantly a gendered disadvantage.

Instead, the answer to protecting substantial assets may lie in the definition of matrimonial/relationship property. Both New Zealand and Scotland have clear approaches to matrimonial assets. New Zealand has the narrowest conception of relationship property limited only to the family home and chattels,¹²³⁹ followed by Scotland. Scotland defines matrimonial property as all property acquired throughout the relationship¹²⁴⁰ which could be limited by the source of funds argument, pre-marital agreements and usage. In comparison, Australia and England and Wales are able to consider all property and also have conceptual problems where the courts have tried to limit claims to one party’s substantial financial assets. Having a more restrictive definition of relationship property may avoid some of the difficulties seen in Australia and England and Wales and may alleviate some of Deech’s criticisms. Yet, this definition has to be carefully considered as, equally, an overly-narrow concept (such as in New Zealand) may actually impact detrimentally on the care-dyad.

From those jurisdictions considered throughout this thesis, Scotland’s definition of matrimonial property seems to find the right balance between Fineman’s and Deech’s position most effectively. Scotland defines matrimonial property as the ‘fruits of the marriage’, thus the relationship home, chattels and any property acquired during the marriage (excluding gifts and inheritance subject to usage)¹²⁴¹ and at the same time has the possibility of excluding certain assets from equal division. This would limit Deech’s ‘gold-diggers’ as the source of funds argument is able to keep the assets those successful entrepreneurs made before the marriage out of the pool of assets. Furthermore, Scotland considers ‘source of funds’ and ‘usage’ which was considered vital in the focus groups’ definition of relationship property. ‘Usage’ would

¹²³⁸ All of the participants of the married women group; Ben and Miles, cohabiting men group

¹²³⁹ S9 Property (Relationships) Act 1976. See Chapter 3 section 3.4.1

¹²⁴⁰ This does not include gifts or inheritances. See s10(4) Family Law (Scotland) Act and the discussions at Chapter 4, section 4.3.1

¹²⁴¹ See Chapter 4, Section 4.2.1

protect the owning spouse from claims against a relationship home which also is integral to a business, such as farmland. This conclusion suggests that this definition should be extended to all qualifying relationships.

However, formal equal division of relationship property on its own creates serious (although very different) problems from both Fineman's and Deech's perspectives. Consequently, although this study can provisionally conclude that an appropriate starting point is equal sharing for relationships with and without children, how universally equal sharing should apply requires further thought according to the contexts under consideration here. Should an entitlement to equal sharing be the automatic starting point in all relationships or should there be an eligibility bar in some situations? Furthermore, should equal sharing be applied rigidly or are there circumstances which might justify equality 'plus' (or minus)? Let us first consider where it may be appropriate to introduce an eligibility bar to the entitlement to equal sharing of relationship property before considering where there may be a case for an entitlement to more than 50%.

8.2.1.3 Eligibility for Automatic Entitlement to Equal Sharing

8.2.1.3.1 A Different Starting Point for Cohabiting Couples without Children?

The danger of having formal equal sharing for all relationships regardless of duration or presence of children is that cohabiting couples may enter these relationships casually and therefore may be surprised to find that they must share 50% of their assets (if relationship assets include a home owned by one party). Therefore, account should be taken of Deech's fears that treating cohabiting couples in the same way as if they were married, may leave unwitting individuals open to 'gold-diggers', and hapless couples may stumble into a regime without realising it. To avoid Deech's fears, careful attention towards a qualification period is needed where there are no children of the relationship. Cohabiting couples with children should be entitled to the starting point of equal sharing to ensure that the care-relationship is placed at the heart of the system and caregiving contributions are recognised.

Yet, the results from this project suggest that the appropriateness of a qualification period for those couples without children may depend on the type of settlement that the cohabiting couples would be entitled to once they have satisfied the threshold. For example, in New Zealand it was felt that the three-year limitation period was applied too rigidly and thus some were concerned that, given that the claimants would be entitled to 50% of all relationship property after a period of three years, this could lead to some unfair awards for those who had

drifted into a relationship. Furthermore, it could (as Deech suggests)¹²⁴² open the doors to 'gold-digging'. In contrast, in Australia the two-year qualification period for a discretionary approach was not criticised, nor was Scotland's approach where a far more limited remedy was available: the scheme began from the first day of cohabiting as it was felt that the length of a relationship would, of itself, be self-limiting. This lack of criticism in Scotland and Australia may be because qualifying for the cohabitation regime does not bring about such substantial entitlements as it did in New Zealand. Thus, another key finding of this project is that these issues are inter-linked.

The tentative conclusion of this study is that cohabiting couples without children should be treated similarly to relationships with children after a longer qualifying period and therefore be entitled to equal sharing. This conclusion suggests that the time bar should be raised to five years to prevent couples from qualifying as a result of just drifting into relationships; five years demonstrates a greater long-term commitment to one another where three years in New Zealand had been considered too low. Also, the lawyers from Australia and New Zealand highlighted the dangers of not having cohabitation provisions for those outside of the time limitation period. Yet, it is fundamentally clear from this project that a Property Law approach which reflects a pure Deech-like position is completely inadequate for cohabiting couples either with or without children. Therefore, it is important to have Family Law provisions for relationships that fall outside of this qualification period rather than merely falling back on a property-based settlement. However, what shape should this alternative approach take? Perhaps a scheme, similar to Scotland's regime which starts from day one, providing protection for claimants and yet, at the same time, is self-limiting according to the length of the relationship would be a way of 'bridging that gap'.

Using Scotland's approach here may create difficulties similar to those seen in New Zealand. If, after five years cohabitants are to find themselves entitled to formal equality, then the narrow, discretionary approach towards cohabiting relationships within Scots Law would mean that there would be a huge leap in rights for couples at the five year mark. New Zealand lawyers were clear that a rigid time bar could also severely disadvantage those who fell below the relationship duration threshold. Furthermore, economic advantages and disadvantages have generally been restrictively interpreted by the Scottish courts which could lead to unfair outcomes in those longer 'short duration' relationships. Consequently, this may impose an arbitrary time limitation period which may severely disadvantage the claimant whose relationship has ended at 4.5 years. While one answer to this may be that a flexible approach

¹²⁴² R Deech, 'Cohabitation' (2010) 40 *Family Law* 39, 40 - 41

to the time-bar is needed, this would create other problems and potentially introduce uncertainty into the system.

Yet, it is also suggested that the regime for those short duration relationships needs ideally to have some connection to the regime for longer relationships. If a regime that mirrors formal equality is to be adopted at five years, then perhaps for short duration relationships, couples could accrue rights incrementally based on the number of years that they are together. For example, as Barlow and Lind suggested with regard to the matrimonial home, the non-legal owner could be entitled to 10% after one year, 20% after two years etc. until they reach the five year threshold where they are entitled to equal sharing of family property.¹²⁴³ However, would this open the door to 'gold-digging', particularly for those hapless couples who have stumbled into cohabitation? What if, after a year, the non-owning cohabitant has rights in the proprietor's home without the proprietor having been aware of it? Perhaps the answer lies in blending these two approaches together. Maybe for those very short duration cohabiting relationships, Scotland's self-limiting approach may be more appealing, and then after three years there should be a different construction of percentages (for example 10% of relationship property after three years, 33% after four years and then 50% after five). This mixture of approaches would prevent 'gold-digging' claims from early cohabitation relationships limiting the extent of unjustified claims in very short duration relationships and yet at the same time provide protection for longer 'short duration' relationships where the approach based on economic-advantages and disadvantages is less appropriate. As indicated earlier, what would be acceptable where there are no children of the family is likely to depend on the definition of relationship property and whether it would include the home owned by one partner and purchased prior to the relationship. Furthermore, such changes to the regulation of a cohabitation relationship would require an awareness campaign for those potentially affected by such a scheme, and there should be scope for cohabitants to contract out of this system which is considered further on in this chapter. While this may be very complicated for the individual trying to navigate their way through the system, tables might be produced to guide people through their entitlement for ease of reference.

8.2.1.1.2 A Different Starting Point for *all* Relationships of Short Duration without Children?

While length was a concern for preventing automatic entitlement to 50% of relationship assets for cohabiting couples, the findings from this project also indicated that most of the lawyers across the four jurisdictions and also the focus groups distinguished between marriages of short and long duration. In fact, the focus groups wanted an approach similar to New Zealand

¹²⁴³ A Barlow and C Lind, 'A Matter of Trust: The Allocation of Rights in the Family Home' (2006) 19(4) *Legal Studies* 468, 478

where contributions were evaluated in relationships of short duration and then, after a length of time, this moved towards a model of entitlement to equal sharing. Thus, this conclusion suggests that a line should also be drawn between short and long marriages without children as well as short and long duration cohabitating relationships without children.

