Equal Sharing and unequal caring? How should family law and policy take account of caretaking responsibilities on parental separation?

Submitted by Anna Heenan, to the University of Exeter as a thesis for the degree of Doctor of Philosophy in Law, December 2019.

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(Signature) …Anna Heenan…………………………………………………………

Abstract

There is a tension at the heart of family law and policy between the increasing influence of individual autonomy and the demands of caring for children (referred to here as caretaking). Individual autonomy envisages decisions made in one's own best interests, whereas decisions around caretaking are often made for the good of the family, at the expense of the caretaker. Additionally, whereas individual autonomy valorises economic self-sufficiency, caretaking responsibilities constrain choice and conflict with paid work, limiting the caretaker's ability to be economically self-sufficient. Using the ideas of autonomy and care as a theoretical lens, this thesis explores this tension with the aim of considering how, given changing social trends, family law and policy should take account of caretaking responsibilities on parental separation.

As part of this undertaking, this thesis analyses the different approaches taken in three jurisdictions (England and Wales, Sweden and the Netherlands) to balancing paid work and caretaking between family members and within society. The division of work and caretaking is largely considered to be a matter of individual choice in England and Wales. In Sweden, parents are encouraged to engage in full time paid work and are supported in this by well-funded state child-care. In contrast, in the Netherlands, there have been attempts to encourage all parents to work part-time and share caretaking responsibilities equally. This thesis considers how these different approaches work in practice, and the lessons that can be learned for England and Wales.

The thesis ultimately concludes that caretaking is hidden from, and undervalued by, law and policy in all three jurisdictions. It is, therefore, suggested that family law and policy should engage more deeply with both the question of what it means to care in the modern family context and the implications of this for family law on relationship breakdown for the future. Rather than simply equating a division of children's time with a division of care, it will be argued that it is important to think about the nature of the care being performed by parents. This thesis further suggests that placing a principle of care at the centre of family law and policy might help to tackle care's current invisibility, and to ensure that family law and policy are better able to address the financial implications of caretaking responsibilities on parental separation.

Contents

Abstract 2
Table of cases (England and Wales) 8
Table of legislation (England and Wales) 8
Statute 8
Statutory Instruments 8
Bills 9
Abbreviations 10
Acknowledgements 11
1. Introduction 13
1.1 Background and context: the conflict between autonomy and care 13
1.1.1 The background to this research 14
1.1.2 The aims of this thesis 18
1.1.3 Autonomy and care in the legal framework of three jurisdictions 20
1.1.4 Why the clash between autonomy and care? Gender (in)equality in England and Wales 24
1.1.5 The gendered financial consequences of the clash between autonomy and care on separation in England and Wales 29
1.2 Thesis overview 30
1.2.1 Research questions 30
1.2.2 Chapter outline 33
1.3 The original contribution of this research 35
1.4 Conclusion 37
2. Autonomy and care in family law and policy 38
2.1 Introduction 38
2.2 What does it mean to care? Thinking theoretically about care 39
2.3 Autonomy in English and Welsh family law: a theoretical and doctrinal analysis 41
2.3.1 Private ordering as an example of neoliberal autonomy in family law 44
2.3.2 The growing influence of autonomy as a principle of family law 48
2.4 The clash between autonomy and care in the reported case law 51
2.5 Can the clash between autonomy and care be resolved? 57
2.5.1 How might autonomy be reconceptualised to take account of care? 58
2.5.2 Thinking about state policy: might different models of sharing care advance autonomy? 62
2.6 Conclusion 67
3. Methods 68
3.1 Introduction 68
3.2 Methodological choices 68

3.2.1 Combining empirical and doctrinal approaches 68
3.2.2 A comparative approach 70
3.3 Empirical Methods 75
3.3.1 Semi-structured interviews 75
3.3.2 Interviewing practicalities 78
3.3.3 Comparative work 80
3.4 Sample and recruitment 81
3.4.1 England and Wales 82
3.4.2 Sweden and the Netherlands 89
3.5 Ethical considerations 90
3.6 Data analysis 91
3.7 Conclusion 94
4. Understandings of Autonomy 96
4.1 Introduction 96
4.2 Overview of key family law provisions 100
4(i) Sweden: Autonomy and gender equality 113
4(i).1 Introduction 113
4(i).2 Gender equality and Swedish identity 113
4(i).3 Gender equality and understandings of autonomy 118
4(i).4 Autonomy in the family law framework 121
4(i).4.1 Private ordering 121
4(i).4.2 Deferred community of property 125
4(i).4.3 Spousal maintenance 128
4(i).4.4 Pensions 132
4(ii) The Netherlands: Autonomy and the erosion of solidarity 136
4(ii).1 Introduction 136
4(ii).2 Solidarity 137
4(ii).3 Autonomy within a framework of solidarity 139
4(ii).3.1 Community of property and marital property agreements 139
4(ii).4 The increasing influence of individual autonomy 142
4(ii).4.1 Community of property 142
4(ii).4.2 Spousal maintenance 143
4(ii).4.3 Private ordering and conflict avoidance 148
4(iii) England and Wales: Autonomy and the idea of choice 152
4(iii).1 Introduction 152
4(iii).2 Influences on financial settlements 154
4(iii).2.1 Key factors 154

4(iii).3 Factors in action: a neoliberal approach to autonomy? 156
4(iii).3.1 Contributions 156
4(iii).3.2 Power imbalances and independence 159
4(iii).3.3 Bargaining and sacrifice 162
4(iii).4 A more relational approach to autonomy? 163
4(iv) Conclusion 167
5. Caring in the comparator jurisdictions 170
5.1 Introduction 170
5.2 Overview of key family policy measures 173
5(i) Sweden: Prioritising paid work? 184
5(i).1 Introduction 184
5(i).2 Care and gender equality 184
5(i).3 What does the Swedish vision of gender equality mean for the visibility of and value attributed to care? 190
5(i).3.1 A choice to care? 190
5(i).3.2 Gender (in)equality in the performance of caretaking tasks 193
5(i).3.3 Understandings of motherhood and fatherhood 196
5(i).4 How does the law think about care? 201
5(i).4.1 Financial provision 201
5(i).4.2 Child arrangements on separation 202
5(ii) The Netherlands: Towards a Universal Caregiver model? 212
5(ii).1 Introduction 212
5(ii).2 Childcare policy in the Netherlands 212
5(ii).3 The ‘choice’ to care 215
5(ii).3.1 Choice and gender norms 219
5(ii).3.2 Choice and the optimism bias 221
5(ii).4 How does the law think about care? 223
5(ii).4.1 Financial provision 223
5(ii).4.2 Child arrangements on separation 226
5(iii) England and Wales: The invisibility of care in parental perceptions 231
5(iii).1 Introduction 231
5(iii).2 Caring and the role of gender 231
5(iii).2.1 Balancing work and caretaking 238
5(iii).2.2 Caretaking as the easier option 244
5(iii).3 Caretaking responsibilities and the idea of choice 248
5(iv) Conclusion 251
6. Rethinking Autonomy and Care for family law and policy 256

6.1 Introduction 256
6.2 Who is responsible? State, partner or self? 258
6.3 A principled approach to family law and policy 262
6.3.1 The problem of relational autonomy 263
6.3.2 The role of a relational approach 264
6.3.3 Care as a core principle of a relational approach 265
6.4 What does it mean to care? 268
6.5 Contrasting care and autonomy as core principles 270
6.5.1 Family law 270
6.5.2 Family policy 273
6.6 Reforming law and policy to recognise care 276
6.6.1 Family policy: parental leave 276
6.6.2 Family law: child arrangements 278
6.6.3 Family law: financial provision 281
7. Conclusion 283
7.1 Introduction 283
7.2 Key findings 284
7.3 Rethinking financial provision: marriage vs cohabitation 286
7.4 Rethinking financial provision for married couples 290
7.4.1 The principles underpinning financial remedy reform 291
7.4.2 Why statutory reform? 292
7.4.3 Amending s 25 293
7.4.4 How does the amended s 25 meet the objectives of reform? 295
7.5 Conclusion 304
Appendix 1: Participant overview (omitted) 305
Appendix 2: Comparison between original and amended Matrimonial Causes Act 1973, s 25 306
Appendix 3: Project information and consent form 308
Parents (one parent interviewed) 308
Parents (both parents interviewed) 312
Lawyers 316
Appendix 4: Certificate of Ethics Approval 320
Appendix 5: Interview guides 321
Parents 321
Lawyers: Sweden 326
Lawyers: Netherlands 330
Scenario questions 334

Scenario A 334
Scenario B 335
Bibliography 336

Table of cases (England and Wales)

Re A (A Child) [2014] EWCA Civ 1577

Charman v Charman [2007] EWCA Civ 503

Cooper-Hohn v Hohn [2014] EWHC 4122 (Fam)

Cowan v Cowan [2001] EWCA Civ 679

Curran v Collins [2015] EWCA Civ 404

Dobson v Griffey [2018] EWHC 1117 (Ch)

Graham-York v York [2015] EWCA Civ 72

IX v IY [2018] EWHC 3053 (Fam)

Lloyds Bank Plc v Rosset and Another [1990] 1 AC 107

Miller v Miller : McFarlane v McFarlane [2006] UKHL 24

Minton v Minton [1979] 1 All ER 79

Parlour v Parlour [2004] EWCA Civ 872

Radmacher (formerly Granatino) v Granatino [2010] UKSC 42

Sharp v Sharp [2017] EWCA Civ 408

Slater v Condappa [2012] EWCA Civ 1506

Stack v Dowden [2007] UKHL 17

Waggott v Waggott [2018] EWCA Civ 727

White v White [2000] UKHL 54

Wyatt v Vince [2015] UKSC 14

Table of legislation (England and Wales)

Statute

Child Support Act 1991

Children Act 1989

Civil Partnership Act 2004

Employment Rights Act 1996

Marriage (Same Sex Couples) Act 2013

Matrimonial Causes Act 1973

Public Health Act 1936

Statutory Instruments

The Civil Partnership (Opposite-sex Couples) Regulations 2019, SI 2019/1458

Maternity and Parental Leave etc Regulations 1999, SI 1999/3312

Shared Parental Leave Regulations 2014, SI 2014/3050

Bills

Divorce (Financial Provision) HL Bill (2017-19) 26

Abbreviations

Divorce (Financial Provision) Bill - Divorce (Financial Provision) Bill HL (2017-19) 26

LASPO – Legal Aid, Sentencing and Punishment of Offenders Act 2012

OIV – Overseas Institutional Visit

Pre-nups – Pre-nuptial agreements

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1. Introduction

1.1 Background and context: the conflict between autonomy and care

> … there is a lot of attention also from the Government… that both partners should work… But the situation is that both don't work. People divide. So there's a normative idea… and the legal system is not correcting that. So the legal system sort of starts with a sort of ideation while in practice it's very different. Um… and the only way you can change that of course when you are really going to fully value, um, caring tasks the same as work tasks. And if you don't do it, you should have really good information for the one who takes the caring tasks.
>
> (**Anne, Legal Adviser, Netherlands**)

This quote from one of the Dutch participants in this research captures the issue at the heart of this thesis.[1] A tension exists in family law and policy between the influence of a neoliberal[2] vision of autonomy, in which economic independence is increasingly encouraged and assumed, and the practical demands of, and social expectations around, caring for children. In England and Wales, within intact families, fathers typically work full-time and mothers typically work part-time, and perform a greater share of child care.[3] As will be discussed later in this chapter and in Chapter 2, this reflects both structural constraints, such as the cost and availability of childcare, and cultural norms about what is expected of mothers and fathers. When parents separate, this division of financial and caretaking responsibilities is problematic. Increasingly there is an emphasis on both parties becoming financially independent following separation. However, whereas the breadwinner may be able to support him- or herself financially following separation, part-time work has long-term financial repercussions,[4] which can

[1] Anne is a legal adviser in the Netherlands who was interviewed as part of this project. This project is also informed by empirical research in Sweden (which, as in the Netherlands, consisted of semi-structured interviews with legal professionals) and in England and Wales (which consisted of semi-structured interviews with parents). The reasons for this empirical work are explained later in this chapter, and in greater detail in Chapter 3. Chapter 3 also explains the reasons for the choice to interview parents in England and Wales and legal professionals in the other jurisdictions.

[2] Neoliberalism is discussed further in Chapter 2. For the purposes of this thesis it is understood as a system in which market values are used to inform responses to economic, political and social matters.

[3] ONS, 'Women shoulder the responsibility of unpaid work' (*ONS Digital*, 10 November 2016) <http://visual.ons.gov.uk/the-value-of-your-unpaid-work/> accessed 18 January 2017 and ONS, 'Women in the labour market: 2013' (25 September 2013) <http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/womeninthelabourmarket/2013-09-25> accessed 18 January 2017 and ONS, 'Families in the labour market, England: 2018' (3 October 2018) <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/familiesandthelabourmarketengland/2018> accessed 6 June 2019

[4] Monica Costa Dias, Robert Joyce and Francesca Parodi, 'The gender pay gap in the UK: children and experience in work' (*IFS,* February 2018) <https://www.ifs.org.uk/uploads/publications/wps/MCD_RJ_FP_GenderPayGap.pdf> accessed 26 September 2018, 22-3

interfere with the ability to be economically self-sufficient. As a backdrop to the rest of the thesis, this chapter explains this dilemma in greater detail, beginning with a discussion of how this issue came to be the central focus of this research.

1.1.1 The background to this research

This project was begun at a time where changes to the law were being discussed that might have resulted in a presumption of shared care when parents separated in England and Wales.[5] Initially, it was intended to consider what the impact of (equal) shared care arrangements might be on the financial arrangements reached by separating parents, given trends observed following similar Australian reforms. Could it lead to equalisation of caring and financial arrangements both within intact families and on separation, or, given that women tend to carry out a greater share of childcare in intact families, might it in practice lead disproportionately to the impoverishment of women on separation if it resulted in a reduction in their financial claims? Further, even if caring and financial arrangements did ultimately become more equal, without state support for caretaking, might the result be two equally impoverished households following separation? Australian research found that:

> Both equal care mothers and fathers were more likely to be working part-time than full-time and only one of the eight equal care fathers had a full-time job. Nearly half of our equal carers were also self-employed. This is consistent with family-friendly work hours being conducive to workable 50/50 arrangements, and also suggests the complexity of juggling full-time paid work with shared care of children following separation.[6]

If the effect of shared parenting arrangements is that parents need to work part-time or be self-employed to sustain them, then for many families the result might be that neither parent is able support themselves financially following separation.

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[5] See, for example, Gov.uk, 'Family justice review final report' (*Ministry of Justice, Department for Education and the Welsh Government,* November 2011) <https://www.gov.uk/government/publications/family-justice-review-final-report> accessed 26 September 2018 Gov.uk, 'Family justice review: interim report (*Ministry of Justice, Department for Education and the Welsh Government,* 31 March 2011) <https://www.gov.uk/government/publications/family-justice-review-interim-report> accessed 2 August 2019

[6] Belinda Fehlberg, Christine Millward and Monica Campo, 'Shared post-separation parenting in 2009: An empirical snapshot' (2009) 23 Australian Journal of Family Law 247, 251

Whilst a different approach to reform was ultimately taken in England and Wales, the debates which emerged at that time have informed the issues and questions explored by this thesis on financial and non-financial contributions to families, and the rationale behind reform. This section therefore begins by explaining the reasons for that initial focus, and how and why this project subsequently evolved.

As explained at the outset, caretaking[7] responsibilities tend not to be shared equally within families, which can have financial consequences for the caretaker when parents separate. When parties are married, the legal framework for financial provision on divorce places emphasis on their needs. Irrespective of gender, where one spouse has undertaken a greater share of the responsibility of caring for children, and has adjusted their working commitments accordingly, that person's ability to support themselves financially is likely to be reduced and their needs correspondingly increased. The legal framework aims to respond to this by recognising non-financial contributions to the welfare of the family. In contrast, for cohabitants there is no bespoke legal framework for dealing with financial claims, and any claims for their own benefit, as opposed to claims for the benefit of children, are dealt with under property law which can take no account of contributions to the welfare of the family.

At the time that shared care reforms were being discussed, it was thought such reforms might result in moves towards a more equal division of assets and a reduction in maintenance payments (spousal and child). This raised concerns about exacerbating inequalities where the historic division of care had been unequal. Where one parent has worked part-time to look after children and the other has worked full-time throughout a relationship, an equal share of capital on separation has very different implications for those parents. It may mean one parent can buy a house and the other cannot; whereas the breadwinner may be able to combine this capital with a mortgage capacity to rehouse, for the caretaker, even renting may be a challenge. The position may be even starker when there is no capital, and there are only debts, to be divided.

[7] Caretaking' is used here to mean the direct meeting of needs for care. See further the discussion in Chapter 2.
This thesis focuses only on caretaking responsibilities for children, rather than elder care, because such caring obligations more uncomplicatedly flow from a parental union. See further Anna Heenan, 'Causal and Temporal Connections in Financial Remedy Cases: The Meaning of Marriage' (2018) 30 CFLQ 75

Australian research, albeit against a different legal backdrop, gives a mixed picture about the link between shared care arrangements and financial settlements.[8] Family law professionals, for example, considered that the share of property mothers received on separation had reduced following shared care reforms.[9] However, research with separated parents concluded that the connections between parenting and financial arrangements were not as evident as expected.[10] There is no equivalent research in England and Wales. Similar research here was therefore crucial if shared care on separation were to be introduced; without it, there was a risk that reform could lead to financial hardship for the parent who had performed the greater share of care historically. However, when the law in England and Wales was eventually amended, it provided for a 'presumption of parental involvement',[11] rather than of shared care. The presumption of parental involvement is explicitly not a presumption of shared care,[12] and was only intended to reflect the existing practice of the courts in facilitating some contact with both parents wherever possible.[13] Nevertheless, this topic highlighted broader questions about the principles guiding financial settlements on separation in a world where caretaking and breadwinning responsibilities are unequally shared in intact relationships.