Yet, as the earlier discussion of time limitation periods revealed,¹²⁴⁴ having a set time-bar may introduce an arbitrary division that produces unfairness for being too low or too high in certain situations. To avoid the criticisms that suggested that the three year time-bar in New Zealand was too low, it seems necessary to place the bar at a five year mark as in the cohabitation context. The question then posed is how should short duration marriages be treated, and should they be any different from cohabiting relationships of short duration? As the discussion above indicates, this thesis rejects evaluation as a method through which to govern the distribution of assets at the end of a relationship, as it tends to disadvantage the female homemaker; it is possible that the criticisms in New Zealand that stated the three year time bar was too high in many cases may in fact reflect the inadequacy of having evaluation as the approach for short duration marriages. At the same time, it was evident that where respondents believed that marriage and cohabitation differed, it was because of the expression of commitment that was associated with a marital union. While many of the respondents throughout this project believed that cohabitants in long-term relationships also reflected that level of commitment, it is important not to ignore the finding that most of the lawyers and in particular, the focus groups presumed there to be a difference between short term relationships according to relationship status. In light of this, the Scottish approach towards cohabitants based on rebalancing economic advantages and disadvantages seems inappropriate in the short-duration marriage context. This is even considering that the Scottish approach towards economic advantages and disadvantages is more generous in the married context than it is in the cohabiting context; even then, the overall approach was still criticised by the lawyers for being overly narrow. Rather, an approach based on incrementally accruing rights each year of the relationship may offer an option which meets both Deech's and Fineman's positions¹²⁴⁵ where each year of marriage carries with it a greater entitlement to a share in the assets, and this increment should be more dramatic than in the cohabitation context. For example, where cohabitants might receive 10% after three years etc., married couples could be entitled to 10% after one year, 20% after two years etc. until they reach 50% at five years.¹²⁴⁶ Any periods of pre-marital cohabitation would also need to be factored in to

¹²⁴⁴ See section 8.2.2

¹²⁴⁵ A Barlow and C Lind, 'A Matter of Trust: The Allocation of Rights in the Family Home' (2006) 19(4) *Legal Studies* 468, 478

¹²⁴⁶ A Barlow and C Lind, 'A Matter of Trust: The Allocation of Rights in the Family Home' (2006) 19(4) *Legal Studies* 468, 478

this on the basis that getting married is an express declaration of commitment. It is the absence, or at least perceived absence of this declaration in the cohabitation context that has caused this commentator to suggest that different approaches for 'short duration' married and cohabiting couples should be taken. Furthermore, in light of this difference, the definition of relationship property should be wider than cohabiting relationships to include 'fruits of the marriage' as under section 8.2.1.2. Consequently, if a cohabiting couple has been together for three years and then marries, only to break up a year later, the short duration married couple scheme should apply. Therefore, the non-owning spouse would be entitled to four years under the short duration marriage scheme and thus to a sum of 40% of relationship property. This is in comparison to the 33% share that a cohabiting relationship of four years would give rise to. Similarly to the cohabitation context, tables would be necessary to explain these entitlements to those who are using this system.

8.2.1.1.3 Contracting Out of this Regime

While Deech may view these suggested proposals as an unwarranted paternalistic intervention into the private affairs of a couple, it is possible to give recognition to autonomy by recognising cohabitation and marital agreements. Additionally, cohabitation agreements and also the possibility of opting-out of the scheme allow cohabitants to avoid being regulated by Family Law where they do not wish it. Yet, balancing both Fineman's and Deech's positions when considering pre-nuptial agreements appears to be more difficult. While Deech argues that everyone is capable of autonomy and entering such contracts, Fineman contends that this autonomy is a myth. Consequently, enforcing contracts that are premised on the autonomy of two parties causes difficulties from Fineman's position. Therefore, to enforce relationship agreements without any formal requirements (such as in Scotland) can induce manifest injustice for Fineman's care-dyad, particularly considering that in Scotland the only prerequisite is that the agreement cannot be unfair; even an inequality in bargaining power will not necessarily render the contract void. While pre-nuptial agreements offer a way for spouses to protect large assets, it needs to be balanced with the economic inequality (and its effect on bargaining positions) that may exist between the parties. Consequently, having strict statutory protocols such as in New Zealand and Australia which require separate legal advice would be a way of balancing those two competing interests of autonomy and protection.

For couples without children, much greater weight should be given to contracts to recognise the autonomy of the parties, and thus such agreements should be upheld if they meet the above procedural requirements. In the absence of these agreements, then both married and cohabiting couples should be regulated by the default system for both short and long duration

relationships. However, contracting-out of this system is more complicated for relationships with children, as the danger of placing too much weight on these contracts is that this will mean that care-relationships are no longer at the heart of the system. Messages of autonomy ought not to be at the expense of those in care-relationships. To avoid this, it is suggested that for relationships with children, contractual agreements should not hold as much force as they would for relationships without children. Instead, for those contracts that meet the above prerequisites, the current approach in England and Wales to pre-nuptial agreements which only takes them into consideration rather than rigidly enforcing them, and also considers how fair they are¹²⁴⁷ may be a suitable compromise between autonomy and protection in this instance.

8.2.1.4 The Safety Net - An Entitlement to Equality 'Plus'

For relationships with children, or where relationships without children have crossed the time-bar (and not before), there may be instances where equal sharing of relationship property is not enough on its own. In light of these scenarios, there needs to be a safety net for the regime, and therefore a way in which the courts can grant an award that is equality 'plus' to the non-owning or financially weaker partner. For relationships without children, the overriding aim of financial provision should be financial autonomy and therefore a clean break through formal equality (as far as possible). For relationships with children, the goal should rather be substantive equality on account of the primary care-giver's reduced ability to be financially independent. This means that how and when the courts should grant equality 'plus' will depend on whether or not children are present.

8.2.1.4.1 Relationships (of at least five years) without Children

Although financial provision on relationship breakdown (without children) should promote financial autonomy and clean break, it is possible that these relationships may still have a division of relationship functions which results in an imbalance or an economic disparity between partners and therefore it may not be possible for one party to be financially autonomous at the moment of separation. Therefore, to recognise these relationships as a joint venture, it may be necessary to have some short-term maintenance to rehabilitate the partner and/or a provision to rebalance any economic disparity and compensate the non-owning spouse as in Scotland and New Zealand. In fact, these two jurisdictions rarely used periodical payments, and the lawyers voiced the clear benefits from a clean break; it severed ties between parties, allowed the parties to move on and limited hostility in the majority of cases. Where maintenance was applied, the emphasis of all of these jurisdictions was on

¹²⁴⁷ *Radmacher v Granatino* [2010] UKSC 42

rehabilitation, and, consequently, the orders were often of short duration. In fact, in Scotland there were two options for maintenance – a short three year provision and an indefinite provision which had a high bar to cross. These provisions were extremely rare to use and where they were, the awards were small and modest, allowing for the parties to go their separate ways post-divorce, and really reflecting greater elements of Deech’s position rather than Fineman’s. Thus, to offer some protection where formal equality may not enable financial independence on relationship breakdown, it is tentatively suggested that maintenance in a limited capacity which is designed to be rehabilitative is available on relationship breakdown in England and Wales. However, given that the onus of awards in this relationship context is on financial independence, it is possible to have unequal division of relationship property, but there is no access to non-relationship property. Furthermore, if this unequal division of relationship property is in place of maintenance, this would facilitate a clean break at the end of these relationships.

8.2.2.2 Relationships with Children

From the findings of this project, the approach outlined for relationships without children would not usually be suitable for those with children. Although ‘entitlement to equal sharing’ appears to be the most appropriate starting point for relationships with children, formal equality with a narrow conception of relationship property and a restrictive approach to maintenance and compensation, as seen in New Zealand and Scotland, can produce results that are unfair towards the care-giving partner. While neither Scotland’s nor New Zealand’s statutory framework excludes discretion, the narrow approach from the judges demonstrated the consequences of having such a restrictive and certain approach. The danger is that a scheme based solely on certainty (at least here through equal division) may go too far, be too rigid and may in fact cause the courts to completely ignore domestic contributions and the impact that care-giving can have on a party’s financial situation. Again, this study has found that preferences for autonomy ought not to disadvantage caregivers on relationship breakdown, and the lawyers from Scotland and New Zealand recognised that where there were children, additional protection on top of formal equality was necessary. Consequently, it is proposed that in the context of relationships with children, formal equality of relationship property (as defined above) ought to be the starting point for financial provisions on relationship breakdown, with discretion to adjust this award in the favour of the homemaker to ensure that the primary care-giver’s needs are met at the very minimum at the end of a relationship. To effectively place these care-relationships at the heart of financial provision on relationship breakdown, the focus of financial awards should be, as Fineman notes, to equalise

the resources between both parties.¹²⁴⁸ Formal equality alone will not always achieve this, as it fails to consider long-term economic disadvantage that arises from care-giving. To ignore these long-term effects not only impoverishes care-givers post-separation, but it also can create a disparity in the standard of living between former spouses which can severely impact children post-separation.

Thus, certainty on its own is not enough of a reason to place a formal equality ceiling on financial provision following relationships with children as this may often prove inadequate to meet the caregiver and children's needs, particularly if formal equality is limited to relationship property. However, in a similar fashion to the Scottish approach (where separate property could be divided under the other principles of s9(1)),¹²⁴⁹ if property which is not considered matrimonial can be used as a resource to achieve substantive equality for the care-relationships, this will balance the competing claims of autonomy for relationships without children, with room to protect primary care-givers and therefore relationships with children in a holistic manner. This overall approach to relationship property means that while the clear definition demarks and protects property ownership, there is space to interfere with separate property where relationship property on its own is insufficient.

Furthermore, most of the lawyers who took part in this project argued that maintenance should be available from future income, particularly for small asset cases and those with children. Respondents in both Scotland and New Zealand, which have rehabilitative approaches to maintenance, felt that the awards made were too infrequent and too small. In fact, the Scottish lawyers criticised the fact that it was not possible to grant periodical payments for s9(1)(b) (the compensatory provision) arguing that the result was that it severely disadvantaged the primary care-giver particularly in small asset cases, and those who had been in long marriages. In direct contrast, in Australia and England and Wales there was little mention of concerns relating to maintenance provisions. Maintenance appeared to be the best way to ensure that needs are met in the majority of cases. Through this definition of matrimonial property and maintenance, a wider scope of resources can be used to meet the needs of the care-dyad where formal equality is insufficient. Moreover, to provide extensive support where equal sharing is not enough to equalise resources on its own, and that this support can be accessed from non-relationship property and also the future income of the other party, demonstrates that the societal importance of care-giving is not displaced by the individual worth of financial contributions. Awards which provide the care-giving spouse a far

¹²⁴⁸ M Fineman, *The Autonomy Myth: A Theory Of Dependency* (New Press 2004)

¹²⁴⁹ Family Law (Scotland) Act 1985

greater sum than that of the other spouse are necessary to fully support the care-giving relationship post-separation.

However, even with a wide pool of assets, formal equality on its own may be insufficient and consequently it may be necessary to provide additional support on top of equal sharing. Yet, what shape should this additional support take: should it be based on relationship-generated disadvantages, needs or both? Neither New Zealand nor Scotland considered the needs of the party; instead the focus was on compensating any relationship-generated disadvantage that either party had suffered. New Zealand uses s15 of the Property (Relationships) Act to rebalance any economic disparity relating to the division of relationship responsibilities, and Scotland rebalanced any economic advantages and disadvantages made in the interests of the family under s9(1)(b) Family Law (Scotland) Act. Furthermore, Scotland compensated for the economic burden of caring under s9(1)(c). Yet, while compensation is conceptually attractive, lawyers from both these jurisdictions indicated that they were in practice immensely dissatisfied with the way in which this approach fails to meet needs. It is hard to discern whether compensation approach fails because of the shape of the statutory provisions, or just because the discretion has not been used widely enough. Perhaps with greater guidance on these discretionary provisions (including maintenance), more effective protection of the care-dyad may have been achieved.