The answers to these questions became particularly topical in light of proposed reforms to the law of financial remedies in a private members' bill: the Divorce (Financial Provision) Bill HL (2017-19) 26 (the Divorce (Financial Provision) Bill).[14] The changes proposed by the Divorce (Financial Provision) Bill will be discussed further later in this chapter. For present purposes it is sufficient to note that it aims to reduce the scope of financial remedies claims on divorce in order to encourage women to push for greater gender equality:

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[8] See, for example, R. Kaspiew, M. Gray, R. Weston, L. Moloney, K. Hand, L. Qu, & the Family Law Evaluation Team. (2009). *Evaluation of the 2006 family law reforms.* Melbourne: Australian Institute of Family Studies, 230 and Belinda Fehlberg, Christine Millward and Monica Campo, Post-separation parenting arrangements, child support and property settlement: Exploring the connections' (2010) 24 Australian Journal of Family Law 214, 218

[9] R. Kaspiew, M. Gray, R. Weston, L. Moloney, K. Hand, L. Qu, & the Family Law Evaluation Team. (2009). *Evaluation of the 2006 family law reforms.* Melbourne: Australian Institute of Family Studies

[10] Belinda Fehlberg, Christine Millward and Monica Campo, Post-separation parenting arrangements, child support and property settlement: Exploring the connections' (2010) 24 Australian Journal of Family Law 214

[11] Children Act 1989, s 1(2A)

[12] Children Act 1989, s 1(2B)

[13] UCL Institute of Education, 'Consultation: Co-operative Parenting Following Family Separation: Proposed Legislation on the Involvement of Both Parents in a Child's Life' (Department for Education and Ministry of Justice, 13 June 2012) <https://dera.ioe.ac.uk/14682/> accessed 6 June 2019

[14] At the time of writing, this Bill has failed to complete its passage through Parliament before the end of the session. However, when this has happened previously, the Bill has been reintroduced in the next Parliamentary session.

> Which comes first – equality at work, affordable childcare and flexible working patterns, or reformed spousal support? I agree… that there is "something fundamentally repulsive about the whole idea of dependent women". And I think that it is only when a reformed financial provision and property law based on equality is promoted that women will push for, and achieve better working conditions and more respect. This is what has come about in other jurisdictions with more equal law. I believe that after one more generation there will be nothing controversial about my Bill.[15]

This passage recognises that there is a link between working patterns, shaped by caretaking obligations, and financial independence, and views family law reform as the way to solve this conflict. This again underscores the importance of exploring the relationship between caretaking arrangements and financial arrangements on separation.

The approach of family law to this issue has shifted over time. Historically, the approach of family law was welfarist.[16] Eekelaar describes a welfarist relationship as one in which 'A has legal powers over B which are expected to be employed for the benefit (as defined by A) of B…'[17] When it came to the law of financial provision on divorce, a welfarist approach could be seen in the aim of meeting the 'reasonable requirements' of the financially weaker spouse (B) (often the caretaker spouse), who was seen as a dependent upon the financially stronger spouse (A). This changed with the case of *White v White,*[18] following which spouses were seen as equal partners in marriage, and financial claims on separation seen to be based upon entitlement. Increasingly since, however, a neoliberal understanding of individual autonomy has become an important guiding principle of family law.[19] As will be discussed in Chapter 2, the vision of individual autonomy that now informs family law and policy is based on ideas such as individual responsibility, freedom of choice and economic self-sufficiency. The changes proposed by the Divorce (Financial Provision) Bill, discussed further below, would mark an even greater shift in this direction. This

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[15] Ruth Deech, 'Financial Provision Reform' [2018] Family Law 1251
[16] John Eekelaar, 'Families and Children: From Welfarism to Rights' in McCrudden and Chambers (eds) *Individual Rights and the Law in Britain* (Law Society 1994)
[17] John Eekelaar, 'Families and Children: From Welfarism to Rights' in McCrudden and Chambers (eds) *Individual Rights and the Law in Britain* (Law Society 1994), 301
[18] *White v White* [2000] UKHL 54
[19] Alison Diduck, 'What is Family Law For?' (2011) 64 Current Legal Problems 287, 314

is understandable in a context where the equality of men and women is more accepted and parental separation is commonplace, and partners therefore want to be able to move on with their lives after separation. However, as explained at the outset of this chapter, this vision of autonomy is problematic for those with caretaking responsibilities. Not only are caretakers' choices constrained by the needs of those for whom they care, but caretaking responsibilities frequently conflict with paid work, and limit the ability to become economically self-sufficient. There is, therefore, a tension at the heart of family law between the principle of individual autonomy and the caretaking role played by family members in looking after children.

1.1.2 The aims of this thesis

The main aim of this thesis is to explore this tension between autonomy and care in order to consider how family law and policy should take account of caretaking responsibilities on parental separation. To this end, the thesis combines a theoretical analysis with doctrinal, comparative and original empirical work to answer this overall research question. Given the lack of international consensus on this issue, this thesis looks at the way in which these issues are addressed not only in England and Wales, but also in Sweden and the Netherlands. As will be discussed in Chapter 3, these two comparator jurisdictions were selected to reflect very different empirical approaches and different expected norms around caretaking responsibilities. In Sweden, for example, individual autonomy (which emphasises financial independence on separation) is an important aspect of pervasive ideas of gender equality. There is, however, an awareness of the demands of caretaking responsibilities which informs state policy. For example, there is generous parental leave provision and heavily subsidised state childcare to enable parents to combine paid work with caretaking responsibilities. In contrast, in the Netherlands, a similar awareness of the impact of caretaking responsibilities resulted in policy support for a sharing of paid and unpaid work between parents, rather than a greater involvement by the state in undertaking caretaking. As will be discussed further below, it was felt that understanding these different approaches, and the way in which the law on separation responds to the broader societal position, might help to inform understandings of law and policy in England and Wales, and provide insights into how they might be reformed. As shall be seen, this thesis ultimately concludes that family law needs to develop a

more nuanced conception of care, and suggests a new and principled basis for law and policy reform based upon such a principle.

This thesis cannot, however, be separated from its wider context in which care is gendered, and largely invisible in society. As will be discussed later in this chapter, there is a disconnect between perceptions of gender equality in society and the gendered division of caretaking responsibilities in intact families. In a world where gender roles are shifting in public life, but the division of caretaking responsibilities has not kept pace with these changes, there is a lack of consensus about the principles that should be applied to financial provision on relationship breakdown both in England and Wales[20] and internationally. Therefore, one of the overarching aims of this thesis is to explore how family law and policy have dealt with the uneven rate of change in gender roles in wider society. To that end, this thesis also engages with three contextual cross-themes: the meaning of gender equality, specifically in the family context (cross-theme 1), what it means to care (cross-theme 2) and the respective roles of the family and society in providing care (cross-theme 3). It is suggested that these are critical questions for our time and for negotiating family life in the future.

The importance of cross-theme 1 lies in the fact that the division of caretaking in society remains gendered. Attempting to resolve the tension between autonomy and care without recognising this means failing to understand the issue as a whole. Conversely, whilst it is beyond the scope of this thesis to provide an answer to the question of how to achieve gender equality, until there is an understanding of what caretaking involves, and the factors that shape its gendered allocation within society, any attempt to achieve gender equality is likely to be illusory.

Cross-theme 2 is vital in trying to understand the tension that exists between autonomy and care in family law. Family law regularly deals with questions of care. On parental separation, for example, there are often issues about where a child should live. Related to this, the question of who should pay child maintenance, and how much, is shaped by how much time a child spends with

[20] See, for example, Ruth Deech, 'Financial Provision Reform' [2018] Family Law 1251 and Emma Hitchings and Joanna Miles, 'Financial Provision Law Reform' [2018] Family Law 1358

each parent. Despite this, family law does not have a clear understanding of what it means to care. Time spent with children is broadly equated with caring for them. However, as will be explored in Chapter 5, the nature of the care provided by different parents may be different, with different economic consequences for those parents. Understanding both gendered expectations around care and the nature of care provided by different parents is, therefore, vital to understanding the clash between care and autonomy.

Cross-theme 3 likewise provides important insights into the gendered nature of care and its invisibility within society. As Fraser explains, social reproduction[21] 'is indispensable to society. Without it there could be no culture, no economy, no political organization. No society that systematically undermines social reproduction can endure for long.'[22] Thus, at the very least, care is valuable to society and should be recognised as such, but does this value mean that society has a role to play in, for example, supporting care, funding care, or allocating caring responsibilities between parents? Cross-theme 3 helps to identify different approaches to accommodating caring responsibilities within society, which ultimately informs the theoretical model of care for family law and policy developed in this thesis. The findings of this thesis also feed into cross-theme 3 by making practical suggestions about how the work involved in social reproduction might be recognised and valued within a family law setting.

1.1.3 Autonomy and care in the legal framework of three jurisdictions

Before considering the concepts of autonomy and care, and the tension between them, in greater depth in Chapter 2, it is important to outline the legal framework for dealing with a couple's financial affairs when they separate. In England and Wales, the applicable law depends upon whether a couple are married. For cohabiting couples, the only financial claims available are under the general law of property or to meet the needs of a child.[23] As will be discussed in Chapter 2, this approach is underpinned by a view of cohabitants as autonomous individuals, even where there are children of the relationship who may interfere with the ability

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[21] Defined as 'a key set of social capacities: those available for birthing and raising children, caring for friends and family members, maintaining households and broader communities, and sustaining connections more generally' (Nancy Fraser, 'Contradictions of Capital and Care' (2016) 100 New Left Review 99, 99)

[22] Nancy Fraser, 'Crisis of Care? On the Social-Reproductive Contradictions of Contemporary Capitalism' in Tithi Bhattacharya (ed) *Social Reproduction Theory: Remapping Class, Recentering Oppression* (Pluto Press 2017), 21

[23] Children Act 1989, Schedule 1

of both partners to make free choices in their own best interests, or to be financially independent.

There are similarities and differences between the legal approaches of England and Wales, Sweden and the Netherlands, but all three jurisdictions treat cohabitants less favourably than married (or civil / registered partner) couples on separation, and seem to place greater importance on individual autonomy than caretaking responsibilities in this context. For example, none of the jurisdictions allow maintenance for the benefit of a former cohabitant (as opposed to maintenance for children), whereas all three offer the possibility of spousal maintenance. In the Netherlands, unregistered cohabitation does not give a right to any claims over property. In Sweden, which is the only jurisdiction considered in this thesis where cohabitation, per se, gives rise to claims over property, a much more limited community of property share[24] is available than for spouses (see further Chapter 4).[25] This approach, based on property rights, is rigid and does not take account of the presence of caretaking responsibilities, albeit that there is state support for reconciling paid work and caretaking.

In England and Wales, it is possible for cohabitants to make claims for the support of children under Children Act 1989, Schedule 1. Such claims can include an element for a 'carer's allowance'. This allowance should be confined to costs arising in connection with the financial support of the child and should not be exaggerated 'to compensate or benefit the previous partner in their own right and not as carer for the child.'[26] Further, Schedule 1 claims are rarely brought in practice,[27] and tend to be seen as most appropriate in big money cases.[28] This approach shows some recognition of the needs of caretakers, but it appears to

[24] In Sweden, as in many other parts of Europe, certain types of relationship automatically affect the partners' rights over their property. Broadly speaking, community of property regimes give each partner a share in the assets of the other (exactly which assets are included depends on the rules of the particular community of property regime). The community of property regimes in Sweden and the Netherlands are discussed further in Chapters 4 and 5. See also Elizabeth Cooke, Anne Barlow and Thérèse Callus, 'Community of Property A Regime for England and Wales?' (The Nuffield Foundation 2006)

[25] Couples in Europe, 'Couples in Sweden' (Notaries of Europe, European Notarial Network and Uni Graz, 2012) <http://www.coupleseurope.eu/en/sweden/topics> accessed 20 August 2018 and Government Offices of Sweden, 'Cohabitees and their joint homes' (*Ministry of Justice,* printed September 2017) <https://www.government.se/4ac0bb/contentassets/e95d660fd9354c139439e051fd8ed4db/cohabitees-and-their-joint-homes.pdf> accessed 2 October 2018

[26] *Re A (A Child)* [2014] EWCA Civ 1577

[27] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com CP No 179, 2006), 4.34

[28] See, for example, Gillian Douglas, Julia Pearce and Hilary Woodward, 'A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown' (2007) <https://orca.cf.ac.uk/5186/1/1.pdf> accessed 25 October 2018 and Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, Summary, 2007)

do so against a backdrop which casts care as an individual, autonomous, decision by the caretaker, rather than as a decision taken in the setting of a family unit. Although the other partner may be required to help meet the incidental costs connected with caretaking, there is no recognition of the wider costs to the caretaker, such as the loss of a career.

For married couples the position is different. In England and Wales, there is a statutory regime, supplemented by case law principles, which provides for a discretionary approach to financial provision.[29] Case law makes clear that the court must aim for an outcome that is fair to both parties.[30] It also establishes that there are three strands of fairness: needs, compensation and sharing.[31] Need is a 'very broad concept with no single definition in family law'.[32] Thus, in cases involving substantial assets, the amount required to meet needs can be very significant indeed. Compensation is concerned with any financial detriment suffered by a party as a result of a relationship (for example, the loss of a career to raise children).[33] Finally, sharing seeks to divide the fruits of the marital partnership fairly between the parties, and is rooted in the idea of marriage as a partnership of equals.

In deciding upon what is a fair outcome, a court must consider the statutory factors outlined in Matrimonial Causes Act 1973, s 25. A judge must give first consideration to the welfare of any minor children,[34] have regard to all the circumstances of the case, and in particular to various factors set out in the statute,[35] and consider whether there can be a 'clean break' between the parties (meaning that there are no ongoing maintenance payments between them for the benefit of either of them; it is not possible to have a clean break as regards obligations for children).[36] As will be discussed further in Chapter 2, this more flexible framework for married couples in England and Wales is more able to recognise the financial implications of caretaking responsibilities than is the law relating to cohabitants. Nevertheless, the increasing influence of individual

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[29] Matrimonial Causes Act 1973, s 25
[30] *White v White* [2000] UKHL 54
[31] *Miller v Miller : McFarlane v McFarlane* [2006] UKHL 24
[32] Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014), x
[33] *Miller v Miller : McFarlane v McFarlane* [2006] UKHL 24
[34] Matrimonial Causes Act 1973, s 25(1)
[35] Matrimonial Causes Act 1973, s 25(1) and (2)
[36] Matrimonial Causes Act 1973, s 25A

autonomy can be seen in this context too. For example, recent research has found an increasing emphasis on clean break settlements on divorce.[37] Thus, in practice, few caretakers receive ongoing financial support for themselves after separation; for cohabitant caretakers, there is no legal framework that allows them to claim, and for married caretakers the emphasis on a clean break has meant that few claims succeed in reality.

This position would be compounded by the Divorce (Financial Provision) Bill, which proposes three main changes to the law in England and Wales. First, it seeks to limit the division of assets on divorce to matrimonial property, meaning property that was acquired during a marriage other than by gift or inheritance. Currently, all property belonging to a couple falls within the courts' powers under Matrimonial Causes Act 1973, s25, and in cases where the parties' needs exceed their assets, there may need to be recourse to non-matrimonial property. Second, the Bill seeks to make pre-nuptial agreements binding; they are currently persuasive but not binding. Finally, the Bill seeks to limit the term of periodical payments to five years, unless the claimant can establish serious financial hardship; currently the courts have a wide discretion to make periodical payments for any period, including until one of the spouses dies if this is required by the circumstances of the case.

Given the rate of parental separation in society, there is of course a need for couples to be able to move on with their lives. There are also very good reasons for trying to keep the ongoing financial ties between couples to a minimum, to avoid bitterness and to facilitate 'a new life which is not overshadowed by the relationship which has broken down.'[38] However, financial independence is not straightforward in a world where parties tend to specialise in breadwinning or caretaking, to at least some degree, with such tasks divided along gender lines. In recent years, there has been an increasing emphasis on shared care following parental separation, possibly linked to the reforms outlined at the start of this chapter. Nevertheless, even if such arrangements are agreed, freeing up both parents to engage in paid work post-separation, it is not a panacea where care

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[37] Emma Hitchings and Joanna Miles, 'Financial remedies on divorce: the need for evidence-based reform' (2018) <http://www.nuffieldfoundation.org/sites/default/files/files/briefing%20paper%20Jun%202018%20FINAL.pdf> accessed 18 July 2018

[38] *Minton v Minton* [1979] 1 All ER 79

was not shared beforehand, because part-time work has long-term economic effects that are not easily overcome.[39]

In Sweden there has been a concerted effort to change societal patterns of caring to encourage a more even division of paid and unpaid work. Mothers and fathers alike are encouraged to take parental leave, and their participation in the workforce is facilitated by well-funded state nursery provision. Accordingly, the law on divorce has moved towards a position that valorises individual autonomy; spousal maintenance is almost non-existent and pension sharing is very limited. Thus, in Sweden, the aim is to achieve individual autonomy, but with state assistance to deal with caretaking responsibilities.

In the Netherlands, similar encouragement for the sharing of paid and unpaid work has been less well-supported by state infrastructure (although employer contributions to childcare play a greater role than in Sweden[40]) because of norms around parents, rather than the state, caring for children.[41] Instead, the aim has been to encourage both parents to share paid and unpaid work. On divorce, spousal maintenance remains a possibility, but the amounts paid are reducing,[42] and norms of individual autonomy are becoming more powerful (see further, Chapter 4(ii)). Caretaking responsibilities have, therefore, featured in policy consciousness in the Netherlands. However, as will be discussed further in Chapters 4 and 5, the effect on parental behaviours has been more limited, and there is a clash between ideas of autonomy and the reality of caretaking responsibilities.

1.1.4 Why the clash between autonomy and care? Gender (in)equality in England and Wales

Having outlined the conflict between autonomy and care, and how the three jurisdictions approach it, this section seeks to explore the reasons this conflict

[39] See, for example, Monica Costa Dias, Robert Joyce and Francesca Parodi, 'The gender pay gap in the UK: children and experience in work' (*IFS,* February 2018) <https://www.ifs.org.uk/uploads/publications/wps/MCD_RJ_FP_GenderPayGap.pdf> accessed 26 September 2018
[40] Barbara Haas and Margit Hartel, 'Towards the Universal Care Course Model' (2010) 12(2) European Societies 139
[41] See, for example, Monique Kremer, *How Welfare States Care* (Amsterdam University Press 2007), 203 and Nathalie Morel, 'From Subsidiarity to "Free Choice": Child- and Elder-care Policy Reforms in France, Belgium, Germany and the Netherlands' (2007) 41(6) Social Policy & Administration 618
[42] Centraal Bureau voor de Statistiek, 'Fewer women receive alimony, lower amounts involved' (29 October 2014) <https://www.cbs.nl/en-gb/news/2014/44/fewer-women-receive-alimony-lower-amounts-involved> accessed 26 September 2018

exists in England and Wales. The purpose of the comparative work in this thesis is ultimately to inform possible law and policy reform in England and Wales, which might help to resolve the conflict between autonomy and care in family law, rather than to suggest reforms in Sweden or the Netherlands. For that reason, this section focuses specifically on gender inequality in England and Wales, and its role in the conflict between autonomy and caring responsibilities, to provide context for the research questions outlined later. As will be discussed further in Chapters 4 and 5, there appears to be a conflict between perceptions of gender equality and the reality in all three jurisdictions. In Sweden, for example, the rhetoric of gender equality is pervasive, but the care of children remains gendered and a gender pay gap persists. In the Netherlands, this tension was less obvious, but despite gendered expectations of the roles of mothers and fathers in society, there were some suggestions in the interviews conducted for this thesis with legal professionals there that a decision to care may be perceived as a free choice, yet one which reinforces gendered norms.[43] These tensions are explored further in the comparative analysis in Chapters 4 and 5.