Yet, Australia, which had a strong history of discretion within its legal framework, also had difficulty with compensation. Australia, had the opportunity to consider future needs under s75(2) of the Family Law Act Cth; however the courts held that this was an inappropriate test and so instead focused on compensation by trying to rebalance any economic disparity.¹²⁵⁰ Thus, the provision was more compensatory and holistic in practice. Similarly, England and Wales also uses a compensatory provision as one of its strands of fairness with the aim to have a holistic approach.¹²⁵¹ Needs alone had been insufficient within England and Wales prior to *White*.¹²⁵² Yet, respondents from both of these jurisdictions indicated that the legal system did not adequately compensate the primary care-giver where there was a relationship-generated disadvantage. Therefore, compensation as a concept may not be easy to apply. Perhaps the practical difficulties that are associated with quantifying the losses that a career sacrifice has in the labour market prevent the courts from adequately compensating the primary care-giver:

¹²⁵⁰ See *Figgins v Figgins* (2002) Fam CA 688. Also see discussion Chapter 5, section 5.3.3

¹²⁵¹ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186 identified that fairness consisted of needs, compensation and sharing.

¹²⁵² As discussed in section 8.2.1.1 above

...I don't think it would fully rebalance future disadvantages, because no one has a crystal ball... (EWLaw6)

...it's really hard to prove a career break because it's really hard to get any evidence about what the career would have been. (NZLaw13)

Furthermore, this practical difficulty may also relate to the typical salaries that are sacrificed by one party. It is unlikely that many will have as large a salary to give up as Mrs McFarlane¹²⁵³ and consequently, compensation may not prove to be a useful provision for most run of the mill cases. While it may prove more quantifiable and effective in big asset cases where a substantial salary has been forgone, in most cases this will be impractical to measure. Consequently, an approach that is based *solely* on compensatory provisions may actually not protect Fineman's care-dyad. However, that is not to say that compensation should be excluded altogether as it may have a place in a small category of cases such as *McFarlane*. Rather, it appears to be ineffective to have relationship-generated disadvantage as the basis of an award in its own right, particularly for these relationships identified as vulnerable. Addressing needs first (and perhaps generously interpreted) which can be reduced to an easy to apply formula, which England and Wales has traditionally done so well, therefore appears to be a safer and more quantifiable approach as a minimum for Fineman's care-dyad. Therefore, having a discretionary approach which is first and foremost needs-based, but which compensation can be built on top of (where possible) will provide a holistic approach towards the care-giving relationship.

Yet, England and Wales was the least satisfied with the provisions made for need at the end of a relationship although, it is suggested that this dissatisfaction may be because the lawyers held high expectations for the outcome of such an approach that has needs at its heart. Given the practical difficulties of quantifying compensation and the fact that the most pro-Fineman jurisdiction had the most dissatisfied lawyers, it appears that to provide adequate provision for the primary care-giver may require wider societal change as Fineman herself has proposed.¹²⁵⁴ An equality 'plus' approach that places the care-relationship at its heart is perhaps the furthest that private law can take Fineman's position which should involve a meeting of needs and compensation where it is relevant; certainty should not trump substantive 'fairness' for the caregiver in these relationships.

Consequently, while the starting points for those with and without children may be the same, the end goal is different. For relationships without children subject to a qualifying period, the

¹²⁵³ *McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186. Mrs McFarlane gave up a career equally lucrative to her husband and thus was granted £250,000 per annum

¹²⁵⁴ M Fineman, *The Autonomy Myth: A Theory Of Dependency* (New Press 2004)

end goal is formal equality and financial independence, and therefore, there should only be a limited entitlement to equality 'plus'. In comparison, for relationships with children the end goal is 'substantive equality'. Consequently, not only should entitlement to equal sharing of relationship property be automatic but there should be extensive provision to allow for equality 'plus' where necessary to place the care-relationship firmly at the centre of financial provision on relationship breakdown. It is concluded from this study that only by separating relationships with and without children will it be possible to balance the competing stances on autonomy and the autonomy myth, and appropriately reflect the lessons learned from other jurisdictions on the benefits and disadvantages of the conflicting feminist positions of Martha Fineman and Ruth Deech on the value to be placed on non-financial contributions to relationships.

APPENDICES

Appendix A: Interview Schedule

Thank you for agreeing to participate. This interview forms the basis of a wider project that looks at how the homemaker (and therefore domestic or non-financial contributions such as the unpaid contributions of caring for children, household chores and the organisation and running of the family home) should be valued by the courts in England and Wales on relationship breakdown when the courts divide the assets. To gain insight into this matter, this interview is interested in how your jurisdiction quantifies these contributions in married couples, cohabiting couples and same-sex relationships. It seeks to establish not only how your jurisdiction values homemaker contributions beside the breadwinner contributions (principally financial) at the end of these relationships, but also wishes to assess the level of your satisfaction at this approach in practice and whether you think that an alternative method of quantification would be more appropriate.

To do this, the questions have been divided into three sections. Section A looks at your general attitudes towards certain aspects of marriage, cohabiting and same-sex relationships. Section B then looks at the more practical elements of your jurisdiction in this area; what principles guide your courts when dividing assets on relationship breakdown and how they value contributions. It also assesses your opinion on these issues. Section C finally provides two scenarios of couples breaking up with a number of variables which aims to establish how your jurisdiction would settle financial provision and how satisfied you are with this approach.

A) ATTITUDES (general)

- 1) To what extent do you agree or disagree with each of the statements below? Please select from **strongly agree; agree; neither agree nor disagree; disagree; strongly disagree**.
 - a) Marriage is a social and economic partnership between equals
 - b) A Cohabiting relationship is an arrangement between individuals in which efforts should be recognised on a discrete or separate basis¹²⁵⁵
 - c) Marriage is a more financially intertwined union than cohabiting relationships
 - d) Marriage and cohabiting relationships should be treated exactly the same in law
 - e) Couples with children are likely to organise their financial and domestic affairs similarly irrespective of marriage
 - f) In general marital unions without children organise their financial and domestic affairs differently from cohabiting unions without children
 - g) In general married couples organise their affairs more traditionally into a homemaker/breadwinner divide than cohabiting couples
 - h) Same-sex cohabiting relationships divide their relationship responsibilities in a similar manner to different sex cohabiting relationships.
 - i) Regardless of who made the contributions, financial and domestic contributions are of equal value within marriage

¹²⁵⁵ Taken from B Fehlberg and J Behrens *Australian Family Law: The Contemporary Context* (Oxford University Press 2008) 543

- j) Regardless of who made the contributions, financial and domestic contributions are of equal value within different-sex cohabiting relationships
- k) Regardless of who made the contributions, financial and domestic contributions are of equal value within same-sex cohabiting relationships

B) THE JURISDICTION (on relationship breakdown)

1) *PRINCIPLES*

Here is a non-exhaustive list of some principles that are used to guide courts when dividing assets on relationship breakdown

- Fairness
- Needs
- Equal Sharing
- Compensation (to redress any significant prospective economic disparity between the parties arising from the way they conducted their relationship)
- Retention of property interests
- Child's Welfare
- Economic burden of caring
- Reward for Past Contributions
- Clean break

a) Which, if any of these principles feature in your jurisdiction on divorce? Please list them in order of importance to the court when determining the division of assets (including maintenance and pension if relevant) for married couples.

- i) Where do these principles originate from?
Case Law; Statute; Both; 'Other'. Please expand on other
- ii) In your experience, how consistently are these applied in that order of importance?
Always; Usually; Sometimes; Infrequently; Never
- iii) How satisfied are you with this order of principles?
Very Satisfied; Satisfied; Neutral; Dissatisfied; Very Dissatisfied
- iv) Please rewrite the list to indicate the order you think would be most appropriate including any alternative principles that you would think appropriate. Please expand on why.

b) In your experience, do the courts use these principles in the same order of importance for cohabiting couples? If not, how would the order of importance of the above principles change? Please list them.

- i) Where do these principles originate from?
Case Law; Statute; Both; 'Other'. Please expand on other.
- ii) In your experience, how consistently are these applied in that order of importance?
Always; Usually; Sometimes; Infrequently; Never
- iii) How satisfied are you with this order of principles?
Very Satisfied; Satisfied; Neutral; Dissatisfied; Very Dissatisfied

- iv) Please rewrite the list to indicate the order you think would be most appropriate including any alternative principles that you would think appropriate. Please expand on why.
- v) Do these principles apply equally to same-sex couples?
Always; Usually; Sometimes; Infrequently; Never
- vi) Do you think the same principles should apply equally between same-sex cohabiting couples and different-sex cohabiting couples?
- vii) Do you think that the same principle should apply equally between married/civil partners and same-sex/different-sex cohabiting couples?

2) VALUING DOMESTIC CONTRIBUTIONS

(a)

- i) In your experience, where the parties in a marriage have divided their roles unequally into breadwinner and homemaker contributions, how does your jurisdiction balance their respective financial and non-financial contributions to a relationship on breakdown?



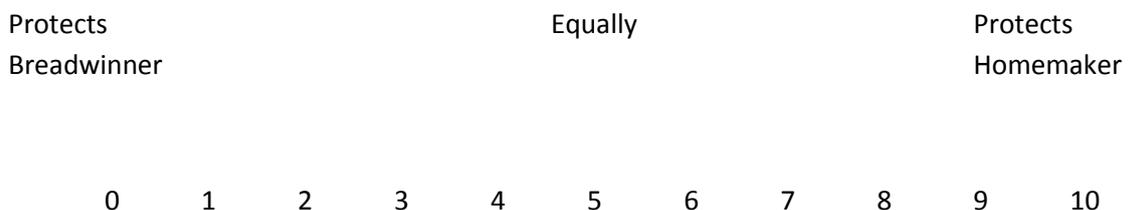
- ii) How adequately do you think that this treats the homemaker?