The tension between autonomy and care in family law in England and Wales is reflective of a wider conflict in society between perceptions of gender equality and the reality of gender roles. Neoliberal ideas of individual autonomy, encompassing freedom of choice and economic self-sufficiency, reflect a vision of society in which men and women are equal. A 2015 YouGov survey looking into global attitudes to gender equality found that 73% of respondents in Britain (76% of men and 70% of women) believed that men and women were equal.[44] Likewise, the 35th British Social Attitudes Report published in 2018 found that 72% of respondents disagreed with the view that a man's job is to earn money and a woman's job is to look after the home and the family.[45] The same percentage agreed that both men and women should contribute to the household income.[46]

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[43] As will be explained further in Chapter 3, this research draws on the findings of semi-structured interviews with legal professionals in Sweden and the Netherlands and with parents in England and Wales that were conducted for this project.

[44] You Gov, 'Global report: attitudes to gender' (2015) <https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/43qhq95qwn/YouGov_Gender_Results_Share_Website2.pdf> accessed 26 September 2018

[45] Eleanor Attar Taylor and Jacqueline Scott 'Gender' in Phillips D, Curtice J, Phillips M and Perry J (eds) *British Social Attitudes: The 35th Report* (The National Centre for Social Research, 2018) <http://www.bsa.natcen.ac.uk/latest-report/british-social-attitudes-35/gender.aspx> accessed 26 September 2018

[46] Eleanor Attar Taylor and Jacqueline Scott 'Gender' in Phillips D, Curtice J, Phillips M and Perry J (eds) *British Social Attitudes: The 35th Report* (The National Centre for Social Research, 2018) <http://www.bsa.natcen.ac.uk/latest-report/british-social-attitudes-35/gender.aspx> accessed 26 September 2018

This view of equality does not, however, accord with the roles actually and normatively played by men and women in society, raising questions over the idea of ‘choice’ which is at the heart of autonomy. The overall gender pay gap in the UK was 17.9% in 2018[47] and, as will be discussed in Chapter 2, women are far more likely than men to work part-time because of caretaking responsibilities. Further, perceptions of the equality of men and women are not reflected in attitudes to caring for children, which remain gendered. For example, in the 2019 British Social Attitudes survey, 51% believed that a woman should stay at home (19%) or work part-time (32%), with the father working full-time, where there is a child under school age.[48] The first of these figures marks a reduction from the 2018 report, when the figures were 33% and 38% respectively,[49] figures which at that time had shown very little change from 2012.[50] Interestingly, it is noted in the 2019 report that the reduction in the proportion of people suggesting that a mother should stay at home ‘has not translated into an equivalent increase in the proportion of people favouring mothers and fathers sharing work and caring responsibilities equally’[51] (6% favour both parents working full-time and 9% favour both parents working part-time). Instead, the proportion of respondents who could not choose an option increased from 19% to 30%. The 2019 report does not include attitudes in relation to the position when the youngest child has started school. In the 2018 report, 49% suggested that a woman should work part-time at this stage, also reflecting gendered visions about the division of paid work and care.[52]

Part-time and flexible working may have implications for future career progression. For example, a 2014 YouGov Survey for the Department for Culture,

[47] ONS, ‘Gender pay gap in the UK: 2018’ (25 October 2018) <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2018> accessed 3 January 2019

[48] John Curtice, Elizabeth Clery, Jane Perry, Miranda Phillips and Nilufer Rahim (eds) *British Social Attitudes 36* (The National Centre for Social Research, 2019) <https://www.bsa.natcen.ac.uk/media/39363/bsa_36.pdf> accessed 27 September 2019

[49] Eleanor Attar Taylor and Jacqueline Scott ‘Gender’ in Phillips D, Curtice J, Phillips M and Perry J (eds) *British Social Attitudes: The 35th Report* (The National Centre for Social Research, 2018) <http://www.bsa.natcen.ac.uk/latest-report/british-social-attitudes-35/gender.aspx> accessed 26 September 2018

[50] Eleanor Attar Taylor and Jacqueline Scott ‘Gender’ in Phillips D, Curtice J, Phillips M and Perry J (eds) *British Social Attitudes: The 35th Report* (The National Centre for Social Research, 2018) <http://www.bsa.natcen.ac.uk/latest-report/british-social-attitudes-35/gender.aspx> accessed 26 September 2018,10-11

[51] John Curtice, Elizabeth Clery, Jane Perry, Miranda Phillips and Nilufer Rahim (eds) *British Social Attitudes 36* (The National Centre for Social Research, 2019) <https://www.bsa.natcen.ac.uk/media/39363/bsa_36.pdf> accessed 27 September 2019

[52] Eleanor Attar Taylor and Jacqueline Scott ‘Gender’ in Phillips D, Curtice J, Phillips M and Perry J (eds) *British Social Attitudes: The 35th Report* (The National Centre for Social Research, 2018) <http://www.bsa.natcen.ac.uk/latest-report/british-social-attitudes-35/gender.aspx> accessed 26 September 2018

Media and Sport[53] found that 43% of respondents felt people in flexible working arrangements did not have the same opportunities for career progression as those who were not (29% felt that they did).[54] Further, only 24% of respondents thought that those who took a career break and returned to work had the same opportunities as those who worked continuously, with women more likely to disagree than men (57% compared to 48%).[55] It is, therefore, perhaps unsurprising that research using data from the British Household Panel Survey and Understanding Society has concluded:

> Gender difference in rates of full-time and part-time work after childbirth are an important driver of differences in hourly wages between men and women. This is because they affect the amount and type of labour market experience that men and women build up, and this experience affects the hourly wage levels they can command… differences in working experience are determinant in explaining the gender pay gap of college graduates, for whom they can explain up to two thirds of the wage differences 20 years after childbirth. The role of experience in driving the gender wage differences of those with GCSE-level and A-levels qualifications is more modest, accounting for about one third of the gap 20 years after the first childbirth.[56]

The authors of the study also note that it is not only taking time out of paid work but also working part-time that affects women's wages, 'because extra experience in full-time work leads to higher hourly wages, whereas extra experience in part-time work does not.'[57] Caretaking responsibilities are, therefore, an important factor in determining the employment opportunities for mothers as a group. However, there remain differences within that group.

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[53] Department for Culture Media & Sport, 'Attitudes towards Equality: Findings from the YouGov Survey' (June 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316290/Attitudes_towards_Equality.pdf> accessed 26 September 2018

[54] Department for Culture Media & Sport, 'Attitudes towards Equality: Findings from the YouGov Survey' (June 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316290/Attitudes_towards_Equality.pdf> accessed 26 September 2018

[55] Department for Culture Media & Sport, 'Attitudes towards Equality: Findings from the YouGov Survey' (June 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316290/Attitudes_towards_Equality.pdf> accessed 26 September 2018

[56] Monica Costa Dias, Robert Joyce and Francesca Parodi, 'The gender pay gap in the UK: children and experience in work' (*IFS,* February 2018) <https://www.ifs.org.uk/uploads/publications/wps/MCD_RJ_FP_GenderPayGap.pdf> accessed 26 September 2018, 22-3

[57] Monica Costa Dias, Robert Joyce and Francesca Parodi, 'The gender pay gap in the UK: children and experience in work' (*IFS,* February 2018) <https://www.ifs.org.uk/uploads/publications/wps/MCD_RJ_FP_GenderPayGap.pdf> accessed 26 September 2018, 23

Notably, the study found that 'among lower-educated people, there is already a relatively substantial gender wage gap before the first child is born, and gender differences in full-time and part-time paid work in the subsequent 20 years explain only a minority of the gender wage gap that has built up by that point.'[58] A consideration of the wider factors affecting gender equality is outside the scope of this thesis, but it is important to note that whilst addressing the issues arising from caretaking is crucial to addressing gender inequality, it cannot be seen as a complete solution to economic gender inequality in England and Wales.

In England and Wales, there is, therefore, a disconnect between what it means to be a good worker and a good parent, and a good mother in particular. A survey of 800 UK professionals carried out by a global management consultancy firm said this about the conflict between work and family life:[59]

> British workplaces do not have an institutionalised approach to balancing work and family life,' said one respondent. 'As a result, men lose out on family life by choosing a career and women lose out in their careers by choosing family.[60]

However, the same survey found that this conflict was not recognised by those with the power to effect change:

> The perception among a majority of men that the playing field is already level often leads to a lack of support for gender parity programmes…. The most satisfied employees are senior-level men with supportive spouses who don't work. In other words, those with the most power to effect change are those least aware of the challenges faced by dual-income families or women balancing work and home.[61]

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[58] Monica Costa Dias, Robert Joyce and Francesca Parodi, 'The gender pay gap in the UK: children and experience in work' (*IFS,* February 2018) <https://www.ifs.org.uk/uploads/publications/wps/MCD_RJ_FP_GenderPayGap.pdf> accessed 26 September 2018, 23

[59] Darci Darnell and Gadiesh Orit, 'Gender equality in the UK: The next stage of the journey' (*Bain & Company*, 16 September 2013) https://www.bain.com/insights/gender-equality-in-the-uk/ accessed 25 October 2018

[60] Darci Darnell and Gadiesh Orit, 'Gender equality in the UK: The next stage of the journey' (*Bain & Company*, 16 September 2013) https://www.bain.com/insights/gender-equality-in-the-uk/ accessed 26 September 2018

[61] Darci Darnell and Gadiesh Orit, 'Gender equality in the UK: The next stage of the journey' (*Bain & Company*, 16 September 2013) <https://www.bain.com/insights/gender-equality-in-the-uk/> accessed 26 September 2018

If the choices of professional caretakers are constrained by workplace structures, then the choices of caretakers who are not professionals may be constrained even further. The demographic information available about respondents to this workplace survey of professionals is limited. However, it seems likely that those in professional careers have several advantages over other workers in trying to navigate a work-life balance. For example, the experiences of some of the parents interviewed for this research (discussed further in Chapters 4 and 5) suggest that professional careers may offer greater opportunities for flexible working of a type controlled by the employee. This sort of flexible working, more often available to those in senior professional positions, is unlikely to have the same sort of consequences for one's career as the flexible working discussed above.[62] Employee directed flexible working may assist with balancing paid work and caretaking. Further, the income of professionals, as compared with unskilled workers, is likely to be higher. This may make it easier to pay for help with childcare. Understanding the difficulties of reconciling paid work and care for caretakers is, therefore, an important element in understanding what ideas of choice really mean in this context.

1.1.5 The gendered financial consequences of the clash between autonomy and care on separation in England and Wales

This conflict between understandings of autonomy, premised on gender equality, and the gendered allocation of caretaking in society has financial implications on separation in England and Wales. Research using 18 waves of data from the nationally representative British Household Panel Survey indicates that, in income terms, the financial consequences of separation are more severe for women and children than for men.[63] Research looking specifically at divorcing couples has found that women lose out more than men in income terms on divorce, regardless of the level of household income.[64] However, 'high income women lose out the most and their losses are the most persistent. Among the

[62] Some of the participants in the England and Wales interviews for this research had become self-employed as a way of balancing paid work and child care responsibilities. Such decisions have financial consequences, such as the loss of employment benefits and potentially employer contributions to a pension. Gareth, for example, referred to the absence of pension benefits and sick pay (see further Chapter 5(iii)). It may be that for those in professional careers these costs are offset by the ability to earn more through self-employment than as an employee. However, the available data regarding self-employment is limited.

[63] Mike Brewer and Alita Nandi, 'Partnership dissolution: how does it affect income, employment and well-being? (*Institute for Social & Economic Research*, September 2014) <https://www.iser.essex.ac.uk/research/publications/working-papers/iser/2014-30.pdf> accessed 26 September 2018

[64] Hayley Fisher and Hamish Low, 'Recovery from divorce: comparing high and low income couples' (2016) 30 International Journal of Law, Policy and the Family 338

lowest income women, losses are less and recovery is fastest. Men tend to increase their standard of living on divorce, especially low income men.'[65]

As discussed above, on divorce, Matrimonial Causes Act 1973 outlines a list of factors that the court must consider when deciding upon what is a fair outcome. One of these factors is the parties' standard of living. Given the disparity in income between spouses upon divorce, it is likely that as well as losing out most in absolute terms compared with their partners, high income women see the greatest falls in their standard of living on divorce. Maintenance from a former partner forms only a small part of women's overall household income, whether these women are on high or low incomes (although it contributes more to the household income of the former).[66] Thus, even in cases where the court departs from the norm of the clean break, and makes an order for spousal maintenance, the effect of spousal maintenance on women's standard of living is limited.

The picture is more complex when it comes to the division of capital and pensions on divorce; the statutory regime does not apply to cohabitants. Although there is some evidence that women receive a more favourable split of housing wealth,[67] this data lacks information about the division of pensions, which might offset the difference. Research into the division of pensions on divorce has found that pensions were shared in only 14% of cases.[68] Overall, there is a significant gap between the pension provision of men and women (estimated at 34.77% in 2016).[69] Thus, the limited numbers of pension sharing orders made on divorce is likely to benefit men financially.

1.2 Thesis overview

1.2.1 Research questions

Answering the overall question posed by this thesis of how family law and policy should take account of caretaking responsibilities on parental separation

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[65] Hayley Fisher and Hamish Low, 'Recovery from divorce: comparing high and low income couples' (2016) 30 International Journal of Law, Policy and the Family 338, 366

[66] Hayley Fisher and Hamish Low, 'Recovery from divorce: comparing high and low income couples' (2016) 30 International Journal of Law, Policy and the Family 338, 337

[67] Hayley Fisher and Hamish Low, 'Divorce early or divorce late? The long-term financial consequences' (2018) 32 Australian Journal of Family Law 6

[68] Hilary Woodward and Mark Sefton, 'Pensions on Divorce: An Empirical Study' (Cardiff Law School, 2014) <http://www.nuffieldfoundation.org/pensions-divorce>, accessed 14 December 2018

[69] Publications Office of the European Union, 'The 2018 pension adequacy report' (*Directorate-General for Employment, Social Affairs and Inclusion (European Commission)*, 2018) <https://publications.europa.eu/en/publication-detail/-/publication/62f83ed2-7821-11e8-ac6a-01aa75ed71a1/language-en> accessed 14 December 2018

combines three stages. The first involves understanding how family law and policy in England and Wales currently take caretaking responsibilities into account on parental separation. The second involves considering alternative approaches to this issue. The third involves combining the findings of the first two stages to suggest ways in which law and policy might be reformed. Such reforms might involve reconceptualising the theoretical underpinnings of law and policy, making substantive changes to law and policy, or some combination of these two approaches. All three of these stages require engaging with the wider social context, which involves engaging with the three cross-themes outlined above: the meaning of gender equality, what it means to care and the respective roles of the family and society in providing care.

In this thesis, tackling the first stage of answering the overall research question involves combining a theoretical and doctrinal analysis of the legal framework in England and Wales with the findings of empirical work to understand how the law works in practice. The doctrinal and theoretical stage of this undertaking explores the central tension between the principles of individual autonomy and the demands of caretaking discussed earlier in this chapter.

This thesis also involves comparative work, primarily as a way of considering alternative approaches to dealing with caretaking responsibilities as part of the second stage above. However, the findings of this comparative work also offer a perspective on the approach taken in England and Wales. This feeds back into the doctrinal and theoretical analysis of the law in England and Wales.

The third stage of answering the overall research question means considering both theoretical and practical insights from the first two stages. The comparative work is designed to highlight potential legal and policy reforms inspired by other jurisdictions. However, the findings of this work and the empirical work also feed into the theoretical and doctrinal analysis, allowing a reconsideration of the theoretical underpinnings of the law.

Whilst conceptually these aspects of answering the overall research question can be easily separated, as this discussion illustrates, practically they are iterative.

For this reason, the specific research questions tackled by this thesis address key themes of the central conflict between autonomy and care. They are:

1. **To what extent do each of the jurisdictions take account of caretaking responsibilities on parental separation?**
    a. **How influential are ideas of autonomy, and how is autonomy conceptualised?**
    b. **How visible is caretaking and how valuable is it considered to be?**
2. **What lessons can be learned in England and Wales from the approaches taken in Sweden and the Netherlands?**
    a. **How far is it possible to reconceptualise the ideas of autonomy underpinning family law?**
    b. **To what extent should caretaking be considered to be a societal, as well as a familial, responsibility?**

The first of these research questions is concerned with the first two stages of answering the overall research question: understanding the approach taken in England and Wales and the alternative approaches taken in Sweden and the Netherlands. Unpacking the ideas of autonomy and care in all three jurisdictions is designed to facilitate understandings of the theoretical underpinnings of law and policy in those jurisdictions. Such understanding provides a foundation for the third stage outlined above: rethinking key theoretical concepts may be one way of reforming law and policy in England and Wales.

This theoretical undertaking also serves a second purpose. This thesis identifies the clash between autonomy and care as central to the challenge of dealing with caretaking responsibilities on parental separation. Unpacking these concepts theoretically allows them to be used as lenses through which to explore the practical approaches taken in all three jurisdictions. Looking at law and policy through these lenses provides both a way of understanding and of evaluating the different approaches taken elsewhere.

The second research question above goes to the third stage of answering the overall research question: combining the insights of how law and policy in all three

jurisdictions address the problem of caretaking responsibilities on parental separation and considering alternative approaches. As will be discussed further in Chapter 3, simply transplanting law or policy initiatives from one jurisdiction to another fails to take account of the different social context.[70] For this reason, rather than seeking to copy measures from Sweden and the Netherlands, this thesis looks at the lessons that can be learned from these jurisdictions in a more conceptual way. For example, it considers what insights these jurisdictions offer into the ideas of autonomy and care. These lessons provide the foundation for answering RQ 2.a and 2.b. Thinking about the meaning of autonomy (RQ 2.a) is designed to prompt a theoretical reflection on the concepts underpinning law and policy: might a change here provide a solution? Thinking about how caretaking is allocated within society (RQ 2.b) requires a conceptual engagement with ideas around responsibility for caretaking. However, it also prompts a more practical assessment of potential reform, which draws on the findings of empirical and comparative work. These insights are combined to answer the overall research question of how family law and policy should take account of caretaking responsibilities on parental separation.

1.2.2 Chapter outline

This chapter provides an overview of the research undertaken by this thesis, its theoretical framing and wider context, and the specific research questions it seeks to answer.

Chapter 2 undertakes a theoretical and doctrinal analysis of family law in England and Wales. It aims to provide a framework for answering the research questions outlined above, and the overall question of how family law and policy should take account of caretaking responsibilities on parental separation. It engages in detail with the ideas of autonomy and care; it considers how they are currently understood in the law and why there is a conflict between them. It is, therefore, a crucial element in understanding how family law and policy in England and Wales currently take account of caretaking responsibilities. This theoretical and doctrinal analysis of the position in England and Wales informs, and is complemented by, the empirical work in Chapters 4(iii) and 5(iii).

[70] Pierre Legrand, 'The Impossibility of "Legal Transplants" (1997) 4 Maastricht Journal of European and Comparative Law 111

The theoretical undertaking in Chapter 2 also helps to answer part of the second research question above. RQ 2.a considers whether it is possible to reconceptualise the ideas of autonomy underpinning family law. This requires a clear picture of current understandings. This theoretical reconsideration is developed further in Chapter 6, which also draws on the empirical and comparative findings of Chapters 4 and 5.

Chapter 3 considers the methodological approach of this thesis in greater detail. As described in this chapter, this thesis combines theoretical, doctrinal, empirical and comparative approaches to answer the overall research question of how family law and policy should take account of caretaking responsibilities on parental separation. Chapter 3 considers each of these methods, the contribution they make to the overall undertaking, and the practical aspects of using them.

Chapter 4 considers the way in which autonomy is understood in the three jurisdictions. As part of the second stage of answering the overall research question (looking at alternative approaches), it addresses the question of how influential ideas of autonomy are and how autonomy is conceptualised in each of the three jurisdictions (RQ 1.a). This chapter also helps to answer the question of the lessons that can be learned in England and Wales from the approaches taken in Sweden and the Netherlands (RQ 2) by considering what these jurisdictions tell us about autonomy. Finally, the findings of this chapter feed into the question of how far it is possible to reconceptualise the ideas of autonomy underpinning family law (RQ 2.a), which is answered in Chapters 6 and 7.

Chapter 5 goes on to explore the way in which the three jurisdictions approach caretaking responsibilities in law and policy. Its primary purpose is to consider the visibility and value of caretaking responsibilities (RQ 1.b), and to look at the lessons that can be learned from Sweden and the Netherlands from the perspective of care (RQ 2). The chapter then combines the findings of Chapters 4 and 5 to consider the extent to which each of the jurisdictions takes account of caretaking responsibilities on parental separation (RQ 1). These questions form a part of the exercise of identifying alternative approaches to the problem of the conflict between autonomy and care (the second stage of answering the overall

research question). These empirical insights also provide the foundation for the rethinking of the approach in England and Wales undertaken in Chapters 6 and 7.

Chapter 6 then combines the findings of Chapters 2, 4 and 5 to reflect on the lessons for England and Wales from the approaches taken in Sweden and the Netherlands (RQ 2). It considers the theoretical understandings of autonomy and care in all three jurisdictions and whether it is possible to reconceptualise autonomy in a way that renders these concepts compatible (RQ 2.a) The chapter also engages with the interplay between law and policy in the three jurisdictions to assess whether a shift in the division of caretaking responsibilities between family and state might offer a solution to the clash between ideas of autonomy and care in England and Wales (RQ 2.b). Building on these insights, the chapter proposes a new framework for thinking about financial provision on relationship breakdown. Ultimately, it is concluded that there is a value to understanding autonomy differently (and specifically in relational terms[71]), but that autonomy should cease to be used as a guiding principle of family law. Instead, care should take a more central role.

Chapters 6 and 7 together conclude this thesis. Chapter 6 provides a theoretical answer to the overall research question of how family law and policy should take account of caretaking responsibilities on parental separation. It also uses this framework to suggest practical changes to law and policy in England and Wales. Chapter 7 develops this analysis further by making use of the framework of care outlined in Chapter 6 to draw final conclusions and suggest reforms to the law of financial provision on separation.

1.3 The original contribution of this research

As explained at the outset, the main aim of this research is to explore the tension at the heart of family law between understandings of care and autonomy. It seeks to understand the interrelationship between these ideas and why it is that caretaking responsibilities are not fully understood by the law of financial provision. Understanding the ideas of autonomy and care, and the tension

[71] As will be discussed further in Chapters 2 and 6, relational ideas of autonomy recognise the fact that the decisions made within a relationship do not exist independently of the needs and preferences of other family members.

between them, provides the foundation for addressing the overall research question asked by this thesis of how family law and policy should take account of caretaking responsibilities on parental separation.

The answers gained from this research will feed into important and current debates around reform of the law of financial remedies on divorce.[72] This thesis seeks to inform and contribute to those debates through an original combination of theoretical, doctrinal, empirical and comparative approaches, providing a rounded view of social and legal issues. The empirical element of this research will contribute to the evidence base on the practical operation of the law dealing with financial provision on relationship breakdown in England and Wales, Sweden and the Netherlands never before attempted in this way. It complements recent large-scale studies looking at the nature of the financial orders made by the courts in England and Wales on divorce,[73] and the economic effects of separation on party incomes (for both cohabiting and married parents),[74] by looking at what this means in practice for parents. The comparative aspect of this research explores the ways in which laws dealing with financial provision interrelate with policies around caretaking. Such understanding is important in considering different approaches to reform and, in particular, the limits of what law reform alone can achieve. Finally, this research adds a new theoretical dimension to these debates by suggesting a new and principled basis for law and policy reform based upon a principle of care.

The central question here of how family law and policy should take account of caretaking responsibilities cannot be separated from its wider context. Addressing it requires engaging with a number of wider theoretical issues, reflected in the three contextual cross-themes outlined above: the meaning of gender equality (cross-theme 1), what it means to care (cross-theme 2) and the respective roles of the family and society in providing care (cross-theme 3). The

[72] See, for example, Ruth Deech, 'Financial Provision Reform' [2018] Family Law 1251 and Emma Hitchings and Joanna Miles, 'Financial Provision Law Reform' [2018] Family Law 1358

[73] Emma Hitchings and Joanna Miles, 'Financial remedies on divorce: the need for evidence-based reform' (2018) <http://www.nuffieldfoundation.org/sites/default/files/files/briefing%20paper%20Jun%202018%20FINAL.pdf> accessed 18 July 2018 and Hilary Woodward and Mark Sefton, 'Pensions on Divorce: An Empirical Study' (Cardiff Law School, 2014) <http://www.nuffieldfoundation.org/pensions-divorce>, accessed 14 December 2018

[74] Hayley Fisher and Hamish Low, 'Recovery from divorce: comparing high and low income couples' (2016) 30 International Journal of Law, Policy and the Family 338 and Mike Brewer and Alita Nandi, 'Partnership dissolution: how does it affect income, employment and well-being? (*Institute for Social & Economic Research*, September 2014) <https://www.iser.essex.ac.uk/research/publications/working-papers/iser/2014-30.pdf> accessed 26 September 2018

relationship between this central question and these cross-themes runs two ways; not only do these cross-themes help to answer the overall research question posed by this thesis, but it is hoped the findings of this thesis will also inform debates in areas related to these cross-themes.

1.4 Conclusion

Having outlined in this chapter the background to, and context for, this research, and the way in which this thesis seeks to answer the overall research question, the next chapter undertakes a theoretical and doctrinal analysis of family law in England and Wales. As explained above, Chapter 2 aims to provide a framework for answering the research questions outlined in this chapter and the overall research question of how family law and policy should take account of caretaking responsibilities on parental separation.

2. Autonomy and care in family law and policy

2.1 Introduction

> … deployed for post-separation families as a contrast with paternalism or dependency, autonomy makes political sense. The problem is of course that the interdependencies and connections that are simultaneously encouraged and rendered invisible in pre-separation families are too often forgotten or become irrelevant in the rush to promote the parties' autonomy post separation.[75]

As outlined in Chapter 1, this thesis seeks to explore the tension at the heart of family law between neoliberal understandings of autonomy and the demands of caretaking responsibilities. The doctrinal and theoretical analysis in this chapter aims to provide a perspective on how caretaking responsibilities are taken into account in law and policy in England and Wales. The chapter, therefore, contributes to answering the first of the research questions posed by this thesis, which asks about the extent to which the three jurisdictions take account of caretaking responsibilities on parental separation. This chapter also provides a foundation for exploring alternative approaches to this issue: by unpacking the theoretical underpinnings of law and policy in England and Wales, the concepts of autonomy and care can be used as lenses to explore the approaches taken in Sweden and the Netherlands in Chapters 4 and 5. Additionally, exploring the concepts of autonomy and care paves the way for considering whether it is possible to reconceptualise the ideas of autonomy underpinning family law (RQ 2.a), in Chapter 6.

This chapter additionally engages with all three contextual cross-themes outlined in Chapter 1. It engages with cross-theme 1 (the meaning of gender equality) and cross-theme 3 (the roles of the family and society in providing care) by exploring different theoretical models of balancing caretaking and labour market responsibilities proposed by feminist academics: the Universal Breadwinner Model, the Caregiver Parity Model and the Universal Caregiver Model. In relation to cross-theme 1, it evaluates the relative strengths and weaknesses of these models and considers their implications for achieving gender equality in society;

[75] Alison Diduck, 'Autonomy and Vulnerability in Family Law: the missing link' in Julie Wallbank and Jonathan Herring (eds) *Vulnerability, Care and Family Law* (Routledge 2013), 96

what sort of equality do these models seek and how likely are they to achieve it? From the perspective of cross-theme 3, these models have different expectations of the state and the family in providing care. For example, the Universal Breadwinner model envisages a significant role for the state in providing childcare, whereas the role of the state is potentially less under the Caregiver Parity and Universal Caregiver models. The chapter also engages with cross-theme 2 (the meaning of care) by exploring Tronto's[76] definition of care, and by considering how caring responsibilities are taken into account in family law more generally.

This chapter begins by considering how care and autonomy are currently understood in family law in England and Wales as a basis for understanding the clash between them. The chapter then explores how the clash between autonomy and care is approached in the case law relating to cohabitants and married couples. Finally, the chapter considers different theoretical approaches to resolving the conflict between these concepts. First, it considers alternative understandings of autonomy to see if these might be better reconciled with caretaking responsibilities. It then considers the different models of carer discussed above to see whether these might provide a basis for a different arrangement of caretaking responsibilities both between parents and within society, helping to resolve the clash between autonomy and care. These discussions will be developed further in Chapter 6.

2.2 What does it mean to care? Thinking theoretically about care

Although often called upon to deal with issues that engage with care, such as where a child should live, family law does not have a clear conception of what it means to care. Child arrangements orders,[77] for example, are concerned with the amount of time a child spends with each parent, rather than the nature of the care provided. Likewise, the statutory child support formula allows for reductions in the amount paid by the non-resident parent based on the number of nights the child spends with them.[78] The formula does not look at the nature of the care provided by each parent or the extent to which that care has a financial cost, for example by requiring a parent to change their working patterns. As will be discussed

[76] Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993)
[77] Children Act 1989, s 8
[78] Child Support Act 1991, Schedule 1, paragraph 7

further in Chapter 5(iii), this may be problematic where there is a division of time that results in a reduction in child support liability without the economic costs of care being shared.

As a basis for understanding the clash between autonomy and care in family law and considering potential solutions, it is important to think conceptually about what it means to care. This analysis also feeds into cross-theme 2: what it means to care. Joan Tronto[79] outlines four phases of caring:

1. Caring about – recognising the need for care
2. Taking care of – assuming some responsibility for the need and determining how to respond to it.
3. Care giving – the direct meeting of needs for care.
4. Care receiving – the final phase of caring, which focuses on the experiences of the recipient of care as a way of assessing how adequately care is provided.[80]

Whereas the first two phases have a high status in society, the latter two are left to the less powerful.[81] Tronto suggests that care is rendered invisible in society precisely because of ideas such as autonomy:

> The connection between fragmented views of care and the distribution of power is better explained through a complex series of ideas about individualism, autonomy and the "self-made man." These "self-made" figures would not only find it difficult to admit the degree to which care has made their lives possible, but such an admission would undermine the legitimacy of the inequitable distribution of power, resources and privilege of which they are the beneficiaries.[82]

[79] Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993), 106-8
[80] One of the examples Tronto gives is a person with limited mobility who may prefer to feed him or herself, even though it would be quicker for a care-giver to feed him or her (see further Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993), 108)
[81] Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993), 114
[82] Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993), 111

She, therefore, suggests that care needs to be viewed as a practice,[83] and that 'the four phases of care can serve as an ideal to describe an integrated, well-accomplished, act of care'.[84]

It is Tronto's idea of care giving which is the primary concern of this thesis. A parent who is performing the physical work of caring for children, and whose ability to engage in the labour market is compromised as a result, is engaged in care giving. However, rather than adopt the terminology of care giving, this thesis uses the term 'caretaking' which is favoured by Fineman:

> Nurturing work should not be assumed to be "given" as a gift, to either the dependent or the society that benefits from the "caregivers'" sacrifices. Taking care of someone such as a child while they are young, until they "become their own person," is work, represents a major contribution to the society, and should be explicitly recognized as such.[85]

Caretaking restricts the ability to be economically self-sufficient and is, therefore, the aspect of care which is of most concern in the context of financial settlements on separation, where neoliberal ideas of autonomy are increasingly influential. Even where a child spends equal time with both parents, unless caretaking is also shared equally, the economic costs of care, and the ability of parents to be autonomous within the neoliberal framework, may be unequal.

2.3 Autonomy in English and Welsh family law: a theoretical and doctrinal analysis

As Diduck explains in the quotation at the start of this chapter, autonomy poses challenges for family law because it fails to take account of the presence of caring (and specifically caretaking) responsibilities. The prevailing understanding of autonomy in English and Welsh family law is a neoliberal one. Neoliberalism is not only an economic policy but also considers that political and social concerns are 'appropriately dominated by market concerns and… organized by market

[83] Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993), 108
[84] Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993), 109
[85] Martha Fineman, *The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies* (Routledge 1995), 9

rationality'.[86] The market values so prized by neoliberalism are 'associated with competition, economic efficiency and choice'.[87] Thus, the 'minimalist state',[88] which accompanies this vision, tends to embrace ideas of privatisation and deregulation in the provision of welfare services, for example.[89] In the neoliberal world, the personal responsibility of the individual is emphasised.[90] 'In short, neoliberal subjects are seen to be characterized by hyperindividuality, flexibility, and a strong sense of personal autonomy and responsibility.'[91] Thus 'economic self-sufficiency and a sense of separation from others in society'[92] is highly valued. Citizens are considered to be 'individual entrepreneurs and consumers whose moral autonomy is measured by their capacity for "self-care" – their ability to provide for their own needs and service their own ambitions'.[93] Underlying this is an assumption of a '"capable adult", unbound by structural constraints, who needs "activating"'.[94]

This idea of autonomy, encompassing ideas of individual responsibility, freedom of choice and economic self-sufficiency, is problematic for caretakers; as Beck observes, '[o]n the one hand, the labour market demands mobility without regard to personal circumstances. Marriage and family require the opposite….'[95] Thus, Buckley describes the problematic nature of neoliberalism (encompassing neoliberal ideas of autonomy) for the family as follows:

> In the family context, neoliberalism reinterprets conduct based on relational values (such as love and altruism) in the language of rationality and self-interest. It also privatizes welfare considerations, including caring responsibilities. Families are essentially expected to be both self-governing and self-sufficient, rather than relying on state support. However, the tensions between personal and family self-sufficiency are

[86] Wendy Brown, 'American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization' (2006) 34 Political Theory 690, 694
[87] Wendy Larner, 'Neo-liberalism: Policy, Ideology, Governmentality' (2000) 63 Studies in Political Economy 5, 5
[88] Wendy Larner, 'Neo-liberalism: Policy, Ideology, Governmentality' (2000) 63 Studies in Political Economy 5, 5
[89] Nancy Fraser, 'Feminism, Capitalism and the Cunning of History' (2009) 56 New Left Review 97, 107 and Wendy Larner, 'Neo-liberalism: Policy, Ideology, Governmentality' (2000) 63 Studies in Political Economy 5, 5
[90] Nancy Fraser, 'Feminism, Capitalism and the Cunning of History' (2009) 56 New Left Review 97, 107
[91] Scott McLean, 'Individual Autonomy or Social Engagement? Adult Learners in Neoliberal Times' (2015) 65 Adult Education Quarterly 196, 200
[92] Martha Fineman, *The Autonomy Myth A Theory of Dependency* (The New Press 2004), XVI
[93] Wendy Brown, 'American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization' (2006) 34 Political Theory 690, 694
[94] Kate Brown, 'Re-moralising "vulnerability"' (2012) 6 People Place and Policy Online <https://extra.shu.ac.uk/ppp-online/re-moralising-vulnerability-2/> accessed 26 September 2018
[95] Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage 1992), 116

disregarded. This has particular consequences for women, who are assumed to be active labour market participants, while simultaneously expected to be the primary family care-providers. These gendered outcomes are, however, obscured by neoliberalism's emphasis on formal equality and the gender-neutral framing of legal and policy measures, which (in practice) constrain women's real autonomy and freedom of choice while ignoring and maintaining their systematic disadvantage. In this way, "choice rhetoric" reinforces the gendered division of labour, while disguising how the costs of childrearing and caring work are generally allocated to women.[96]

In the post-separation family, this tension is intensified. As described in Chapter 1, when caretaking is performed within a family unit, the incompatibility between paid and unpaid work tends to be disguised because these responsibilities are managed by the family as a whole. This division of labour is, however, problematic when parents separate, given the increasing emphasis on the idea of a clean break.[97] As discussed in Chapter 1, there are limits on the ability of post-separation shared care to redress the financial effects of historic gendered caretaking patterns. Such arrangements do not address inequalities in earning capacity as a result of different roles played historically. The opportunities to work part-time or flexibly if one has reached a senior position are somewhat different from those part-time opportunities available to those who are more junior or who have taken career breaks. Further, even where children's time is split between their parents, there is a question about the extent to which the work of caretaking, as opposed to caring about or taking care of, is actually shared in such cases (see further Chapter 5(iii)).