- iii) Please expand on why.

(b)

- i) In your experience, where the parties in a same-sex cohabiting relationship have divided their roles unequally into breadwinner and homemaker contributions, how does your jurisdiction balance their respective financial and non-financial contributions to a relationship on divorce?



ii) How adequately do you think that this treats the homemaker?

Too Little					Satisfactorily						Too Generous
	0	1	2	3	4	5	6	7	8	9	10

Please expand on why.

(c)

i) In your experience, where the parties in a different-sex cohabiting relationship have divided their roles unequally into breadwinner and homemaker contributions, how does your jurisdiction balance their respective financial and non-financial contributions to a relationship on breakdown?

Protects Breadwinner					Equally						Protects Homemaker
	0	1	2	3	4	5	6	7	8	9	10

ii) How adequately do you think that this treats the homemaker?

Too Little					Satisfactorily						Too Generous
	0	1	2	3	4	5	6	7	8	9	10

iii) Please expand on why.

(d)

i) In your experience, where the parties in a marriage are both fulltime dual earners and only one is predominantly responsible for the homemaker contributions, how is this additional contribution reflected in financial provision on relationship breakdown in your jurisdiction in comparison to a fulltime homemaker's contribution?

It is valued less

It enhances the award on account of the additional contributions

0 1 2 3 4 5 6 7 8 9 10

ii) How adequately do you think that this serves the interests of the party who carries out the dual role?

Too Little

Satisfactorily

Too Generous

0 1 2 3 4 5 6 7 8 9 10

iii) Please expand on why.

(e)

i) In your experience, where the parties in a same-sex cohabiting relationship are both fulltime dual earners and only one is predominantly responsible for the homemaker contributions, how is this additional contribution reflected in financial provision on relationship breakdown in your jurisdiction in comparison to a fulltime homemaker's contribution?

It is valued less

It enhances the award on account of the additional contributions

0 1 2 3 4 5 6 7 8 9 10

ii) How adequately do you think that this serves the interests of the party who carries out the dual role?

Too Little

Satisfactorily

Too Generous

0 1 2 3 4 5 6 7 8 9 10

iii) Please expand on why.

(f)

i) In your experience, where the parties in a different-sex cohabiting relationship are both fulltime dual earners and only one is predominantly responsible for the homemaker contributions, how is this additional contribution reflected in

financial provision on relationship breakdown in your jurisdiction in comparison to a fulltime homemaker's contribution?

It is valued less

It enhances the award on account of the additional contributions

0 1 2 3 4 5 6 7 8 9 10

ii) How adequately do you think that this serves the interests of the party who carries out the dual role?

Too Little

Satisfactorily

Too Generous

0 1 2 3 4 5 6 7 8 9 10

Please expand on why

(g)

i) In your experience, where the parties in a marriage, one party works fulltime and the other works part-time as well as carrying out all the homemaker responsibilities, how does financial provision in your jurisdiction reflect this relationship generated disadvantage on relationship breakdown?

Disregarded:

Fully rebalances past, present and future disadvantages

0 1 2 3 4 5 6 7 8 9 10

ii) How adequately do you think that this serves the interests of the party who carries out the dual role?

Disregarded:

Fully
rebalances past,
present and
future disadvantages

0 1 2 3 4 5 6 7 8 9 10

ii) How adequately do you think that this serves the interests of the party who carries out the dual role?

Too
Little

Satisfactorily

Too
Generous

0 1 2 3 4 5 6 7 8 9 10

iii) Please expand on why.

Please indicate how far you agree with the following statements in (j) and (k)

(j)

i) Financial provision on relationship breakdown in my jurisdiction encourages couples to avoid financial dependence on one another post separation.

Agree

Disagree

0 1 2 3 4 5 6 7 8 9 10

ii) In principle I think that financial provision on relationship breakdown in my jurisdiction should encourage couples to avoid financial dependence on one another post separation.

Agree

Disagree

0 1 2 3 4 5 6 7 8 9 10

iii) Please expand on why.

iv) Does this differ between same-sex and different-sex cohabiting couples and married couples?

(k)
i) Financial provision on relationship breakdown in my jurisdiction does not protect those who are financially dependent on their partners.

Agree Disagree

0 1 2 3 4 5 6 7 8 9 10

ii) In principle I think that financial provision on relationship breakdown in my jurisdiction should not protect those who are financially dependent on their partners.

Agree Disagree

0 1 2 3 4 5 6 7 8 9 10

iii) Please expand on why.

iv) Does this differ between same-sex and different-sex cohabiting couples and married couples?

(L)
i) How does financial provision in your jurisdiction at the point of relationship breakdown value homemaking contributions in couples where there are children compared to where there are not?

With Children: Without Children:
More Favourably The Same More Favourably

0 1 2 3 4 5 6 7 8 9 10

ii) How do you think that financial provision in your jurisdiction at the point of relationship breakdown SHOULD value homemaking contributions in couples where there are children from those where there are not?

With Children: Without Children:
More Favourably The Same More Favourably
Favourably 0 1 2 3 4 5 6 7 8 9 10

- iii) Please expand on why.
- iv) Does this differ between same-sex and different-sex cohabiting couples and married couples?

(m)

- i) How does financial provision in your jurisdiction at the point of relationship breakdown value homemaking contributions in married couples beside those of unmarried couples.

With more weight Cohabiting couples	The same	With more weight in married couples
0	5	10
1	6	9
2	7	8
3	8	7
4	9	6

- ii) How do you think that financial provision in your jurisdiction at the point of relationship breakdown SHOULD value homemaking contributions in married couples beside those of unmarried couples?

With more weight Cohabiting couples	The same	With more weight in married couples
0	5	10
1	6	9
2	7	8
3	8	7
4	9	6

- iii) Please expand on why.

(n)

- i) How does financial provision in your jurisdiction at the point of relationship breakdown value homemaking contributions in different-sex couples beside those of same-sex couples.

With more weight in different-sex couples	The same	With more weight in same-sex couples
0	5	10
1	6	9
2	7	8
3	8	7
4	9	6

- ii) How do you think that financial provision in your jurisdiction at the point of relationship breakdown SHOULD value homemaking contributions in different-sex couples beside those of same-sex couples?

With more weight in different-sex couples	The same	With more weight in same-sex couples
0	5	10
1	6	9
2	7	8
3	8	7
4	9	6

- iii) Please expand on why.

- (o)
i) What degree of flexibility do the courts have when valuing these contributions?

Applies Strict Rules

Complete Discretion

0 1 2 3 4 5 6 7 8 9 10

- ii) Which number on this scale best matches your view on this amount of discretion?

Far too rigid

Right Balance

Far too uncertain

0 1 2 3 4 5 6 7 8 9 10

- iii) Please expand on why you have chosen this answer.
- iv) Does this differ between same-sex and different-sex cohabiting couples and married couples?
- v) What difficulties are posed when quantifying domestic contributions in your jurisdiction? Please expand.

C) SCENARIOS

This section wishes to establish how your jurisdiction would settle financial disputes in two scenarios. Each will entail a set of circumstances surrounding a couple splitting up which has a number of alternative variables. For each scenario you will be given the outcome in England and Wales then asked your opinion, then you will be asked a number of questions underneath about financial awards made for either Miss Jones (Scenario A) or Mrs Higgins (Scenario B). Both scenarios will have 4 variations of case facts. For each of these adaptations you will be asked a number of questions concerning the approach that your jurisdiction would take in light of these.

Scenario A:

Mr Smith and Miss Jones were unmarried and had lived together for almost 20 years. Their home was purchased in Mr Smith's name and Miss Jones had made no contribution to the purchase price or to any subsequent mortgage payments. They presented themselves as a married couple and she had assumed the homemaker role, raising their three children who are now grown up. 15 years into their relationship she began to work part-time and subsequently contributed to household bills and bought various chattels. She also had redecorated the house twice. On separation, she had no assets of her own or any potential earning capacity. The house was an average three-bedroom house and Mr Smith was on an average income.

THE OUTCOME IN ENGLAND AND WALES: It is likely that as the couple are unmarried and Miss Jones has not made any direct financial contributions to the property's purchase price, the courts in England and Wales would not find a beneficial entitlement in the home and thus she has no share in the property, no right to remain in the home and no remedy elsewhere on relationship breakdown.

1)

- a. Which number on the below scale best represents your opinion on this outcome in England and Wales? Please give an explanation regarding your choice.

Too protective of the financial contributor	About Right								Too generous to the non-financial contributor	
0	1	2	3	4	5	6	7	8	9	10

2)

- a. In your experience, how would financial provision on relationship breakdown in your jurisdiction differ for Miss Jones in comparison? (Please also indicate the award that the courts would be likely to grant e.g. any potential maintenance and/or how the assets would be divided)

Much less generous; A little less generous; the same; a little more generous; much more generous

- b. Which number on the scale best represents your opinion on your jurisdiction's approach? Please give an explanation regarding your choice.

Too protective of the financial contributor	About Right								Too generous to the non-financial contributor	
0	1	2	3	4	5	6	7	8	9	10

- c. If you could, how would you in comparison to your jurisdiction vary the financial orders for Miss Jones in light of this variation? (Please also indicate the award that you would feel to be most appropriate AND WHY)

Much less generous; A little less generous; the same; a little more generous; much more generous

3) VARIABLES

- I) Miss Jones had not had any children.
- II) Mr Smith and Miss Jones were in fact married
- III) Miss Jones had worked throughout the relationship
- IV) If this was a same-sex relationship with adoptive children

You will be asked the below questions for each scenario:

- i) How would the financial provision for the original scenario in Your jurisdiction for Miss Jones alter in light of this variation? (Please also indicate the award that the courts would be likely to grant)

Much less generous; A little less generous; the same; a little more generous; much more generous

- ii) Which number on the scale best represents your opinion on the approach to this variant in your jurisdiction? Please give an explanation regarding your choice.

Too protective of the financial contributor					About Right						Too generous to the non-financial contributor
0	1	2	3	4	5	6	7	8	9	10	

- iii) If you could, how would you in comparison to your jurisdiction vary the financial orders for Miss Jones in light of this variation? (Please also indicate the award that you would feel to be most appropriate AND WHY)

Much less generous; A little less generous; the same; a little more generous; much more generous

Scenario B:

Mr and Mrs Higgins had been married for under three years with no children. At the time of the marriage, Mr Higgins had a very successful career and a high income bringing vast multi-million assets to the relationship over 16.7 million. Shortly after their marriage Mr Higgins joined a new company buying vast shares in it. Mrs Higgins gave up her high income job upon marriage to become the homemaker. She was used to an extremely high standard of living. At the time of separation, Mr Higgins had huge assets increasing to 17.5 million plus his shares worth between 12 and 18 million and an income of 1 million a year. Mrs Higgins had significantly smaller assets worth 100,000 of which half were tied up in pension funds.

THE OUTCOME IN ENGLAND AND WALES: In England and Wales, although the marriage was short, giving the standard of living that Mrs Higgins legitimately expected and that Mr Higgins had acquired some of the wealth through his actions during the marriage, the courts would award her financial provision exceeding her needs; the matrimonial home (worth 2.3 million) and a 2.7 million lump sum for a clean break.

- iv)
- a. Which number on the below scale best represents your opinion on this outcome in England and Wales? Please give an explanation regarding your choice.

Appendix B: Focus Group Schedule

Firstly, thank you for taking part in my project and giving up the time for this session. As I'm sure you're aware, my project looks at how the law values roles in relationships which is reflected in the way that it divides assets when couples break down. In particular, I'm investigating options for legal reform on financial provision for when married couples, civil partnerships, and unmarried couples split up. This session therefore seeks your own opinions on how the law should go about taking considerations of the domestic and financial arrangements within couples of different styles when it decides how to divide assets.

With regards to the rules of the focus groups, this session is being recorded but everything said and done is confidential and will not be used outside the room except for research purposes. If you feel it is necessary you do not have to give your real name in the group introductions. Also, there are no wrong opinions although please do not hesitate to disagree with someone else's perspective.

Opening **1. Tell us your name and a little bit about yourself**

Introductory **2. The first task of this session is for you to list the things that you think of when we talk about contributions in relationships? So what types of come to mind?**

- What about sacrifices?
- Childcare/housework
- Not about fault/negative contributions in the law
- Financial Assets? (Gifts/inheritances)
- **Is this the same for cohabiting couples or same-sex couples?**

NB - SAY HOW IT FALLS INTO FINANCIAL AND NON-FINANCIAL/DOMESTIC CONTRIBUTIONS

Transitional **3. When a couple breaks up, how do you think that domestic contributions in comparison to financial contributions should be valued by the law and therefore reflected in the division of assets? Do you think that the law should view them as equally valuable, thus giving 50:50, or do you think certain contributions are of more value or importance? E.g. business success or caring for a disabled child.**

- What about where a special contribution has been made?
- Is childcare more important than without, be treated more generously?
- Should the law think about needs if there are relationship disadvantages caused by the homemaking?
- **Is this the same for cohabiting couples or same-sex couples?**

Key **4. What sort of financial assets do you think that the law should be able to divide between *both* parties at the end of a relationship no matter who they belong to? Should any type of property be seen by the law as solely belonging to one party or should everything the parties own be divisible?**

- Gifts and inheritances?
- Very large income?
- Business Assets?
- Property bought before/during/after a relationship and its subsequent increase in its value.
- Pensions
- **Is this the same for cohabiting couples or same-sex couples?**

Key **5. The law has a choice of a number ways of paying attention to domestic contributions which take a number of alternative approaches to the issues that we have discussed. What do you think of these alternatives? Which do you prefer, which do you least prefer and why? Could a compromise be reached?**

**THINK ABOUT DIFFERENT MODELS FOR DIFFERENT RELATIONSHIP STATUSES –
COHABITANTS, MARRIED COUPLES, SAME-SEX and CIVIL PARTNERSHIPS**

MODEL ONE: *FINANCIAL FOCUS:* Financial contributions only should be recognised. Money in is money out. There is no recognition of domestic contributions unless they add value to the property.

MODEL TWO: *ECONOMIC ADVANTAGE v. ECONOMIC DISADVANTAGE:* This rebalances the positive and negative economic effects of a relationship. It ensures that no-one is dramatically better or worse off financially than the other as a result of the contributions made in the relationship. It can't be for loss of earnings (just that the loss has caused a lasting disadvantage) and does not consider the needs of the parties.

MODEL THREE: *EVALUATIVE APPROACH:* An evaluation of the domestic and financial contributions made. The homemaker must prove that their contributions are significant enough to gain a percentage of the financial assets either by linking it to the property. This also may consider future needs, but not necessarily.

MODEL FOUR: *EQUAL SHARING.* It is a partnership, so everything should be divided equally in all circumstances regardless of the roles.

- **What if certain property was excluded?**
 - **Property owned before the relationship**
 - **Gifts/inheritance**
 - **Business assets**

MODEL FIVE: *NEEDS AND COMPENSATION:* The needs of the parties are central to this model and it ensures they are met regardless of the ownership of property. Secondly, if there are any family assets (e.g. the relationship home or property attained after the relationship began) left after meeting needs, it will be

divided equally. However, if there has been a career disadvantage (such as giving up a job to look after children) then the courts may award unequal sharing with compensation to the homemaker.

6. SCENARIOS – Which if any of the outcomes would be most appropriate/least appropriate?

Key 6. What if I said that this couple was married?

Appendix C: Focus Group Handout

MODELS OF FINANCIAL PROVISION

MODEL ONE:	<i>FINANCIAL FOCUS:</i> Only financial contributions should be recognised. Money in is money out. There is no recognition of domestic contributions unless they add value to the property.
MODEL TWO:	<i>ECONOMIC ADVANTAGE v. ECONOMIC DISADVANTAGE:</i> This rebalances the positive and negative economic effects of a relationship. It ensures that no-one is dramatically better or worse off financially than the other as a result of the contributions made in the relationship. It can't be for loss of earnings (just that that loss has produced lasting disadvantage) and does not consider needs of the parties.
MODEL THREE:	<i>EVALUATIVE APPROACH:</i> An evaluation of the domestic and financial contributions made. The homemaker must prove that their contributions are significant enough to gain a percentage of the financial assets either by linking it to the property. This also considers future needs of the parties.
MODEL FOUR:	<i>EQUAL SHARING.</i> It is a partnership, so everything should be divided equally in all circumstances regardless of the roles.
MODEL FIVE:	<i>NEEDS AND COMPENSATION:</i> The needs of the parties are central to this model and it ensures they are met regardless of the ownership of property. Secondly, if there are any family assets (e.g. the relationship home or property attained after the relationship began) left after meeting needs, it will be divided equally. However, if there has been a career disadvantage (such as giving up a job to look after children) then the courts may award unequal sharing with compensation to the homemaker.

SCENARIOS:

<u>SCENARIO A</u>	<u>Potential Outcomes.</u>
<p>Mr Smith (45) and Miss Jones (43) were unmarried and had lived together for almost 20 years. Their home was purchased in Mr Smith's name and Miss Jones had made no contribution to the purchase price or to any subsequent mortgage payments. They presented themselves as a married couple and she had assumed the homemaker role, raising their three children who are now grown up. 15 years into their relationship she began to work part-time and subsequently contributed to household bills and bought various chattels. She also had redecorated the house twice. On separation, she had no assets of her own or any potential earning capacity. The house was an average three-bedroom house and Mr Smith was on an average income.</p>	a. Miss Jones would receive nothing. She would have no right to remain in the home and no remedy elsewhere
	b. Mr Smith would have to sell the house and she would be entitled to about 30% and some of maybe pension sharing. She could not claim any maintenance.
	c. 50% of home only, without maintenance (40% for contributions and 10% extra for future needs)
	d. 50% of home and 50% of Mr Smith's pension
	e. 50% of the house and 50% pension and maybe maintenance for a maximum of 3 years
	f. 50% of the house and 50% of pension and maintenance over 3 years
	g. Over 50% of house and any share of pension and maintenance until she remarries or enters another relationship

<u>SCENARIO B</u>	<u>Potential Outcomes.</u>
<p>Mr and Mrs Higgins (respectively 41 and 36) had been cohabiting for two years and then married for under three years without children. At the time of the marriage, Mr Higgins had a very successful career and a high income bringing vast multi-million assets to the relationship over 16.7 million. Shortly after their marriage Mr Higgins joined a new company buying vast shares in it. Mrs Higgins gave up her high income job upon marriage to become the homemaker. She was used to an extremely high standard of living. At the time of separation, Mr Higgins had huge assets increasing to 17.5 million plus his shares worth between 12 and 18 million and an income of 1 million a year. Mrs Higgins had significantly smaller assets worth 100,000 of which half were tied up in pension funds.</p>	a. Mrs Higgins would receive nothing as she has made no financial contributions.
	b. Mrs Higgins would receive a settlement that would share the economic disadvantage she sustained during the course of their relationship. Given that she was only out of employment for three years, it is likely to be negligible unless she can show it produced lasting disadvantage. She could not claim any maintenance.
	c. As her contributions could not be linked to Mr Higgins' financial assets she could not receive more than 10% (a lump sum of 2-3 million)
	d. She would get 50% of house and £6-9 million for half of Mr Higgins' shares
	e. She would get 50% of the house which is worth 2.3 million (so 1.15 million) and half of the increase in Mr Higgins assets (around 500,000)
	f. She would get the house (2.3 million) and a lump sum of 2.7 million

e) Length of time (if relevant) you and your partner have been married:.....

f) Have you ever lived with any other partner before? **Yes/No**

g) Have you ever been married before? **Yes/No**

4) Employment.