Despite the challenges that caretaking responsibilities pose to financial independence, the legal response to family breakdown in England and Wales is increasingly influenced by a neoliberal understanding of autonomy. This is particularly apparent in two trends in family law, the increasing influence of private ordering and the role of autonomy as a principle in the law, which are explored further in the next two sections of this chapter.

[96] Lucinda Buckley, 'Relational Theory and Choice Rhetoric in the Supreme Court of Canada' (2015) 29 Canadian Journal of Family Law 251, 258-9
[97] Matrimonial Causes Act 1973, s 25A

2.3.1 Private ordering as an example of neoliberal autonomy in family law

Perhaps the most significant example of neoliberal influence in family law in England and Wales is the strong influence of 'private ordering',[98] a concept Cretney describes as follows:

> [Private ordering is] based on the philosophy that individuals should have the right to organise their lives as they wish, free from intervention by the state and courts, and that, accordingly, they should have the right to create legal obligations, enforceable by the courts, either in substitution for what the state prescribes as the default option, or to provide for situations in which the state makes no regulatory provision.[99]

This understanding of private ordering sees it as an alternative to the default position, where such a default position exists. This type of private ordering has been regarded as desirable for some time. For example, the Children Act was intended to be 'non-interventionist':[100] not only is there no need for parents to consult the court if they can agree the arrangements for their children themselves, but the no order principle[101] directs the court not to make any order unless to do so would be better than making no order at all. This ethos can also be seen in the repeal of Matrimonial Causes Act 1973, s 41, which directed the court to consider the arrangements for children before decree absolute could be granted. The position in financial remedy cases is slightly more complex. There is certainly an emphasis on private methods of dispute resolution, particularly mediation, in reaching an agreement. However, divorcing couples cannot opt out of the legal framework entirely if they want finality. Not only is decree absolute necessary to end their marriage, but a financial agreement must be captured in a court order if it is to be binding.[102] Nevertheless, in 2000 it was suggested that a consent order is made in only around 40% of cases[103], a number which seems to have fallen

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[98] Stephen Cretney, 'Private Ordering and Divorce - How Far Can We Go?' [2003] Family Law 399

[99] Stephen Cretney, 'Private Ordering and Divorce - How Far Can We Go?' [2003] Family Law 399, 399

[100] Maebh Harding and Annika Newnham, 'How do County Courts Share the Care of Children Between Parents?' (*University of Warwick*, 2015) <http://www.nuffieldfoundation.org/sites/default/files/files/Full%20report.pdf> accessed 18 February 2016, 35

[101] Children Act 1989, s 1(5)

[102] *Wyatt v Vince* [2015] UKSC 14

[103] Gwynn Davis, Julia Pearce, Roger Bird, Hilary Woodward and Chris Wallace' 'Ancillary Relief Outcomes' (2000) 12 CFLQ 43

since.[104] Further, a significant number of people have always divorced without legal advice (47% of people divorcing between 1996 and 2011).[105]

There are good reasons to encourage parents to negotiate privately, both in relation to financial matters and the arrangements for their children. For example, a private agreement avoids the stress and hostility of court proceedings. Private arrangements also tend to be more flexible and adaptive to changing circumstances.[106] However, this sort of private ordering was, until recently, encouraged against the background of a system in which there was recourse to the courts if an agreement could not be reached. Since the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), private ordering is cast as the new normal. The Government's justification for withdrawing legal aid in private family law cases was in neoliberal terms:

> We do not consider that it will generally be in the best interests of the children involved for these essentially personal matters to be resolved in the adversarial forum of a court. The Government's view is that people should take responsibility for resolving such issues themselves, and that it is best for both the parents and children involved.[107]

This decision was taken as part of a wider neoliberal agenda of reducing public spending. Neoliberal understandings of autonomy are also evident in the quote above, which refers to taking 'responsibility'. Such an assumption in relation to financial arrangements on separation assumes a negotiation between two autonomous individuals with equal bargaining positions. As Diduck explains, this is problematic:

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[104] Gov.uk, 'Family Court Tables: April to June 2019 (Table 13)' (*Ministry of Justice*, 26 September 2019) <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-april-to-june-2019> accessed 17 October 2019

[105] Anne Barlow, Rosemary Hunter, Janet Smithson and Jan Ewing, 'Mapping Paths to Family Justice: Briefing Paper and Report on Key Findings' (*University of Exeter*, 2014) <http://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/lawimages/familyregulationandsociety/pdfs/Mapping_briefing_paper_final_post_conference_version___ISBN.pdf> accessed 26 September 2018

[106] Gov.uk, 'Family justice review final report' (*Ministry of Justice, Department for Education and the Welsh Government,* November 2011) <https://www.gov.uk/government/publications/family-justice-review-final-report> accessed 26 September 2018

[107] Gov.uk, 'Proposals for reform of Legal Aid in England and Wales' (*Ministry of Justice,* November 2010) <https://www.gov.uk/government/publications/proposals-for-reform-of-legal-aid-in-england-and-wales> accessed 26 September 2018, 4.210

> … the dejuridification of financial issues on divorce, in the name of party autonomy, reinforces the view that any financial disadvantage that may result from familial (inter)dependence and/or care responsibilities is the result of a private, freely made choice rather than of those very relationships and other social structural factors and influences. This assumption is problematic because when justice has *come to mean* the freedom to express your choices, there is little law can do about disadvantage that results from them other than either reinforce it or to encourage its remedy also by choice, in the private sphere of contract.[108]

Private ordering where parties cannot afford legal advice is particularly problematic. The reported financial remedy case law tends to deal with so-called 'big money cases', which do not represent most divorces. First, the courts in these cases often apply a concept of needs that bears no relation to the average case. Second, and perhaps more significantly, judges often explore reasons for a departure from an equal division of assets, such as an inheritance or the presence of pre-acquired assets. In cases where there is not enough to meet even the parties' basic needs, these factors would not normally have any further application. This point may be overlooked or lost where people are left to interpret the law themselves. This might, therefore, result in a situation where one partner ends up with less than is required to meet their needs because the other inherited assets or owned assets prior to the relationship.

It remains important to understand how care is treated in the reported case law because this provides the framework against which lawyers are advising and may, to some extent, inform the positions of those bargaining 'in the shadow of the law'.[109] However, the limitations of reported case law mean that a doctrinal analysis alone is insufficient in the post-LASPO world. Cuts to legal aid mean that legal advice is no longer the norm. As the Law Commission observed in their review of the law in this area:

[108] Alison Diduck, 'Autonomy and Vulnerability in Family Law: the missing link' in Julie Wallbank and Jonathan Herring (eds) *Vulnerability, Care and Family Law* (Routledge 2013), 112
[109] Robert Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 The Yale Law Journal 950, 968

> Bargaining "in the shadow of the law", seeking to produce the sort of outcome that the courts would have ordered, is very difficult if the law is not known and not accessible. The removal of legal aid means that there will be more litigants in person, either approaching the courts without the help of lawyers to manage their expectations or to assist them in reaching settlement, or seeking to negotiate entirely outside the court system.[110]

It is unclear if, and if so where, the increasing numbers separating without legal advice gain access to information about the law and how accurate any such information is. The reported case law, which tends to deal with big money cases, is problematic for the reasons outlined above. Other sources of information such as the media are potentially as, if not more, misleading. For example, the presumption of parental involvement, discussed in Chapter 1, was reported as a 'legal right to spend time with their children'[111] and 'a new right to "shared parenting" following family breakdown.'[112] As the Law Commission noted in a different context, '[s]ometimes what the law is thought to be may be almost as important as what it in fact is.'[113] There is, therefore, the potential for the presumption to influence the arrangements reached by parents in ways not envisaged by the statute itself, which specifically provides that the presumption does not entail any particular division of a child's time.[114] As discussed in Chapter 1, this may have implications for the way in which parents divide assets (and would at the very least affect the calculation of child support under the statutory formula). Likewise, in the financial remedy sphere, messages about dividing assets 50:50 have an instinctive appeal and are easy to apply in practice. In cases where the parties do not have the same ability to become financially independent after divorce, because one of them has sacrificed their earning capacity to take on a caretaking role, there is the potential that the needs of the financially weaker party will be left unmet if formal equality guides the division of assets.

[110] Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014), para 1.23
[111] Robert Winnett, 'Absent fathers to get legal right to spend time with their children' *The Telegraph* (London, 5 November 2012) <http://www.telegraph.co.uk/news/uknews/law-and-order/9656507/Absent-fathers-to-get-legal-right-to-spend-time-with-their-children.html> accessed 26 September 2018
[112] James Chapman, 'Mothers who deny fathers access to the couple's children after a break-up could be jailed' *The Daily Mail* (London, 13 June 2012) <http://www.dailymail.co.uk/news/article-2158490/Mothers-deny-fathers-access-couple-s-children-break-jailed.html> accessed 26 September 2018
[113] Law Commission, *Family Law: Illegitimacy* (Law Com No 118, 1982), 4.26
[114] Children Act 1989, s 1(2B)

Given the increasing numbers of people separating without legal advice, as will be explained further in Chapter 3, original empirical research, including semi-structured interviews with parents in England and Wales, forms part of the approach taken to answering the research questions posed by this thesis, in order to understand how parents navigate the financial consequences of relationship breakdown. The findings of that empirical research are discussed further in Chapter 5(iii).

Another potential concern of private ordering is that encouraging individuals to negotiate privately, without any regard to their respective bargaining positions, may create the opportunity for one party to dominate (in practice this is likely to be the economically stronger party). The absence of any legal oversight may allow the stronger party to reduce, or even avoid, the financial provision they would otherwise be obliged to make under the law. Thus, the autonomy of the economically stronger party to move on free from financial constraint may result in the other party being left financially reliant on the state. Neoliberal autonomy therefore appears, in reality, to be the preserve of the powerful. As Barlow et al observe,

> To the extent that autonomy in dispute resolution entails freedom *from* law and its values, freedom from social obligations, freedom to pursue one's own interests and exert one's own power regardless of the disadvantage to others, or simply reconciling the weaker party to an unjust fate, then this, in our view, is the antithesis of justice.[115]

2.3.2 The growing influence of autonomy as a principle of family law

The same assumptions about the behaviour of autonomous neoliberal individuals that underpin increasing private ordering also accompany the increasing influence of autonomy as a principle of family law. The most obvious example of its use is in relation to pre-nuptial agreements (pre-nups) which, in recent years, have become strongly persuasive when determining the division of assets on divorce. In *Radmacher v Granatino,*[116] which marked a sea-change in the law, the majority said this:

[115] Anne Barlow, Rosemary Hunter, Janet Smithson and Jan Ewing, *Mapping Paths to Family Justice* (Palgrave Socio-Legal Studies 2017), 7

[116] *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42

> The reason why the court should give weight to a nuptial agreement is that 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.[117]

The idea of autonomy expressed here is an interesting one. Pre-nups are a means of private ordering, and thus consistent with the trends described above. However, the Supreme Court also seems to recognise party autonomy as being of value in its own right. Underpinning both of these ideas is an assumption that individuals are equally placed to negotiate such agreements. As Thompson explains, this assumption is problematic:

> … viewing the way in which choices are made as something that occurs in a vacuum, once certain procedures are followed, fails to recognise the extent to which parties' decisions are influenced by society and other people. Neglecting this wider context could also lead to the assumption that parties voluntarily entered into a prenup, when a deeper consideration of the balance of power between the parties could produce a different conclusion.[118]

These objections, raised in the context of pre-nups, are also relevant where parties are negotiating a financial settlement at the point of separation. Separation agreements also raise questions about power imbalances between the parties at the time the agreement is made, and it is important to recognise that their relative financial positions are not necessarily the result of a free and informed choice. As Fineman explains:

> Using notions of individual choice or responsibility as a justification for existing conditions fails to recognize that quite often a choice carries with it consequences not anticipated or imagined at the time of the initial

[117] *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42 [75]
[118] Sharon Thompson, *Prenuptial Agreements and the Presumption of Free Choice* (Hart 2015), 33

decision. For example, in assessing who should bear the burdens or costs associated with dependency and child care, we may believe… that a woman chose to become a mother, but does this choice mean she has also consented to the societal conditions attendant to that role and the many ways in which that status will negatively affect her economic prospects? Did she even realize what those costs might be? It is possible that society and culture might have led her astray on the issue of costs, and misled her about the returns and rewards of caretaking?[119]

Where parents are separating, these sorts of consequences are likely to be even more apparent than during a relationship because, as discussed above, people often manage the division of paid work and caretaking within the family as a whole. Research suggests that caretaking responsibilities have a very real impact on a person's economic position and that such responsibilities are still overwhelmingly performed by women. In 2012, a British Social Attitudes Survey found that on average women undertook 13 hours of housework and 23 hours of caring for the family compared with 8 and 10 hours respectively for men.[120] ONS data from 2016 suggests a similar split: women's unpaid work totalled 25.54 hours per week as compared to 15.99 hours for men, with women undertaking 4.67 hours of childcare for men's 1.89 hours per week.[121] When it comes to paid work, women are far more likely to work part-time. Around 42% of women work part-time as compared with 12% of men.[122] Further, census data suggest that where individuals do not work at all, for men this is most commonly because they are students (37%)[123] or sick and disabled (27%)[124] whereas women are most commonly economically inactive because they are looking after the family and home (31%).[125]

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[119] Martha Fineman, *The Autonomy Myth A Theory of Dependency* (The New Press 2004), 226

[120] Jacqueline Scott and Elizabeth Clery, 'Gender roles' in Alison Park, Caroline Bryson, Elizabeth Clery, John Curtice and Miranda Phillips (eds) *British Social Attitudes 30* (The National Centre for Social Research, 2013) <http://www.bsa.natcen.ac.uk/media/38723/bsa30_full_report_final.pdf> accessed 26 September 2018

[121] ONS, 'Women shoulder the responsibility of unpaid work' (*ONS Digital*, 10 November 2016) <http://visual.ons.gov.uk/the-value-of-your-unpaid-work/> accessed 18 January 2017

[122] ONS, 'Women in the labour market: 2013' (25 September 2013) <http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/womeninthelabourmarket/2013-09-25> accessed 18 January 2017

[123] ONS, '2011 Census analysis: Ethnicity and the Labour Market, England and Wales' (13 November 2014) <https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/ethnicity/articles/ethnicityandthelabourmarket2011censusenglandandwales/2014-11-13> accessed 19 June 2018

[124] ONS, '2011 Census analysis: Ethnicity and the Labour Market, England and Wales' (13 November 2014) <https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/ethnicity/articles/ethnicityandthelabourmarket2011censusenglandandwales/2014-11-13> accessed 26 September 2018

[125] ONS, '2011 Census analysis: Ethnicity and the Labour Market, England and Wales' (13 November 2014) <https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/ethnicity/articles/ethnicityandthelabourmarket2011censusenglandandwales/2014-11-13> accessed 26 September 2018

It is, of course, important to recognise the differences between women, as well as between women and men. The gendered division of labour described above is more pronounced within certain ethnic groups. For example, census data suggests '[w]omen who were Bangladeshi (54%), Pakistani (52%), Gypsy or Irish Traveller (45%) and Arab (39%) had the highest economic inactivity because of looking after the family or home.'[126] That said, women from every ethnic group, with the exception of White Irish women, experience a gender pay gap when compared with White British men.[127] Similarly, in terms of full-time work, women of almost every ethnic group (the exceptions are Black Caribbean women and White Irish women) experience a gender pay gap as compared with men from the same ethnic group.[128] Whilst not the only explanation for the gap, the need to balance caring responsibilities is something that is a greater problem for women than men. For example, within the EU only 65.8% of women with young children work as compared with 89.1% of men.[129] This explanation is also supported by the fact that the gender pay gap in England and Wales is greatest from age 40 upwards which the ONS suggest is 'likely to be connected to women taking time out of the labour market to have children.'[130] The presence of children, therefore, has significant implications for the extent to which caretakers, who are still predominantly women, can be economically independent upon separation.

2.4 The clash between autonomy and care in the reported case law

Whilst the influence of a neoliberal vision of autonomy is increasingly prevalent in family law in England and Wales, the way in which it applies in particular cases differs. There is a very clear difference between the treatment of cohabitants and married couples in the law, based on the very different legal frameworks outlined

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[126] ONS, '2011 Census analysis: Ethnicity and the Labour Market, England and Wales' (13 November 2014) <https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/ethnicity/articles/ethnicityandthelabourmarket2011censusenglandandwales/2014-11-13> accessed 26 September 2018

[127] Anthony Breach and Professor Yaojun Li, 'Gender Pay Gap by Ethnicity in Britain - Briefing' (*Fawcett Society and University of Manchester*, March 2017) <https://www.fawcettsociety.org.uk/gender-pay-by-ethnicity-britain> accessed 26 February 2018

[128] Anthony Breach and Professor Yaojun Li, 'Gender Pay Gap by Ethnicity in Britain - Briefing' (*Fawcett Society and University of Manchester*, March 2017) <https://www.fawcettsociety.org.uk/gender-pay-by-ethnicity-britain> accessed 26 February 2018

[129] European Commission, 'Causes of unequal pay between men and women' <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/causes-unequal-pay-between-men-and-women_en> accessed 26 September 2018

[130] ONS, 'What is the Gender Pay Gap?' (*ONS Digital*, 12 February 2016) <http://visual.ons.gov.uk/what-is-the-gender-pay-gap/> accessed 9 March 2017

in Chapter 1. Despite research which reveals the variety of cohabiting relationships,[131] cohabitants are viewed as autonomous and, as Diduck explains,

> … deemed to have chosen not to marry/register their partnership and [so they] must therefore live with the consequences of that choice, regardless of the disadvantage it may confer upon them. This position is justified by the claim that it would be violation of their autonomy and therefore unfair to subject them to a regime which they had chosen to avoid.[132]

For cohabitants, consistently with neoliberal understandings of autonomy, which focus on economic independence, it is economic contributions which are the route to establishing an interest in a family home. The constructive trust, the Supreme Court's preferred framework for determining beneficial interests,[133] is based upon the combination of a common intention that a party have an interest in the property and detrimental reliance by that party on the common intention. Where there is no express common intention, there has been some evidence of a wider view of the contributions that will suffice as evidence of common intention.[134] However, care and other domestic contributions are insufficient. This is illustrated particularly starkly in the recent case of *Dobson v Griffey*,[135] which closely follows the approach adopted by the House of Lords in *Lloyds Bank v Rosset*[136] over twenty years earlier.

In *Dobson v Griffey*[137] the female partner's contributions to the refurbishment of the parties' home were considered insufficient to establish an interest in that property:

> Her labour and commitment were understandable in the context of their relationship and their intended long-term future together with children. This was to be her home, and that of her children. It is unnecessary to suppose some quasi-commercial bargain between them to explain it.

[131] Anne Barlow, 'Cohabitation law reform – Messages from research' (2006) 14 Feminist Legal Studies 167
[132] Alison Diduck, 'Autonomy and Vulnerability in Family Law: the missing link' in Julie Wallbank and Jonathan Herring (eds) *Vulnerability, Care and Family Law* (Routledge 2013), 105
[133] *Stack v Dowden* [2007] UKHL 17
[134] See, for example, *Slater v Condappa* [2012] EWCA Civ 1506, *Curran v Collins* [2015] EWCA Civ 404, *Graham-York v York* [2015] EWCA Civ 72
[135] *Dobson v Griffey* [2018] EWHC 1117 (Ch)
[136] *Lloyds Bank Plc v Rosset and Another* [1990] 1 AC 107
[137] [2018] EWHC 1117 (Ch)

This echoes Lord Bridge's comment in *Rosset* that 'it would seem the most natural thing in the world for any wife, in the absence of her husband abroad, to spend all the time she could spare and to employ any skills she might have… to accelerate progress of the work quite irrespective of any expectation she might have of enjoying a beneficial interest in the property.'[138]

As the court in *Dobson v Griffey* concluded that there was no common intention for the female partner to receive an interest in their family home, it was unnecessary to consider the issue of detrimental reliance. Nevertheless, the judge commented:

> I do not consider that the claimant did rely on any such agreement as she might have been able to prove. She did what she did because she had decided to make a home with the defendant and hopefully have children with him there. It is entirely natural to suppose that she would have wanted to use her skills and abilities to make the best possible home that she could for them all, rather than because she was trying to make money.

The claimant's contributions in this case were primarily in terms of renovations to the home, rather than care. However, the way in which these renovations were viewed reflects the societal value attributed to domestic contributions, which include caretaking, and the extent to which family functioning is ignored by the law. As Bridgeman et al observe, '[care] is expected but unacknowledged, essential but unvalued, indispensable but invisible.'[139]

For cohabitants, the law is, therefore, concerned with protecting the property owner from financial claims. Both parties are considered to be autonomous and to have exercised a free choice in their dealings for which they must bear the financial consequences. The relationship between them is ignored. The judgment in *Dobson v Griffey*[140] does not consider the extent to which the claimant's own financial position was affected by her work on the property, beyond considering

[138] *Lloyds Bank Plc v Rosset and Another* [1990] 1 AC 107 [131 E]
[139] Jo Bridgeman, Heather Keating and Craig Lind, 'Supporting, Fostering and Coercing? The Legal Regulation of the Exercise of Family Responsibilities' in Jo Bridgeman, Heather Keating and Craig Lind (eds) *Regulating Family Responsibilities* (Ashgate 2011)
[140] [2018] EWHC 1117 (Ch)

payments for materials and other renovation costs. Whilst her motivation may not have been financial, and whilst it is understandable that someone would want to do work to improve their home, the extent to which someone sacrifices their own time and financial position to do so is context specific. Someone in a rental property, for example, may be far less inclined to engage in extensive renovation that makes a profit for the landlord than someone who considers themselves in some way an owner of, or at least to have rights in, the property in question. This is particularly likely to be the case if the work involved in supervising or engaging in those renovations interferes with time that could otherwise be spent in paid work.

For married couples, the law focuses far less on financial contributions, and the nature of the parties' relationship is far more important, than it is for cohabitants. As outlined in Chapter 1, courts dealing with financial provision on separation have wide-ranging powers to make whatever combination of orders best meets the parties' circumstances. These powers are exercised by reference to the statutory factors in the Matrimonial Causes Act 1973 and the case law objective of fairness[141]. Fairness is held to consist of three strands: needs, compensation and sharing.[142]

Douglas outlines three different approaches to the treatment of caretaking in the financial remedy cases: reward, compensation and recognition.[143] The former, evident in cases such as *White*[144] 'sees caring as a means whereby the carer *works* to build the family and thereby *earns* her share in the family wealth.'[145] The *White* approach is explicitly premised on the idea of non-discrimination:

> If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.[146]

[141] *White v White* [2000] UKHL 54
[142] *Miller v Miller : McFarlane v McFarlane* [2006] UKHL 24
[143] Gillian Douglas, *Obligation and Commitment in Family Law* (Hart 2018), 198
[144] *White v White* [2000] UKHL 54
[145] Gillian Douglas, *Obligation and Commitment in Family Law* (Hart 2018), 198
[146] *White v White* [2000] UKHL 54

This approach to valuing financial and non-financial contributions was a reaction to the historic approach in which the homemaker would be awarded enough to meet his or her 'reasonable requirements' and the breadwinner would retain the rest.[147] A concern about discrimination against the homemaker also underpins judicial reluctance to expand the doctrine of special contribution, which serves to counter the judicial assumption of the equal value of financial and non-financial contributions in cases where one party's contribution is considered to be exceptional:

> The notion of a special contribution to the welfare of the family will not successfully have been purged of inherent gender discrimination unless it is accepted that such a contribution can, in principle, take a number of forms; that it can be non-financial as well as financial; and that it can thus be made by a party whose role has been exclusively that of a home-maker. Nevertheless in practice, and for a self-evident reason, the claim to have made a special contribution seems so far to have arisen only in cases of substantial wealth generated by a party's success in business during the marriage. The self-evident reason is that in such cases there is substantial property over the distribution of which it is worthwhile to argue.[148]

Different approaches have been suggested as to how a share of family wealth is earned. Eekelaar, for example, has suggested that there is a 'durational element'[149] and that the carer's share is earned over time. Whether or not there is a durational element to such claims, however, there are issues with this approach to the caretaker's share. First, because of the differences in earning capacity inherent in a case where the parties have played different roles in their relationships, an equal share of the parties' capital will not leave the parties in an equal financial position: the breadwinner will be far better off. Second, as Douglas explains:

> The problem with this approach is that it reinstates discrimination between the spouses, by treating financial contributions as the benchmark against which the caring contribution is to be measured. The carer's non-financial

[147] *White v White* [2000] UKHL 54
[148] *Charman v Charman* [2007] EWCA Civ 503 [80]
[149] John Eekelaar, 'Asset distribution on divorce - the durational element' (2001) 117 LQR 552

> contribution is compared with that of the bread-winner and may be found wanting, while his possible lack of non-financial contribution (he might be a neglectful husband and father who has built up his wealth because he is only interested in his job) is ignored.[150]

Tronto, refers to this phenomenon as 'privileged irresponsibility': '[d]ividing up responsibility privileges those who are excused by not needing to provide care; thus the privileged avoid responding directly to the actual processes of care and the meeting of basic needs.'[151]

The compensatory approach outlined by Douglas, which considers that the loss or detriment suffered by the caretaker should be compensated,[152] addresses the first of these objections, if not the second. The clearest example of such an approach may be seen in *Miller; McFarlane*[153] in which the Supreme Court awarded Mrs McFarlane significant periodical payments on the basis that '[t]his is a paradigm case for an award of compensation in respect of the significant future economic disparity, sustained by the wife, arising from the way the parties conducted their marriage.'[154] Thus, the compensatory approach focuses on the economic loss to the caretaker as a result of the way in which the parties arranged their lives. Such an approach is understandable in light of neoliberal conceptions of autonomy: if economic self-sufficiency is the ultimate aspiration then the absence of this as a result of the relationship can be seen to justify compensation. However, such a principle ignores the position of the breadwinner. Not only does it enable the continuation of the sort of privileged irresponsibility Tronto describes, but it ignores the extent to which the breadwinner may also have secured a financial benefit as a result of this division of labour.[155] Nevertheless, the Court of Appeal has made clear that the compensation principle only applies where the caretaker has suffered a loss and not where the breadwinner has sustained a financial advantage.[156]

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[150] Gillian Douglas, *Obligation and Commitment in Family Law* (Hart 2018), 198
[151] Joan Tronto, *Moral Boundaries A Political Argument for an Ethic of Care* (Routledge 1993), 121
[152] Gillian Douglas, *Obligation and Commitment in Family Law* (Hart 2018), 199
[153] *Miller v Miller : McFarlane v McFarlane* [2006] UKHL 24
[154] *Miller v Miller : McFarlane v McFarlane* [2006] UKHL 24 [93]
[155] Anna Heenan, 'Causal and Temporal Connections in Financial Remedy Cases: The Meaning of Marriage' (2018) 30 CFLQ 75 and Anna Heenan, 'An (un)equal start on the road to independent living: what does fairness mean in big money cases?' (2018) 40 Journal of Social Welfare and Family Law 362
[156] *Waggott v Waggott* [2018] EWCA Civ 727

The third approach Douglas identifies to valuing caring contributions considers that caretaking ‘demonstrates a commitment to the other spouse or to the marriage that is to be *recognised*’.[157] She suggests:

> The caring undertaken in a marriage… is underpinned by the mutual commitment evidenced in the act of getting married itself. Since marriage is now regarded as an *equal* partnership, this commitment should entail sharing both the benefits and the burdens *equally*…where the burdens created by the marriage fall unequally on one party, the other should be required to redress the balance; otherwise, he or she gains an unfair advantage and is unjustly enriched.[158]

This model has the advantage of recognising the implications for both parties of how they divide caring responsibilities between them: it advocates the sharing of benefits and burdens. However, it is problematic for cohabitants where there is no ceremony which acts as a proxy for commitment. Douglas, therefore, suggests that in these cases ‘the law should focus on the relationship-generated disadvantage suffered by the more vulnerable party through her economic sacrifices, which are more likely to have been caused by the caring role she has undertaken during the relationship.’[159]

Whilst for married couples the idea of sharing benefit and burden addresses the question of privileged responsibility, it does so primarily by viewing care as a burden. In the neoliberal world this is legitimate because it reflects the prevailing concept of autonomy and the impact that caretaking responsibilities have on the ability to be autonomous. However, as Fraser explains,[160] care is vital to society. An approach that fails properly to understand this is unlikely to fully address the current incompatibility of autonomy and care.

2.5 Can the clash between autonomy and care be resolved?

Chapter 1 explained that the third stage of answering the overall research question posed by this thesis is to consider both the current approach of law and

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[157] Gillian Douglas, *Obligation and Commitment in Family Law* (Hart 2018), 198
[158] Gillian Douglas, *Obligation and Commitment in Family Law* (Hart 2018), 200-201
[159] Gillian Douglas, *Obligation and Commitment in Family Law* (Hart 2018), 206-7
[160] Nancy Fraser, 'Crisis of Care? On the Social-Reproductive Contradictions of Contemporary Capitalism' in Tithi Bhattacharya (ed) *Social Reproduction Theory: Remapping Class, Recentering Oppression* (Pluto Press 2017), 21

policy and alternative approaches in order to suggest how law and policy might be reformed. This third stage might involve reconceptualising the theoretical underpinnings of law and policy, making substantive changes to law and policy, or some combination of these two approaches. This section lays the foundations for the theoretical reconsideration of law and policy which is undertaken in Chapter 6. It considers both how autonomy might be reconceived so as to be made compatible with caretaking responsibilities, and how caretaking responsibilities might be allocated differently within society to address the gendered financial consequences of relationship breakdown discussed in Chapter 1.

2.5.1 How might autonomy be reconceptualised to take account of care?

The main critique of neoliberal autonomy advanced above is its failure to recognise the ways in which families function. Therefore, relational ideas of autonomy, focusing as they do explicitly on relationships, are the most obvious understanding to consider. McKenzie and Stoljar explain such understandings as follows:

> [relational autonomy is] an umbrella term, designating a range of related perspectives… premised on a shared conviction… that persons are socially embedded and that agents' identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class and gender.[161]

It is this sort of view of autonomy, which Diduck describes as 'one that recognises that competent adults make decisions all the time that are not exclusively about their own preferences',[162] that can be seen in Lady Hale's dissenting opinion in the *Radmacher* decision:

> Most spouses want their partners to be happy – partly, of course, because they love them and partly because it is not much fun living with a miserable person. So, choices are often make for the overall happiness of the

[161] Catriona MacKenzie and Natalie Stoljar, 'Introduction: Autonomy refigured' in Catriona MacKenzie and Natalie Stoljar (eds) *Relational Autonomy* (Oxford University Press 2000), 4
[162] Alison Diduck, 'Autonomy and Vulnerability in Family Law: the missing link' in Julie Wallbank and Jonathan Herring (eds) *Vulnerability, Care and Family Law* (Routledge 2013), 100

> family… These sorts of things happen all the time in a relationship. The couple will support one another while they are together.[163]

Relational concepts of autonomy are potentially useful when it comes to valuing caretaking on separation. They explicitly consider the extent to which the positions of the parties are intertwined, and the potential difficulties of seeking to achieve financial independence. Nedelsky[164] explains her understanding of relational autonomy as follows:

> I see autonomy as the core of a capacity to engage in the ongoing, interactive creation of our selves – our relational selves, are selves that are constituted, yet not determined, by the web of nested relations within which we live. We have the capacity to interact creatively, that is, in an undetermined way, with all the relationships that shape us – and thus to reshape, re-create, both the relationships and ourselves. The idea that such acts arise from the actor rather than being determined by something else is captured by the notion of autonomy.[165]

For Nedelsky, autonomy is not simply something that can be presumed,[166] although 'a capacity for autonomy'[167] can be. Importantly, Nedelsky rejects the idea that autonomy means independence or control.[168] In respect of the latter, she notes: '[o]ur lives involve other people, and control is not a respectful relation to other autonomous beings (including children).'[169] Not all those who reject neoliberal conceptions of autonomy, however, necessarily reject ideas of independence or control over one's life (also referred to using the terminology of choice). Verkerk,[170] for example, argues that 'the critique of autonomy in terms of self-sufficiency still leaves room for an idea of autonomy as the moral capacity to make one's own choices in life, sustained by others.'[171] It does, however, appear that the ideas of independence and choice are key elements to unpick in

[163] *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42 [188]
[164] Jennifer Nedelsky, *Law's Relations* (2013 OUP), 43-4
[165] Jennifer Nedelsky, *Law's Relations* (2013 OUP), 45-6
[166] Jennifer Nedelsky, *Law's Relations* (2013 OUP), 46
[167] Jennifer Nedelsky, *Law's Relations* (2013 OUP), 46
[168] Jennifer Nedelsky, *Law's Relations* (2013 OUP), 46
[169] Jennifer Nedelsky, *Law's Relations* (2013 OUP), 46
[170] Marian Verkerk, 'The care perspective and autonomy' (2001) 4 Medicine, Health Care and Philosophy 289
[171] Marian Verkerk, 'The care perspective and autonomy' (2001) 4 Medicine, Health Care and Philosophy 289, 291

considering alternatives to neoliberal understandings of autonomy. These ideas are, therefore, considered further below.

2.5.1.1 (Financial) independence

> The law now encourages spouses to avoid bitterness after family breakdown and to settle their money and property problems. An object of the modern law is to encourage the parties to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down.[172]

This quote from the judgment in *Minton v Minton* outlines the current legal approach in which a clean break between divorcing couples is the favoured outcome. Neoliberal conceptions of autonomy are frequently criticised for their emphasis on economic self-sufficiency and the failure to recognise the different effects of caretaking responsibilities on the ability to achieve such a status. However, on parental separation, the desirability of economic self-sufficiency is underpinned by an emphasis on enabling the parties to become independent of a partner in a more general sense. This is linked to the value of choice or control over one's life, discussed further below.

As will be discussed further in Chapter 4(iii), this ideal of independence resonated with several of the separated parents in England and Wales who were interviewed as part of this research. However, financial independence was not always achieved by those who extolled its virtues; independence of a partner often entailed dependence on the state, for example. Relatedly, as will be discussed in Chapter 4(i), the ideal of autonomy in the Swedish system, which focuses on financial independence, is premised upon a far greater role for the welfare state. It is, therefore, important to recognise that independence is capable of multiple meanings.

Nedelsky's rejection of independence is explained as follows:

[172] *Minton v Minton* [1979] 1 All ER 79

> … parts of the dominant picture of autonomy as independence are not really human possibilities and… the aspiration to achieve them… can only come at the cost of subordinating others who do the (unacknowledged) work made necessary by dependence.[173]

Further, this illusion of autonomy has consequences: 'those excluded from it will suffer'.[174] Friedman, however, suggests that there remains value in the idea of independence:

> The term "independence" can serve to stand for a capacity that Nedelsky herself lauds, namely, the "human capacity for creation in the shaping of one's life and self." It can serve to guide a feminist concern that Nedelsky cites, namely, "freeing women to shape their own lives" and to define *themselves*…[175]

Viewed in the post-separation context, Nedelsky's critique of independence does not seem to preclude the possibility of independence of a former partner, financially or otherwise. Rather, it criticises an aspiration that human beings can and should achieve economic self-sufficiency. Friedman's response, focusing as it does on the capacity to shape one's own life, actually seems to relate more to the idea of choice than it does financial independence. Friedman herself recognises the limits of independence and considers that the concept 'should be understood as referring to relatively low levels of *dependency* in some particular form of dependence.'[176]

2.5.1.2 Choice

Autonomy is closely linked to ideas of choice or control over one's own destiny. At a basic level, the concept has been described as 'the capacity to be one's own person, to live one's life according to reasons and motives that are taken as one's own and not the product of manipulative or distorting external forces'.[177] The idea

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[173] Jennifer Nedelsky, *Law's Relations* (2013 OUP), 45
[174] Jennifer Nedelsky, *Law's Relations* (2013 OUP), 43
[175] Marilyn Friedman, 'Relational Autonomy and Independence' in Andrea Vletman and Mark Piper (eds) *Autonomy, Oppression and Gender* (OUP 2014), 57
[176] Marilyn Friedman, 'Relational Autonomy and Independence' in Andrea Vletman and Mark Piper (eds) *Autonomy, Oppression and Gender* (OUP 2014), 56
[177] Stanford Encyclopaedia of Philosophy, 'Autonomy in Moral and Political Philosophy' <https://plato.stanford.edu/entries/autonomy-moral/> accessed 9 August 2019

of choice is also central to the Supreme Court's understanding of the principle as it underpins the decision in *Radmacher*,[178] discussed above. However, as alluded to above and as will be discussed further in Chapter 5, ideas of choice, particularly when it comes to decisions around which partner is to care for children, are complex and rarely capture the variety of factors underpinning them.