- a) Your Status:
- | | | | |
|------------|--------------------------|---------------|--------------------------|
| Fulltime | <input type="checkbox"/> | Part-Time | <input type="checkbox"/> |
| Casual | <input type="checkbox"/> | Homemaker | <input type="checkbox"/> |
| Retired | <input type="checkbox"/> | Student | <input type="checkbox"/> |
| Unemployed | <input type="checkbox"/> | Self Employed | <input type="checkbox"/> |
| Other | <input type="checkbox"/> | | |

- b) Your income bracket
- | | | | |
|------------------------------|--|--|--------------------------|
| <input type="checkbox"/> | Under £5,000 | £5,000 - £10,000 | <input type="checkbox"/> |
| N/A <input type="checkbox"/> | £10,000 - £20,000 <input type="checkbox"/> | £20,000 - £30,000 <input type="checkbox"/> | |
| | £30,000 - £40,000 <input type="checkbox"/> | Over £40,000 | <input type="checkbox"/> |

- c) Your **partner's** status:
- | | | | |
|----------|--------------------------|-----------|--------------------------|
| Fulltime | <input type="checkbox"/> | Part-Time | <input type="checkbox"/> |
| Casual | <input type="checkbox"/> | Homemaker | <input type="checkbox"/> |

Retired Student

Unemployed Self Employed

Other

d) Your **partner's** income bracket

Under £5,000 £5,000 - £10,000
N/A £10,000 - £20,000 £20,000 - £30,000
£30,000 - £40,000 Over £40,000

e) Who would you regard to be the main financial earner in your household?

Me

About equal

My Partner

5) THE FAMILY HOME

What is the status of your family home's ownership:

Rented

Owned solely by you

Jointly owned

Owned solely by your partner

Other Please Expand

.....
.....

Do you have a mortgage? **Yes/No**

Overall, who would you say is mostly responsible for paying the rent/mortgage? Please circle.

Always me	Usually me	About equal	Usually my partner	Always my partner
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6) CHILDREN (If relevant)

a) Number of Children under 18 in the household:

b) Do you have any children from previous relationships living with you and your partner?
If yes, how many?.....

c) Overall, who would you say is mostly responsible for childcare responsibilities? Please circle.

Always me	Usually me	About equal	Usually my partner	Always my partner
--------------	---------------	----------------	--------------------------	-------------------------

7) Overall, who would you say is mostly responsible for domestic (not including childcare) responsibilities? Please circle.

Always me Usually me About equal Usually my partner Always my partner

8) Overall, who would you say is mostly responsible for *organising* financial payments e.g. bills, house expenses? Please circle.

Always me Usually me About equal Usually my partner Always my partner

9) Overall, who would you say is mostly responsible for *paying* financial payments e.g. bills, house expenses? Please circle.

Always me Usually me About equal Usually my partner Always my partner

10) In which ways, if at all, have either you or your partner made lifestyle changes to support your partner's career (e.g. moving location, helping them out at work, taking on more childcare responsibilities, paid for training/educational courses...)

.....
.....
.....

Do you have any other comments?

.....
.....
.....

Thank you for completing this questionnaire – your help is much appreciated.

Appendix E: Interview Consent Form

GUIDE INFORMATION/CONSENT FORM FOR INTERVIEWS

Title of Research Project

Valuing Domestic Contributions: A Search for a Solution for Family Law

Details of Project

My name is Fae Garland and I am currently a PhD student at the University of Exeter, England and my research project concerns aspects Family Law. Currently, the family, its forms, and traditional family practices are undergoing change in British society and these changes are in turn affecting the development of family law, particularly when relationships break down. As part of this research, this project investigates options for legal reform on financial provision for when married couples, civil partnerships, and unmarried couples split up. In particular, this session seeks your opinion of how well you think your legal system values domestic contributions, if at all, when considering how to divide the assets in each of the various forms of relationship breakdown.

Contact Details

For further information about the research or your interview data, please contact:

Fae Garland School of Law Exeter University, Devon UK.

Tel 00 44 (0) 1392 263240, fsg201@ex.ac.uk

If you have concerns/questions about the research you would like to discuss with someone else at the University, please contact my PhD supervisor:

Professor Anne Barlow, a.e.barlow@ex.ac.uk

Confidentiality

This interview session will be tape recorded but as set out below, it will only be used anonymously in any publication or presentation relating to the project and not for any other purpose. Interview tapes and transcripts will be held in confidence. They will not be used other than for the purposes described above and third parties will not be allowed access to them (except as may be required by the law). However, if you request it, you will be supplied with a copy of *your* interview transcript so that you can comment on and edit it as you see fit (please give your email below). Your data will be held in accordance with the Data Protection Act and held indefinitely on an anonymous basis.

Anonymity

Interview data will be held and used on an anonymous basis, with no mention of your name, but we will assign you a first-name pseudonym if we wish to quote your interview.

Consent

Appendix F: Focus Group Consent Forms

GUIDE INFORMATION/CONSENT FORM FOR FOCUS GROUPS

Title of Research Project

Valuing Domestic Contributions: A Search for a Solution for Family Law

Details of Project

My name is Fae Garland and I am currently a PhD student at the University of Exeter, England and my research project concerns aspects of Family Law. Currently, the family, its forms, and traditional family practices are undergoing change in British society and these changes are in turn affecting the development of family law, particularly when relationships break down. As part of this research, this project investigates options for legal reform on financial provision for when married couples, civil partnerships, and unmarried couples split up. In particular, this focus group session seeks your views on how the law should value and consider 'homemaker' and 'breadwinner' contributions before making a decision on the division of assets.

Contact Details

For further information about the research or your interview data, please contact:

Fae Garland School of Law Exeter University, Devon UK.

Tel 00 44 (0) 1392 263240, fsg201@ex.ac.uk

If you have concerns/questions about the research you would like to discuss with someone else at the University, please contact my PhD supervisor:

Professor Anne Barlow, a.e.barlow@ex.ac.uk

Confidentiality

The focus group session will be tape recorded but as set out below, contributions to discussion will only be used anonymously in any publication or presentation relating to the project. Focus Group tapes and transcripts will be held in confidence. They will not be used other than for the purposes described above and third parties will not be allowed access to them (except as may be required by the law). However, if you request it, you will be supplied with a copy of the focus group transcript so that you can comment on and edit it as you see fit (please give your email below). Your data will be held in accordance with the Data Protection Act and held indefinitely on an anonymous basis.

Anonymity

Appendix G: Interview Information Sheets

Thank you for agreeing to participate.

- **Background to the project:**
I am a PhD student at the University of Exeter, England studying Family Law and this project forms part of my thesis. Currently, the family, its forms, and traditional family practices are undergoing change in British society and these changes are in turn affecting the development of family law, particularly when relationships break down. As part of this research, this project investigates options for legal reform on financial provision for when married couples, civil partnerships, and unmarried couples split up. Therefore, this project looks at how the law should go about taking considerations of the domestic and financial arrangements within couples of different styles when it decides how to divide assets.
- **What is involved?**
This session will involve an interview which will last around half an hour. It is one of up to 12 that shall be carried out in your jurisdiction. You will be asked several questions involving some personal information, some information on how the law in your jurisdiction values domestic contributions, whether the current law is fair or justified in its approach, and the possible ways that the law could and should value and consider 'homemaker' and 'breadwinner' contributions before making a decision on the division of assets.
- **Any Risks?**
I am unaware of any risks in this project, although it does deal with personal data and concern topics that are personal in their nature such as your opinions on your legal systems which I hope that you are happy to discuss. However, consent is completely voluntary and you may withdraw at any point and do not have to answer any questions that cause discomfort. Furthermore, you can have any statements withdrawn within 7 days after this session, and can request to review the transcript.
- **Confidentiality:**
This project shall comply with the University of Exeter's policy regarding anonymity and storage of personal data and the procedures used have been approved by the Ethics Officer. Therefore, the data collected shall be completely confidential to the researcher unless your permission is gained. Additionally, upon signing the consent form, all those participating in the focus groups shall be expected to maintain the confidentiality of the other participants. Please refer to your consent sheet for further information on data storage.
- It will be possible to request a summary of the findings.

Please complete the attached consent sheet and return it to me at the beginning of the session. If you have any further queries, then please do not hesitate to contact me on the following details.

Many thanks,

Fae Garland.

Tel: 07729 836 470

Email: fsg201@ex.ac.uk

Appendix H: Focus Group Information Sheet

Thank you for agreeing to participate.

- **Background to the project:**
I am a PhD student at the University of Exeter, England studying Family Law and this project forms part of my thesis. Currently, the family, its forms, and traditional family practices are undergoing change in British society and these changes are in turn affecting the development of family law, particularly when relationships break down. As part of this research, this project investigates options for legal reform on financial provision for when married couples, civil partnerships, and unmarried couples split up. Therefore, this project looks at how the law should go about taking considerations of the domestic and financial arrangements within couples of different styles when it decides how to divide assets.
- **What is involved?**
This session will ask you to complete a brief questionnaire to tell me a bit about yourselves. After this, you and five to seven others shall come together in a focus group to have a general discussion on issues surrounding how domestic contributions, whether the current law is fair or justified in its approach, and the possible ways that the law could and should value and consider 'homemaker' and 'breadwinner' contributions before making a decision on the division of assets. This will be one of up to six groups studied in this project. This session should last about an hour in total.
- **Any Risks?**
I am unaware of any risks in this project, although it does deal with personal data and opinions which I hope that you are happy to discuss (in a group scenario). However, consent is completely voluntary and you may withdraw at any point and do not have to answer any questions that cause discomfort. Furthermore, you can have any statements withdrawn within 7 days after this session, and can request to review the transcript.
- **Confidentiality:**
This project shall comply with the University of Exeter's policy regarding anonymity and storage of personal data and the procedures used have been approved by the Ethics Officer. Therefore, the data collected shall be completely confidential to the researcher unless your permission is gained. Additionally, upon signing the consent form, all those participating in the focus groups shall be expected to maintain the confidentiality of the other participants. Please refer to your consent sheet for further information on data storage.
- It will be possible to request a summary of the findings.

Please complete the attached consent sheet and return it to me at the beginning of the session. If you have any further queries, then please do not hesitate to contact me on the following details.

Many thanks,

Fae Garland.