When considering both alternative models of caretaking and the extent to which ideas of autonomy give effect to ideals such as financial independence, it is also important to consider ideas of choice. Different ways of structuring relationships to accommodate caretaking responsibilities might more readily enable (some form of) financial independence upon separation, but should such options be mandated for everyone or should there be a choice to care? The statistics discussed above about the extent to which women do not engage in paid work in order to care for their children appear to demonstrate that such a policy would most affect the life patterns of Bangladeshi, Pakistani, Gypsy or Irish Traveller and Arab women. It is, therefore, important to engage with ideas of choice in considering whether particular reforms can be justified.

2.5.2 Thinking about state policy: might different models of sharing care advance autonomy?

A second way of attempting to reconcile the clash between autonomy and caretaking responsibilities is to consider how caretaking responsibilities might be allocated differently within society. This might, for example, better enable the combination of caretaking and paid work, which might allow for the economic independence envisaged by neoliberal ideas of autonomy to be realised on parental separation. This section outlines some of the different models suggested by feminist theorists for reconciling paid work and care. These models are, therefore, relevant to cross-theme 3 of this thesis (the role of the family and the state in providing care) because the different options envisage different degrees of family and state involvement in caring. The models are also relevant to cross-theme 1 (the meaning of gender equality) because they were developed in response to the gender inequality that exists in the division of caretaking responsibilities. These models recognise the gendered way in which care is

[178] *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42 [75]

performed in society, which forms an important part of the context for this project. In turn, this thesis provides an insight into the reality of caretaking responsibilities, which is essential to any project which seeks to achieve gender equality.

Broadly speaking, the models can be divided into the Universal Breadwinner model, the Caregiver Parity model and the Universal Caregiver model.[179] Whilst these models were designed by feminist scholars it is important to evaluate their ability to accommodate care regardless of the gender of the caretaker. As Fineman notes, 'it is caretaking, not the sex of the caretaker, that is incompatible with, and thus burdened by the structures and values of…society.'[180] Further, it is important to look at the effects of these different models on both the intact family, for which they were developed, and the post-separation family, which forms the focus of this research.

The Universal Breadwinner model 'aims to achieve gender equity principally by promoting women's employment. The point is to enable women to support themselves and their families through their own wage earning.'[181] To achieve the aim of both parents working, childcare would need to be provided by the market or the state. This model fits with a liberal feminist version of equality which envisages formal equality between men and women. It has an instinctive appeal on separation. If both parents are able to work full-time then they are far more likely to achieve self-sufficiency on separation. However, the success of this model is likely to depend on the responsibility for children being shared relatively equally both during the relationship and afterwards. As Fraser explains, '[i]t assumes that all of women's current domestic and carework responsibilities can be shifted to the market and/or the state. But that assumption is patently unrealistic. Some things, such as childbearing, attending to family emergencies, and much parenting work, cannot be shifted…'[182] Further, 'in valorizing paid work, it implicitly devalues unpaid work.'[183] Fraser envisages this as problematic for

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[179] Nancy Fraser, 'After the Family Wage: A Postindustrial Thought Experiment' in Nancy Fraser (ed) *Justice Interruptus. Critical Reflections on the "Postsocialist" Condition* (Routledge 1997)
[180] Martha Fineman, 'Responsibility, Family, and the Limits of Equality: An American Perspective' in Craig Lind, Heather Keating and Jo Bridgeman (eds) *Taking Responsibility, Law and the Changing Family* (Ashgate 2011), 40
[181] Nancy Fraser, 'After the Family Wage: A Postindustrial Thought Experiment' in Nancy Fraser (ed) *Justice Interruptus. Critical Reflections on the "Postsocialist" Condition* (Routledge 1997), 51
[182] Nancy Fraser, 'After the Family Wage: A Postindustrial Thought Experiment' in Nancy Fraser (ed) *Justice Interruptus. Critical Reflections on the "Postsocialist" Condition* (Routledge 1997), 53
[183] Nancy Fraser, 'After the Family Wage: A Postindustrial Thought Experiment' in Nancy Fraser (ed) *Justice Interruptus. Critical Reflections on the "Postsocialist" Condition* (Routledge 1997), 53

women, who currently undertake the majority of caretaking. Thus, the model's success in tackling issues around the recognition of caretaking is likely to be more limited. The model may, therefore, not achieve a move away from traditional gender roles and, even if it does, it may simply create a clearer divide between workers with and without dependents. Further, this model allows no opportunity for parents to choose to prioritise caretaking rather than paid work.

In contrast, the Caregiver Parity model, 'aims to promote gender equity principally by supporting informal carework.'[184] Rather than aiming for men and women's lives to be the same, it seeks to achieve an equivalence between breadwinner and caretaker by supporting private caretaking through public funds. Thus, as Fineman explains, '[i]nstead of being a society where our ideals and our ideology (the private, natural family) are out of sync with the real lives of many of our citizens, we would become a society that recognized and accepted the inevitability of dependency.'[185] This approach is, therefore, aimed at recognising the importance of the caretaking role. Not only does the model treat 'caregiving as intrinsically valuable, not as a mere obstacle to employment, thus challenging the view that only men's traditional activities are fully human',[186] but 'single mothers and their children, indeed all "extended" families transcending generations, would not be the "deviant" and forgotten or chastised forms that they are considered to be today because they do not include a male head of household.'[187]

There are, however, disadvantages of this model. First, it carries the danger of entrenching gender difference yet further by leaving unchanged assumptions that women are responsible for caretaking. This is unlikely to achieve the aim of recognising the value of unpaid work. Further, by entrenching gender difference, the model is limiting for both men who want to care and women who want to work. Second, it is not clear how successful this model would be at achieving economic independence for caretakers on separation. As Eichner observes, 'it is difficult to

[184] Nancy Fraser, 'After the Family Wage: A Postindustrial Thought Experiment' in Nancy Fraser (ed) *Justice Interruptus. Critical Reflections on the "Postsocialist" Condition* (Routledge 1997), 55
[185] Martha Fineman, *The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies* (Routledge 1995), 232
[186] Nancy Fraser, 'After the Family Wage: A Postindustrial Thought Experiment' in Nancy Fraser (ed) *Justice Interruptus. Critical Reflections on the "Postsocialist" Condition* (Routledge 1997), 58
[187] Martha Fineman, *The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies* (Routledge 1995), 5

imagine that [the state] would subsidize caretaking to such an extent that caretakers will experience no societal penalties whatever.'[188] Even if the income paid was sufficient to enable those caretakers to support themselves, when children have grown up those caretakers will either need to find employment or further care work. If the former, then the jobs, and wages, available are likely to be limited as time out of the job market means fewer skills that are of use to that market.

A more extreme version of this model might involve having 'employers make out wage checks equally divided between the earner and the partner who provides all or most of his or her unpaid domestic services.'[189] As Okin argues:

> The equal splitting of wages would constitute public recognition of the fact that the currently unpaid labour of families is just as important as the paid labour. If we do *not* believe this, then we should insist on the complete and equal sharing of both paid and unpaid labor, as occurs in [the Universal Caregiver model]. It is only if we *do* believe it that society can justly allow couples to distribute the two types of labor so unevenly. But in such cases, given the enormous significance that our society attaches to money and earnings, we should insist that earnings be recognized as equally earned by the two persons.[190]

Should such a model be accepted, then Okin would argue for its continuation after divorce.[191] This version of the Caregiver Parity model is, however, unlikely to find favour in a world where a clean break is increasingly the goal of financial provision on divorce.[192]

The Universal Caregiver model aims 'to *induce men to become more like most women are now,* namely, people who do primary carework.'[193] The idea would be to ensure that employment accommodated caretaking responsibilities, for

[188] Maxine Eichner, 'Dependency and the Liberal Polity: On Martha Fineman's The Autonomy Myth' (2005) 93 California Law Review 1285, 1302
[189] Susan Moller Okin, *Justice, Gender and the Family* (Basic Books 1989), 181
[190] Susan Moller Okin, *Justice, Gender and the Family* (Basic Books 1989), 181
[191] Susan Moller Okin, *Justice, Gender and the Family* (Basic Books 1989), 183
[192] Matrimonial Causes Act 1973, s 25A
[193] Nancy Fraser, 'After the Family Wage: A Postindustrial Thought Experiment' in Nancy Fraser (ed) *Justice Interruptus. Critical Reflections on the "Postsocialist" Condition* (Routledge 1997), 60

example through a shorter work week. This is Fraser's preferred method for achieving gender equity; dismantling the roles of breadwinning and caretaking 'is tantamount to a wholesale restructuring of the institution of gender.'[194] In Okin's view, the result of such an approach becoming firmly established would be that '[n]o assumptions would be made about "male" and "female" roles; childbearing would be so conceptually separated from child rearing and other family responsibilities that it would be a cause for surprise, and of no little concern, if men and women were not equally responsible for domestic life or if children were to spend much more time with one parent than another.'[195] The strength of this model is that it moves away from a gendered assumption of the division of paid and unpaid work and explicitly accommodates caretaking within an employment framework. But there are practical questions about the workings of this model. For example, would all employers be able to accommodate such a working week? What would prevent employers from offering longer working weeks to those who sought them?

There is also a very real question over the Universal Caregiver model's ability to accommodate single parent families. First, it assumes continued cooperation between parents to ensure childcare obligations are met. If the model ensures a move towards greater shared parenting within intact families then this may also result in a greater degree of parental sharing thereafter. However, as Eichner observes, this does not work for 'the considerable numbers of single-mother [or indeed father] families in which there is no man [or woman] to share the workload.'[196] For this model to work for single parents, state support would be required, for example in the form of subsidised childcare and / or in work benefits. Relatedly, a model premised on both parents working fewer hours is likely to result in reduced earnings. Even where this works during the course of a relationship, this is likely to become problematic upon separation, when each partner needs to be self-sufficient, and state support may be required. Whilst it would leave both parents in an equivalent position to start again, it is not clear that less than full-time earnings would actually enable either of them to be financially independent.

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[194] Nancy Fraser, 'After the Family Wage: A Postindustrial Thought Experiment' in Nancy Fraser (ed) *Justice Interruptus. Critical Reflections on the "Postsocialist" Condition* (Routledge 1997), 61
[195] Susan Moller Okin, *Justice, Gender and the Family* (Basic Books 1989), 171
[196] Maxine Eichner, 'Dependency and the Liberal Polity: On Martha Fineman's The Autonomy Myth' (2005) 93 California Law Review 1285, 1297

There are, therefore, strengths and weaknesses of each of these models in terms of achieving gender equality. However, they provide a useful basis for considering different approaches to accommodating caretaking responsibilities on separation. The current approach in England and Wales does not obviously conform to any of these models. During a relationship, care is seen primarily as a matter of private choice.[197] However, following separation there appear to be moves towards formal equality, which imply, although do not ensure, a Universal Caregiver or Universal Breadwinner model. In contrast, the Swedish model seems to most resemble the Universal Breadwinner model,[198] although there are elements of the Universal Caregiver model in the encouragement for both parents to take parental leave when children are young. In the Netherlands, despite some policy support for a Universal Caregiver model[199] (see further Chapter 5(ii)), there are similarities with the position in England and Wales in reality, in that fathers tend to work full-time and mothers part-time (see further the table at the beginning of Chapter 5).

2.6 Conclusion

Having further explored the tension between autonomy and care in this chapter, Chapter 3 explains how that conflict informed the choices of methods used in this project. Chapters 4 and 5 then develop the doctrinal and theoretical insights of this chapter through a combination of doctrinal, empirical and comparative work.

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[197] Olivier Thévenon, 'Family Policies in OECD Countries: A Comparative Analysis' (2011) 37(1) Population and Development Review 57

[198] Barbara Haas and Margit Hartel, 'Towards the Universal Care Course Model' (2010) 12(2) European Societies 139

[199] Barbara Haas and Margit Hartel, 'Towards the Universal Care Course Model' (2010) 12(2) European Societies 139

3. Methods

3.1 Introduction

The issue at the heart of this thesis, the clash between autonomy and care in family law, is complex and raises policy issues as well as questions about the approach of the law. This thesis has, therefore, chosen to combine different methods to provide a rounded picture. Given the lack of international consensus on how to deal with caretaking responsibilities on parental separation, it was felt that a comparative approach looking to different jurisdictions (specifically Sweden, in which a greater role is envisaged for the state in caretaking, and the Netherlands, in which attempts have been made to encourage a more even sharing of care between parents) might offer alternative perspectives on how to tackle this challenge, albeit that it is important to be sensitive to different cultural contexts in doing so.

The complexity of the issues raised by this thesis and the need for sensitivity to context also led to the choice to combine doctrinal and empirical methods. Whereas the former generates an overall picture of a legal system, the latter provides a perspective on how law works in reality. This was important not only in England and Wales, where increasing numbers of parents need to resolve family law disputes without legal advice, but also to gain a more complete picture of the approaches taken in Sweden and the Netherlands.

This chapter outlines the methods used in this project. It also explains how and why these methods were used to answer the specific research questions outlined in Chapter 1, to address the three contextual cross-themes, and to answer the overall research question posed by the thesis.

3.2 Methodological choices

3.2.1 Combining empirical and doctrinal approaches

Both doctrinal and empirical approaches provide important insights into the law. However, neither provides a complete picture alone. Doctrinal legal research has been described as an attempt to find coherence within a body of legal rules by 'cross-referencing…specific rules to more general underlying principles as if together they formed a single, mutually reinforcing and rational system of regulation. The presence within legal doctrine of various contradictions, gaps,

ambiguities and irrationalities, including those stemming from “external” policy and political factors, must be treated as deviant and exceptional.’[200] The so-called ‘positive law’ resulting from this exercise is the law that lawyers use.[201] It is key to understanding the legal framework and is the basis of legal advice.[202] For this reason, a doctrinal approach is used in building up an overall picture of the legal systems in each of the three jurisdictions considered in this thesis.

There are, however, important limitations of a doctrinal approach, particularly in the field of family law. Baldwin and Davis note that ‘[m]any aspects of the legal process are characterised by the exercise of discretion’[203] and that there are aspects of working practices, such as the pervasive settlement culture, which do not feature in formal accounts of legal rules.[204] In England and Wales, family law is characterised by significant discretion and a settlement culture,[205] and the latter may increase with the greater moves to private ordering described in Chapter 2. Further, if private ordering increasingly takes place without legal advice, then there is scope for ever-greater divergence between the law in the books and practice on the ground. Therefore, combining doctrinal and empirical approaches is crucial to understanding the law in England and Wales.

This thesis explores the tension between autonomy and care in family law in England and Wales. In a world where parents are increasingly left to navigate the legal system without legal advice, their experiences are crucial in understanding how the law in England and Wales currently operates, and specifically how it takes account of caretaking responsibilities on parental separation (RQ 1). Understanding how the law works is also essential in understanding ideas of autonomy within the law (RQ 1.a) and the visibility and value attributed to care by the law and by parents (RQ 1.b). To that end, as discussed further below, this thesis draws upon the findings of semi-structured interviews with parents in England and Wales.

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[200] Michael Salter and Julie Mason, *Writing Law Dissertations* (Pearson 2007), 44
[201] Philip Selznick, '"Law in Context" Revisited' (2003) 30 Journal of Law and Society 177, 178
[202] John Eekelaar, 'Judges and Citizens: Two Conceptions of Law' (2002) 22 Oxford Journal of Legal Studies 497
[203] John Baldwin and Gwynn Davis, 'Empirical Research in Law' in Mark Tushnet and Peter Cane (eds) *The Oxford Handbook of Legal Studies* (OUP 2005)
[204] John Baldwin and Gwynn Davis, 'Empirical Research in Law' in Mark Tushnet and Peter Cane (eds) *The Oxford Handbook of Legal Studies* (OUP 2005)
[205] Stephen Cretney, Judith Masson and Rebecca Bailey-Harris, *Principles of Family Law* (Sweet & Maxwell 2002)

The findings of these interviews are also relevant to the contextual cross-themes identified in Chapter 1. For example, the findings provide information about how gender equality is perceived and experienced by separating parents (relevant to cross-theme 1). The findings are also revealing about how care is viewed by separating parents (relevant to cross-theme 2). Do parents, for example, always recognise the burden of caretaking responsibilities in the arrangements they reach on separation? Do they observe the separation between financial and children issues observed by the law and practitioner organisations?[206] Additionally, some of the challenges experienced by parents in balancing work and care potentially feed into questions about the role of the family and society in the care of children (cross-theme 3).

The reasons for adopting a comparative approach are discussed in the next section. It is, however, worth noting the value of combining doctrinal and empirical approaches in that context too. As in England and Wales, this combination of approaches can help to identify differences between the law in the books and the law as it operates in practice. There were also particular benefits for the comparative aspect of this research. For example, the writer's perspective on the comparison was necessarily shaped by a 'history of learning' in the English and Welsh legal system and being 'socialized' in that culture.[207] Conducting interviews with practitioners qualified in the legal systems under study offered an opportunity to clarify understanding of the rules of that system, as well as finding out how the system operated in practice, in a way that would not have been possible with a purely doctrinal approach.

3.2.2 A comparative approach

Chapter 1 explained that there is a lack of consensus about how to reconcile the tension between autonomy and care both within England and Wales and internationally. A comparative approach, looking at approaches taken in other jurisdictions, was therefore considered valuable in evaluating alternative approaches. The choice to compare the jurisdictions of Sweden and the Netherlands was influenced by the very different policy approaches of those

[206] Resolution, 'Resolution Guides to Good Practice' <http://www.resolution.org.uk/site_content_files/files/guides_to_good_practice_2012_lo_res_merged.pdf> accessed 2 August 2019
[207] Gunter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 Harvard International law Journal 411, 442

jurisdictions to reconciling paid work and care. The central concern of this thesis is with the tension between autonomy and care in family law. As discussed in Chapter 2, one way of attempting to address this tension would be to reconsider how caretaking responsibilities are performed in society. Therefore, it was hoped that looking to Sweden and the Netherlands might provide new perspectives on this issue (RQ 2).

In a review of policy initiatives concerning work-family balance, Scott and Dex describe Sweden as having a 'gender participation model'[208] to integrating work and care, which promotes gender equality whilst recognising gender difference. Plantenga describes the aim of this model as 'to free women from unpaid responsibilities so that they can take full-time employment on terms comparable to men'.[209] This suggests Fraser's Universal Breadwinner model[210] (see further Chapter 2). In contrast, the Netherlands' Combination Model, which emphasises sharing paid and unpaid work, was described by Scott and Dex as a '[g]ender equality based on a women's model of equality'[211] and by Plantenga 'close to' the Universal Caregiver model,[212] also discussed in Chapter 2. However, as will be discussed further in Chapter 5(ii), the Combination Model's success in achieving universal caring has been mixed. In contrast, in England and Wales care is seen primarily as a matter of private choice in policy terms. Whilst legal change, such as the introduction of shared parental leave, has allowed for different choices, there is little state encouragement of any one option. It was felt that these different approaches to accommodating care, both within families and between the family and state, might provide insights into how care could be reorganised in England and Wales (RQ 2.b). Additionally, it was felt that these different approaches might provide insights into how autonomy might be reconceptualised so as to more easily coexist with caretaking responsibilities (RQ 2.a).