Tel: 07729 836 470

Email: fsg201@ex.ac.uk

Appendix I: Table Summarising Ruth Deech's and Martha Fineman's Positions

<u>Ruth Deech's Position</u>	<u>Martha Fineman's Position</u>
<p>Women are rational, they are as rational as men</p> <p>The Law should promote autonomy</p> <p>No Discretion – Certainty is Key</p> <p>Domestic contributions should have no value; financial contributions and property ownership is central. To value them is to retard the emancipation of women</p> <p>The Law should stay out of the private sphere</p> <p>Cohabitants should have no remedy; their free choice should be recognised</p> <p>Ideally financial agreements, maintenance should only apply in extreme circumstances and be rehabilitative.</p> <p>Autonomy: Imposing a solution will subordinate, undermine women's autonomy</p>	<p>Women ARE different – gendered</p> <p>The Law should protect</p> <p>Needs discretion: dependent on it to work out how to protect care model</p> <p>Care, and therefore domestic contributions should be central</p> <p>Should protect and recognise the private sphere, make sure the carer's voice is 'heard' in the public sphere</p> <p>Irrelevant of marital status, shouldn't be based on a sexual relationship</p> <p>maintenance to support the care-dyad</p> <p>Autonomy myth! Dependency is inherent, thus the Mother/child care-dyad needs protecting by state</p>

Appendix J: s18 Property (Relationship) Act 1976 (New Zealand)

18 Contributions of spouses or partners

- (1) For the purposes of this Act, a contribution to the marriage, civil union, or de facto relationship means all or any of the following:
 - (a) the care of—
 - (i) any child of the marriage, civil union, or de facto relationship;
 - (ii) any aged or infirm relative or dependant of either spouse or partner;
 - (b) the management of the household and the performance of household duties;
 - (c) the provision of money, including the earning of income, for the purposes of the marriage, civil union, or de facto relationship;
 - (d) the acquisition or creation of relationship property, including the payment of money for those purposes;
 - (e) the payment of money to maintain or increase the value of—
 - (i) the relationship property or any part of that property; or
 - (ii) the separate property of the other spouse or partner or any part of that property;
 - (f) the performance of work or services in respect of—
 - (i) the relationship property or any part of that property; or
 - (ii) the separate property of the other spouse or partner or any part of that property;
 - (g) the forgoing of a higher standard of living than would otherwise have been available;
 - (h) the giving of assistance or support to the other spouse or partner (whether or not of a material kind), including the giving of assistance or support that—
 - (i) enables the other spouse or partner to acquire qualifications; or
 - (ii) aids the other spouse or partner in the carrying on of his or her occupation or business.
- (2) There is no presumption that a contribution of a monetary nature (whether under subsection (1)(c) or otherwise) is of greater value than a contribution of a non-monetary nature.

Subsection (3) was substituted, as from 6 November 1986, by section 2 Matrimonial Property Amendment Act 1986 (1986 No 99).

Sections 11 to 18, and the headings before sections 11 and 15, were repealed, and a new Part 4 (comprising sections 11 to 18C) was inserted, as from 1 February 2002, by section 17 Property (Relationships) Amendment Act 2001 (2001 No 5). See Part 9 of this Act as to the transitional and saving provisions.

The heading to section 18 was amended, as from 26 April 2005, by section 3(1) Property (Relationships) Amendment Act 2005 (2005 No 19) by substituting the word “partners” for the words “de facto partners”.

Subsection (1) was amended, as from 26 April 2005, by section 3(2) Property (Relationships) Amendment Act 2005 (2005 No 19) by substituting the word “partner” for the words “de facto partner” wherever they appear.

Subsection (1) was amended, as from 26 April 2005, by section 3(4) Property (Relationships) Amendment Act 2005 (2005 No 19) by inserting the words “, civil union,” after the word “marriage” in the first place where it appears.

Subsection (1)(a)(i) was substituted, as from 26 April 2005, by section 3(4) Property (Relationships) Amendment Act 2005 (2005 No 19).

Subsection (1)(c) was amended, as from 26 April 2005, by section 3(3) Property (Relationships) Amendment Act 2005 (2005 No 19) by inserting the words “, civil union,” after the word “marriage”.

Appendix K: s2D Property (Relationship) Act 1976 (New Zealand)

2D Meaning of de facto relationship

- (1) For the purposes of this Act, a **de facto relationship** is a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman)—
 - (a) who are both aged 18 years or older; and
 - (b) who live together as a couple; and
 - (c) who are not married to, or in a civil union with, one another.
- (2) In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:
 - (a) the duration of the relationship:
 - (b) the nature and extent of common residence:
 - (c) whether or not a sexual relationship exists:
 - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties:
 - (e) the ownership, use, and acquisition of property:
 - (f) the degree of mutual commitment to a shared life:
 - (g) the care and support of children:
 - (h) the performance of household duties:
 - (i) the reputation and public aspects of the relationship.
- (3) In determining whether 2 persons live together as a couple,—
 - (a) no finding in respect of any of the matters stated in subsection (2), or in respect of any combination of them, is to be regarded as necessary; and
 - (b) a Court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the Court in the circumstances of the case.
- (4) For the purposes of this Act, a de facto relationship ends if—
 - (a) the de facto partners cease to live together as a couple; or
 - (b) 1 of the de facto partners dies.

Compare: Property (Relationships) Act 1984 (New South Wales) s 4(1)-(3)

Sections 2A to 2H and the heading preceding section 3 were inserted, as from 1 February 2002, by section 8 Property (Relationships) Amendment Act 2001 (2001 No 5). See Part 9 of this Act as to the transitional and saving provisions.

Subsection (1)(c) was amended, as from 26 April 2005, by section 3(4) Property (Relationships) Amendment Act 2005 (2005 No 19) by inserting the words “, or in a civil union with,” after the words “married to”.

Appendix L: s9(1) Family Law (Scotland) Act 1985

9 Principles to be applied.

(1) The principles which the court shall apply in deciding what order for financial provision, if any, to make are that—

- (a) the net value of the matrimonial property should be shared fairly between the parties to the marriage;
- (b) fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of the family;
- (c) any economic burden of caring, after divorce, for a child of the marriage under the age of 16 years should be shared fairly between the parties;
- (d) a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from the date of the decree of divorce, to the loss of that support on divorce;
- (e) a party who at the time of the divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.

(2) In subsection (1)(b) above and section 11(2) of this Act—

- “economic advantage” means advantage gained whether before or during the marriage and includes gains in capital, in income and in earning capacity, and “economic disadvantage” shall be construed accordingly;
- “contributions” means contributions made whether before or during the marriage; and includes indirect and non-financial contributions and, in particular, any such contribution made by looking after the family home or caring for the family.

Appendix M: s10(6) Family Law (Scotland) Act 1985

10 Sharing of value of matrimonial property.

(6) In subsection (1) above “special circumstances”, without prejudice to the generality of the words, may include—

- (a) the terms of any agreement between the parties on the ownership or division of any of the matrimonial property;
- (b) the source of the funds or assets used to acquire any of the matrimonial property where those funds or assets were not derived from the income or efforts of the parties during the marriage;
- (c) any destruction, dissipation or alienation of property by either party;
- (d) the nature of the matrimonial property, the use made of it (including use for business purposes or as a matrimonial home) and the extent to which it is reasonable to expect it to be realised or divided or used as security;
- (E) the actual or prospective liability for any expenses of valuation or transfer of property in connection with the divorce.

Appendix N: s11 Family Law (Scotland) Act 1985

11 Factors to be taken into account.

(1) In applying the principles set out in section 9 of this Act, the following provisions of this section shall have effect.

(2) For the purposes of section 9(1)(b) of this Act, the court shall have regard to the extent to which—

(a) the economic advantages or disadvantages sustained by either party have been balanced by the economic advantages or disadvantages sustained by the other party, and

(b) any resulting imbalance has been or will be corrected by a sharing of the value of the matrimonial property or otherwise.

(3) For the purposes of section 9(1)(c) of this Act, the court shall have regard to—

(a) any decree or arrangement for aliment for the child;

(b) any expenditure or loss of earning capacity caused by the need to care for the child;

(c) the need to provide suitable accommodation for the child;

(d) the age and health of the child;

(e) the educational, financial and other circumstances of the child;

(f) the availability and cost of suitable child-care facilities or services;

(g) the needs and resources of the parties; and

(h) all the other circumstances of the case.

(4) For the purposes of section 9(1)(d) of this Act, the court shall have regard to—

(a) the age, health and earning capacity of the party who is claiming the financial provision;

(b) the duration and extent of the dependence of that party prior to divorce;

(c) any intention of that party to undertake a course of education or training;

(d) the needs and resources of the parties; and

(e) all the other circumstances of the case.

(5) For the purposes of section 9(1)(e) of this Act, the court shall have regard to—

(a) the age, health and earning capacity of the party who is claiming the financial provision;

- (b) the duration of the marriage;
- (c) the standard of living of the parties during the marriage;
- (d) the needs and resources of the parties; and
- (e) all the other circumstances of the case.

(6) In having regard under subsections (3) to (5) above to all the other circumstances of the case, the court may, if it thinks fit, take account of any support, financial or otherwise, given by the party who is to make the financial provision to any person whom he maintains as a dependant in his household whether or not he owes an obligation of aliment to that person.

(7) In applying the principles set out in section 9 of this Act, the court shall not take account of the conduct of either party unless—

- (a) the conduct has adversely affected the financial resources which are relevant to the decision of the court on a claim for financial provision; or
- (b) in relation to section 9(1)(d) or (e), it would be manifestly inequitable to leave the conduct out of account.

Appendix O: s79(4) Family Law Act (Cth), (Australia)

79 Alteration of property interests

(4) In considering what order (if any) should be made under this section in property settlement proceedings, the court shall take into account:

(a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and

(b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and

(c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent; and

(d) the effect of any proposed order upon the earning capacity of either party to the marriage; and

(e) the matters referred to in subsection 75(2) so far as they are relevant; and

(f) any other order made under this Act affecting a party to the marriage or a child of the marriage; and

(g) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage.

Appendix Q: s75(2) Family Law Act 1975 (Cth), (Australia)

FAMILY LAW ACT 1975 - SECT 75

Matters to be taken into consideration in relation to spousal maintenance

(1) In exercising jurisdiction under section 74, the court shall take into account only the matters referred to in subsection (2).

(2) The matters to be so taken into account are:

- (a) the age and state of health of each of the parties; and
 - (b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment; and
 - (c) whether either party has the care or control of a child of the marriage who has not attained the age of 18 years; and
 - (d) commitments of each of the parties that are necessary to enable the party to support:
 - (i) himself or herself; and
 - (ii) a child or another person that the party has a duty to maintain; and
 - (e) the responsibilities of either party to support any other person; and
 - (f) subject to subsection (3), the eligibility of either party for a pension, allowance or benefit under:
 - (i) any law of the Commonwealth, of a State or Territory or of another country; or
 - (ii) any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia;
- and the rate of any such pension, allowance or benefit being paid to either party; and
- (g) where the parties have separated or divorced, a standard of living that in all the circumstances is reasonable; and
 - (h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income; and
 - (ha) the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant; and

(j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party; and

(k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration; and

(l) the need to protect a party who wishes to continue that party's role as a parent; and

(m) if either party is cohabiting with another person--the financial circumstances relating to the cohabitation; and

(n) the terms of any order made or proposed to be made under section 79 in relation to:

(i) the property of the parties; or

(ii) vested bankruptcy property in relation to a bankrupt party; and

(naa) the terms of any order or declaration made, or proposed to be made, under Part VIIIAB in relation to:

(i) a party to the marriage; or

(ii) a person who is a party to a de facto relationship with a party to the marriage; or

(iii) the property of a person covered by subparagraph (i) and of a person covered by subparagraph (ii), or of either of them; or

(iv) vested bankruptcy property in relation to a person covered by subparagraph (i) or (ii); and

(na) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage; and

(o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account; and

(p) the terms of any financial agreement that is binding on the parties to the marriage; and

(q) the terms of any Part VIIIAB financial agreement that is binding on a party to the marriage.

(3) In exercising its jurisdiction under section 74, a court shall disregard any entitlement of the party whose maintenance is under consideration to an income tested pension, allowance or benefit.

(4) In this section:

"party" means a party to the marriage concerned.

Appendix R: S4AA Family Law Act 1975(Cth), (Australia)

S4AA Meaning of de facto relationship

(1) A person is in a *de facto relationship* with another person if:

- (a) the persons are not legally married to each other; and
- (b) the persons are not related by family (see subsection (6)); and
- (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

Paragraph (c) has effect subject to subsection (5).

Working out if persons have a relationship as a couple

(2) Those circumstances may include any or all of the following:

- (a) the duration of the relationship;
- (b) the nature and extent of their common residence;
- (c) whether a sexual relationship exists;
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
- (e) the ownership, use and acquisition of their property;
- (f) the degree of mutual commitment to a shared life;
- (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
- (h) the care and support of children;
- (i) the reputation and public aspects of the relationship.

(3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship.

(4) A court determining whether a de facto relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

(5) For the purposes of this Act:

- (a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and

(b) a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.

When 2 persons are related by family

(6) For the purposes of subsection (1), 2 persons are ***related by family*** if:

(a) one is the child (including an adopted child) of the other; or

(b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or

(c) they have a parent in common (who may be an adoptive parent of either or both of them).

For this purpose, disregard whether an adoption is declared void or has ceased to have effect.

Appendix S: s25 Part II Matrimonial Causes Act 1973 **(England and Wales)**

25 Matters to which court is to have regard in deciding how to exercise its powers

(2) As regards the exercise of the powers of the court under section 23(1)(a), (b) or (c), 24 above in relation to a party to the marriage, the court shall in particular have regard to the following matters—

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;
- (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
- (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
- (h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit . . . which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

Appendix T: Schedule 1, Children Act 1989 (England and Wales)

4 Matters to which court is to have regard in making orders for financial relief

4(1) In deciding whether to exercise its powers under paragraph 1 or 2, and if so in what manner, the court shall have regard to all the circumstances including—

- (a) the income, earning capacity, property and other financial resources which each person mentioned in sub-paragraph (4) has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each person mentioned in sub-paragraph (4) has or is likely to have in the foreseeable future;
- (c) the financial needs of the child;
- (d) the income, earning capacity (if any), property and other financial resources of the child;
- (e) any physical or mental disability of the child;
- (f) the manner in which the child was being, or was expected to be, educated or trained.

(2) In deciding whether to exercise its powers under paragraph 1 against a person who is not the mother or father of the child, and if so in what manner, the court shall in addition have regard to—

- (a) whether that person had assumed responsibility for the maintenance of the child and, if so, the extent to which and basis on which he assumed that responsibility and the length of the period during which he met that responsibility;
- (b) whether he did so knowing that the child was not his child;
- (c) the liability of any other person to maintain the child.

(3) Where the court makes an order under paragraph 1 against a person who is not the father of the child, it shall record in the order that the order is made on the basis that the person against whom the order is made is not the child's father.

(4) The persons mentioned in sub-paragraph (1) are—

- (a) in relation to a decision whether to exercise its powers under paragraph 1, any parent of the child;

(b)in relation to a decision whether to exercise its powers under paragraph 2, the mother and father of the child;

(c)the applicant for the order;

(d)any other person in whose favour the court proposes to make the order.

Appendix U: s64(2) Family Proceedings Act 1980

64 Maintenance after marriage or civil union dissolved or de facto relationship ends

(2) The circumstances referred to in subsection [\(1\)](#) are as follows:

(a) the ability of the spouses, civil union partners, or de facto partners to become self-supporting, having regard to—

(i) the effects of the division of functions within the marriage or civil union or de facto relationship while the spouses, civil union partners, or de facto partners lived together:

(ii) the likely earning capacity of each spouse, civil union partner, or de facto partner:

(iii) any other relevant circumstances:

(b) the responsibilities of each spouse, civil union partner, or de facto partner for the ongoing daily care of any minor or dependent children of the marriage or civil union or (as the case requires) any minor or dependent children of the de facto relationship after the dissolution of the marriage or civil union or (as the case requires) the de facto partners ceased to live together:

(c) the standard of living of the spouses, civil union partners, or de facto partners while they lived together:

(d) the undertaking by a spouse, civil union partner, or de facto partner of a reasonable period of education or training designed to increase the earning capacity of that spouse, civil union partner, or de facto partner or to reduce or eliminate the need of that spouse, civil union partner, or de facto partner for maintenance from the other spouse, civil union partner, or de facto partner if it would be unfair, in all the circumstances, for the reasonable needs of the spouse, civil union partner, or de facto partner undertaking that education or training to be met immediately by that spouse, civil union partner, or de facto partner—

(i) because of the effects of any of the matters set out in paragraphs [\(a\)\(i\)](#) and [\(b\)](#) on the potential earning capacity of that spouse, civil union partner, or de facto partner; or

(ii) because that spouse, civil union partner, or de facto partner has previously maintained or contributed to the maintenance of the other spouse, civil union partner, or de facto partner during a period of education or training.

Appendix V: Ethical Consent Form



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CERTIFICATE OF ETHICAL APPROVAL

School/Academic Unit:

Law, School of Humanities and Social Sciences, University of Exeter

Title of Project:

Valuing Domestic Contributions: A Search for a Solution for Family Law

Name(s)/Title of Project Research Team Member(s):

Fae Garland

Project Contact Point:

Email: fsg201@ex.ac.uk

Brief Description of Project:

The aim of this research project is to examine how the law might in future better address the valuation of domestic contributions (particularly regarding cohabitants) and to provide further evidence for policy makers in this area when considering whether to reform the law.

This project has been approved for the period

From: January 2010

To: January 2012

School Ethics Committee approval reference: 30.10.09/ix

Signature... *H. Farrimond* Date... *3rd Nov '09*
(Hannah Farrimond – Chair HUSS School Ethics Committee)

Appendix V: Comparative Table On The Cohabitation Regimes Within Australia

This table demonstrates the core similarities and differences between the marital regime, the new Federal cohabitation regime, and Queensland's State regime.¹²⁵⁶

De Facto Property Adjustment Legislation Comparative Table			
	Marriages	De Facto Relationships	Queensland (before 1.3.09)
	Family Law Act	Family Law Act	Property Law Act
De Facto Relationship		4AA	32DA <i>Acts Interpretation Act</i>
Declaration regarding relationship		90RD	319-323
Binding Financial Agreements exclude the jurisdiction	71A	90SA(1)	264,265,266
Spousal maintenance	74	90SE	-
Matters to take into account in maintenance proceedings	75(2)	90F(3)	-
Superannuation as Property	90MA	90MA	-
Superannuation Splitting Orders	90MS	90MS	-
Urgent maintenance	77	990SG	-
Declarations of interests in property	78	90SL	280-281
Alteration of property interests	79	90SM	Subdiv. 2
Just & Equitable	79(2)	90SM(3)	286
Matters to take into account	79(4)	90SM(4)	291-309
Adjournment because likely change in financial circumstances	79(5)	90SM(5)	310
Effect on proceeding of death of party	79(8)	905(8)	s. 315
Varying and setting aside orders altering property	79A	90SN	334
General Powers	80	90SS(1)	333
Duty to end financial relationships	81	90ST	337
Modification of maintenance orders	83	90SI	-
Stamp Duty	90	90WA	422 & 424 <i>Duty Act</i>
Binding Financial Agreements (BFAs)	Pt VIIIA	Div 4 Pt VIIIA B	Subdiv. 4
BFAs before marriage-cohabitation	90B	90UB	264
BFAs during marriage/cohabitation	90C	90UC	264
BFAs after divorce/breakdown	90D	90UD	265
Formal requirements of BFAs	90G(1)	90UJ(1)	266
Setting aside BFAs	90K	90UM	276
Validity, enforceability and effect of BFAs	90KA	90UN	277
Orders and injunctions binding third parties	Pt VIIIAA	Div 2 Pt VIIIA B	336, 338, 339, 340
Costs	117(1)(2)	117(1)(2)	341, 342

¹²⁵⁶ F Willis and D Morzone, 'The New De Facto Legislation' (2009) 37 *The Journal of the Bar Association of Queensland* <http://www.hearsay.org.au/index.php?option=com_content&task=view&id=580&Itemid=45> accessed 16/12/2011

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