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[208] Jacqueline Scott and Shirley Dex, 'Paid and Unpaid Work' in Jo Miles and Rebecca Probert (eds) *Sharing Lives, Dividing Assets* (Hart 2009), 51
[209] Janneke Plantenga, 'Combining Work and Care in the Polder Model: An Assessment of the Dutch Part-time Strategy' (2002) 22 Critical Social Policy 53, 64
[210] Nancy Fraser, 'After the Family Wage: A Postindustrial Thought Experiment' in Nancy Fraser (ed) *Justice Interruptus. Critical Reflections on the "Postsocialist" Condition* (Routledge 1997)
[211] Jacqueline Scott and Shirley Dex, 'Paid and Unpaid Work' in Jo Miles and Rebecca Probert (eds) *Sharing Lives, Dividing Assets* (Hart 2009), 51
[212] Janneke Plantenga, 'Combining Work and Care in the Polder Model: An Assessment of the Dutch Part-time Strategy' (2002) 22 Critical Social Policy 53

Although these theoretical models of care helped to identify the jurisdictions to be compared in this thesis, it is recognised that those models are not necessarily a complete or an accurate representation of the legal and policy framework in Sweden and the Netherlands. That said, it is important to be aware of the potential for these pre-conceived ideas to inform the comparative exercise and to try and respond accordingly. As Frankenberg suggests, '[i]nstead of continuing the endless search for a neutral stance and objective status, comparatists have to recognize that they are participant observers, therefore their studies have to be self-reflective and self-critical.'[213] Recognising the challenges of objectivity in this context has implications for the way in which the comparative exercise in this thesis is undertaken.

This thesis rejects the traditional, functionalist, approach to comparative law, which seeks to compare laws that fulfil the same function.[214] The issues addressed by this thesis are shaped by perceived problems in the legal and policy response to caretaking responsibilities on parental separation in England and Wales. This does not automatically correspond to the way in which those problems are perceived elsewhere. Further, even if it is accepted that all systems face similar problems, there are very marked differences in the way those systems resolve them.[215] As Kamba notes, 'a legal system is closely connected with the social and economic environment in which it operates'.[216] It is, therefore, important to understand the social and political context as well as the content of a foreign law itself.[217] This is particularly relevant to this thesis given central concern with caretaking. The way in which care is provided, and whether it takes place in the public or the private sphere, may be shaped by social and political ideals such as gender equality far more than the legal framework. In Sweden, for example, gender equality was a key driver behind the shared parental leave provisions.[218] Thus, understanding the Swedish approach to gender equality is important in trying to understand the context and content of legal rules, albeit that there are practical constraints on the ability of this project fully to understand the

[213] Gunter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 Harvard International law Journal 411, 441
[214] K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998), 34
[215] Jonathan Hill, 'Comparative Law, Law Reform and Legal Theory' (1989) 9 Oxford Journal of Legal Studies 101, 108
[216] Walter Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 International and Comparative Law Quarterly 485, 493
[217] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 1
[218] The Official Site of Sweden, 'Gender Equality in Sweden' (last updated 10 April 2019) <https://sweden.se/society/gender-equality-in-sweden/> accessed 17 October 2019

political and social context of the jurisdictions, as well as getting to grips with their legal rules.

In contrast to the functionalist method, Legrand[219] suggests an approach whereby comparative law is seen as a perspective. This is helpful insofar as it recognises that 'there is much of the utmost relevance to a deep understanding of a legal order, of an experience of law, that is simply not to be found in legislative texts and in judicial decisions.'[220] He argues that simply referring to comparative law as a method 'conceals another dimension', namely that comparative law can be used as a perspective that can be 'called upon to question the received orthodoxies of the legal system.'[221] However, the sort of deep comparison Legrand calls for, drawing on theories as diverse as anthropology, linguistics and psychology[222] is unachievable in a project such as this one.

This thesis does, however, attempt to draw on some features of Legrand's approach. For example, the doctrinal analysis of the different legal systems in Chapters 2, 4 and 5 draws on policy documents and commentary, as well as more orthodox legal sources. This thesis also seeks to adopt the sort of critical approach suggested by Frankenberg as a way of trying to respond to the illusion of objectivity that can limit the extent to which a comparative undertaking can be used as a perspective to challenge one's own legal system.

Empirical work was an important aspect of such a critical perspective in allowing the opportunity to ask questions about legal provisions, as well as seeking to understand how they worked in practice. It was, however, easier to undertake this sort of exercise in Sweden than in the Netherlands. The writer spent time studying at Uppsala University in Sweden as part of an Overseas Institutional Visit (OIV), in addition to conducting fieldwork there. This OIV provided an opportunity to present preliminary findings to Swedish academics in both law and sociology departments of the University. Their feedback was valuable in trying to gauge both the extent to which the writer's interpretation of the Swedish legal and policy framework was accurate, and the extent to which it echoed their own

[219] Pierre Legrand, 'How to Compare Now' (1996) 16 Legal Studies 232
[220] Pierre Legrand, 'How to Compare Now' (1996) 16 Legal Studies 232
[221] Pierre Legrand, 'Beyond Method: Comparative Law as Perspective' (1988) 36 The American Journal of Comparative Law 788, 789
[222] Pierre Legrand, 'How to Compare Now' (1996) 16 Legal Studies 232

understandings of how the system worked. Something that became particularly apparent, both as a result of reading about Swedish law[223] and of these discussions, was the very different understanding of the nature of marriage in Sweden and England and Wales. The Swedish understanding of marriage as a relationship from which both parties can walk away with minimal financial responsibilities to one another felt uncomfortable when coming from a system in which marriage is seen as a partnership of equals and financial provision often aims to achieve a transition to independence.[224] This provided a useful perspective on the differences between the two systems.

The OIV also allowed ongoing, informal, discussions with PhD students about life in Sweden, and with academics about comparative work conducted by other academics from England and Wales, in particular the work of David Bradley.[225] Knowing that Bradley's work, albeit conducted some time ago, was well-regarded by these Swedish academics, meant that it could serve an introductory role for someone from the same legal background who was trying to understand family law in Sweden for the first time.

This sort of exercise was more challenging in the Netherlands. The writer was able to have informal conversations via Skype with academics in the Netherlands, introduced by mutual contacts. This allowed for some discussion of preliminary research findings to get some sense of the extent to which these insights both accurately understood the system and matched their own perspectives. This was, however, a much less in depth undertaking than the opportunities to present research to academics more formally that was afforded in Sweden. Further, there was not the same opportunity to spend time in the Netherlands outside of fieldwork or to have ongoing, informal, conversations about day to day life.

The vision of comparative law adopted here, which sees it as both a perspective and a critical undertaking, has implications for the way in which the findings of that undertaking can be used in the legal system in England and Wales. Simply transplanting a legal rule from one system to another overlooks its social

[223] Caroline Sörgjerd, *Reconstructing Marriage* (Intersentia 2012), 91
[224] Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014)
[225] See, for example, David Bradley, *Family Law and Political Culture* (Sweet & Maxwell 1996) and [225] David Bradley, 'Sexual Equality and Maintenance Allowances in Sweden' (1989) 9 Oxford Journal of Legal Studies 403

context.[226] Nevertheless, whilst accepting the importance of context, to deny the possibility of any connection between different legal systems also seems short-sighted. As Örücü notes, '[t]he movement of legal institutions and ideas is trans-border and such transmigration is a natural phase in legal development.'[227] This thesis, therefore, favours Örücü's notion of comparative law as 'transposition':

> In musical transposition, each note takes the same relative place in the scale of the new key as in the old, the "transposition" being made to suit the particular instrument or voice-range of the singer. So in law. Each legal institution or rule introduced is used in the system of the recipient, as it was in the system of the model, the transposition occurring to suit the particular socio-legal culture and needs of the recipient.[228]

Having explained the reasons for the combination of methods chosen by this thesis, the next section of this chapter outlines how those methods were used in this thesis.

3.3 Empirical Methods

3.3.1 Semi-structured interviews

As outlined above, empirical work was used to identify both the gap between the law in the books and how it operates in practice and, additionally in Sweden and the Netherlands, as a way of testing understanding of legal concepts. Qualitative interviews with 18 parents and 13 legal practitioners were chosen as the method of conducting that empirical work because this research involves what Anderson refers to as 'complex human interactions that can rarely be studied or explained in simple terms.'[229] When parents agree their financial arrangements on separation, they are unlikely to isolate particular factors, such as caretaking responsibilities, in their negotiations. Rather, if such responsibilities are taken into account at all, it is likely to be as part of a wider ranging discussion. Further, the importance of this particular factor is likely to vary depending on the circumstances. In view of this complexity, the interviews with legal practitioners

[226] Pierre Legrand, 'The Impossibility of "Legal Transplants" (1997) 4 Maastricht Journal of European and Comparative Law 111
[227] Esin Örücü, 'Law as Transposition' (2002) 51 The International and Comparative Law Quarterly 205, 205
[228] Esin Örücü, 'Law as Transposition' (2002) 51 The International and Comparative Law Quarterly 205, 207
[229] Claire Anderson, 'Presenting and Evaluating Qualitative Research' (2010) 74 American Journal of Pharmaceutical Education 141, 141

in the Netherlands and Sweden were designed to elicit an understanding of the sorts of factors that, in their experience, influenced financial settlements. They were also intended to elicit practitioners' thoughts about the impact of caretaking responsibilities both on negotiations and on the relative outcomes for parents.

There were several reasons for the choice to interview parents in this jurisdiction but lawyers in the Netherlands and Sweden. In England and Wales, the almost complete removal of legal aid in family law matters means that increasingly parents are being left to resolve matters on separation without legal advice.[230] Thus, it seemed important to understand parents', rather than lawyers', experiences and perceptions. The scale of the restriction of legal advice in England and Wales has not been mirrored in Sweden or the Netherlands and, therefore, the experiences of practitioners still offer a high level understanding of the way the system works. That said, the writer used to work as a family lawyer in practice in England and Wales, and having worked at both national firms and a mid-sized firm provided insights into the very different concerns of clients with different asset bases. In addition, the writer continues to do occasional work as a professional support lawyer for a specialist family law firm and is part of a network of family law professional support lawyers, allowing continued insights into family law practice. This experience, when combined with access to reported case law, research papers and other materials, allowed for a good overview of the family law system as a whole. In contrast, the writer does not speak Dutch or Swedish, so the range of sources available to build a similar picture were more limited. The language barrier also provided a practical reason for these slightly different approaches: it was felt that building a sample of lawyers who could be interviewed in English would be more achievable than building a sample of parents who could do so, particularly in light of the time, financial and other constraints of this project.

For several reasons, semi-structured interviews were used when speaking to both parents and professionals. First, unlike structured interviews, semi-structured interviews allow an opportunity for participants to make their voices heard, albeit that there are more constraints upon this than in an unstructured

[230] Gabrielle Garton Grimwood, 'Litigants in person: the rise of the self-represented litigant in civil and family cases (*House of Commons Library: Briefing Paper,* 14 January 2016) <https://researchbriefings.files.parliament.uk/documents/SN07113/SN07113.pdf> accessed 17 October 2019

interview. Given the concerns highlighted in Chapter 2 about the extent to which caretaking responsibilities are invisible in the law, ensuring that parents could share their experiences was considered vital in understanding the law's response. Consistently with feminist methodological concerns, this research seeks to challenge the view of the law as objective by giving a voice to those whose experiences are invisible within the legal framework.[231] Semi-structured interviews with parents allowed this. This research also takes a feminist approach by asking 'about the gender implications of a social practice or rule'.[232] It, therefore, recognises the gendered division of caretaking in society. However, this research recognises that caretaking is also performed by men and does not see caretaking as part of a uniquely female experience.[233]

The choice of semi-structured, as opposed to unstructured interviews was intended to balance the concerns outlined in the previous paragraph with the possibility that data could feed into questions of law and policy reform. Whilst sample size is less important in a qualitative project that does not seek to produce generalisable results, capturing a variety of different circumstances was considered important. Semi-structured interviews are less time-consuming to analyse than unstructured interviews, allowing for a greater number of interviews (and therefore experiences). In research with a policy dimension it is also helpful to be able to draw comparisons between participants' answers. This is possible to a greater extent with semi-structured interviews than unstructured interviews.

Semi-structured interviews also compared favourably with focus groups for the purposes of this project. For parents, focus groups would have been particularly inappropriate because of the very personal nature of the topic, which might be uncomfortable for participants.[234] This was less of a concern regarding practitioners, but some of the other limitations of focus groups were relevant, such as the risk that certain members of the group may be reluctant to speak or may dominate the discussion. This factor is particularly relevant given the small number of participants. Additionally, as Liamputtong observes, 'focus group discussions may not be sufficiently in depth to allow the researchers to gain a

[231] See, for example, Ann Oakley, 'Gender, Methodology and People's Ways of Knowing: Some Problems with Feminism and the Paradigm Debate in Social Science' (1998) 32 Sociology 707
[232] Katharine Bartlett, 'Feminist Legal Methods' (1990) Harvard Law Review 829, 837
[233] Judith Grant, 'I Feel Therefore I Am' (1987) 7 Women and Politics 99
[234] Alan Bryman, *Social Research Methods* (4th ed, OUP 2012), 518

good understanding of the participants' experiences'.[235] Focus group discussions also tend to lead to ideas being challenged and refined, with the result that the outcome of the group discussion may not represent the individual experience of any of the participants. Given that the aim of speaking to participants was to understand the range of their experiences, and is thus detail focussed, focus groups were considered not to be the best way to generate that data.

3.3.2 Interviewing practicalities

With the exception of one interview in the Netherlands, all interviews with legal professionals were conducted in person. Because of the language barrier and the complexity of the issues being discussed, it was felt preferable for such interviews to be conducted in person where there was the potential for non-verbal cues to aid verbal explanations. The one interview not conducted in person was conducted by Skype audio. The writer had previously spoken with this participant and was confident that the language barrier would not be a problem.

The fact that legal professionals were interviewed in English did not generally seem to create problems in communicating meaning. Several participants in the Netherlands raised a question about what was meant by the phrase 'the default community regime' in one of the scenario questions (see Appendix 5), and it was explained that this referred to the default legal position if there was no pre-nuptial agreement. There was also some misunderstanding in one of the Swedish interviews around the meaning of one of the questions. This was tackled by allowing the participant to finish her answer and then asking a re-worded version of the same question. Other than these examples, there did not appear to be any real issues with communication. When transcribing interviews, however, it did seem to be the case that the overall pace of conversation was slower and clearer in the interviews with legal professionals than with parents. As a result, the experience of transcribing these interviews was much faster than transcribing the interviews with parents (although on occasion it was necessary to try and research the meaning of legal terms in Dutch or Swedish that were mentioned using written and online sources).

[235] Pranee Liamputtong, *Focus Group Methodology* (Sage 2011), 8

A mixture of telephone and in-person interviews were used when interviewing parents in England and Wales. The use of telephone interviews had a number of practical advantages. For example, approaches to recruitment resulted in a spread of participants across the country. Many participants worked during the day, and so needed to speak in the evening or at a weekend. Thus, getting across the country for an evening interview could have been very difficult. The use of telephone interviews was particularly valuable during periods where overseas fieldwork was being conducted. The writer spent three months in Sweden, for example, and it was thought much less likely that interviews organised from Sweden would go ahead if they did not take place until the Swedish research was concluded.

Where there was a possibility of either a face to face or a telephone interview, parents were given the choice. Where Sturges and Hanrahan[236] did this, they found that the most common reason for preferring the latter was because participants did not have the time to participate in a face-to-face interview. Whilst convenience was also a factor for those who chose to be interviewed face-to-face, Sturges and Hanrahan were interviewing correctional officers and visitors at county jails so the participants 'had time to be interviewed before visiting began'.[237] Telephone interviews appeared to be more convenient for a number of participants in this research, with calls being scheduled, for example, when children were at school or in bed.

Whilst the practicalities of interviews are important, as Sturges and Hanrahan point out, the most important factor in any interview is the quality of data gathered. Rodgers,[238] in what appears to have been structured interviews, found that the data obtained by telephone interviews was comparable to that from in person interviews. She also found that '[i]f anything, the data suggest that those interviewed in person are somewhat more likely to give socially desirable answers than those interviewed by telephone.'[239] Similarly, in the context of semi-

[236] Judith Sturges and Kathleen Hanrahan, 'Comparing Telephone and Face-to-Face Qualitative Interviewing: A Research Note' (2004) 4 Qualitative Research 107
[237] Judith Sturges and Kathleen Hanrahan, 'Comparing Telephone and Face-to-Face Qualitative Interviewing: A Research Note' (2004) 4 Qualitative Research 107, 113
[238] Theresa Rodgers, 'Interviews by Telephone and in Person: Quality of Responses and Field Performance' (1976) 40 Public Opinion Quarterly 51
[239] Theresa Rodgers, 'Interviews by Telephone and in Person: Quality of Responses and Field Performance' (1976) 40 Public Opinion Quarterly 51, 53

structured qualitative interviews, Sturges and Hanrahan[240] concluded that there were no significant differences between interviews carried out face-to-face and by telephone. Irvine et al[241] did find a number of differences between telephone and in-person interviews. For example:

1. Face-to-face interviews tended to be longer
2. The additional duration was due to participants talking for longer and the interviewer being less dominant
3. It was more common in telephone interviews than in face-to-face interviews for the researcher to begin saying something but then to stop because he or she realised that the participant hadn't finished.
4. Unfinished or not fully grammatically formed questions were more common in face-to-face interviews.

The researcher's overall impression was that whereas these differences did appear to exist, there was very little difference in the nature and quality of the data obtained.

3.3.3 Comparative work

There are clear differences between the comparative methodologies described in the first section of this chapter in terms of the type of knowledge they seek. However, those calling for a more 'pragmatic and inclusive approach'[242] tend to view them as differences of methodology or epistemology, rather than of method.[243] Kamba[244] suggests that there are three main stages of a comparative enquiry. The first, descriptive, phase 'may take the form of a description of norms, concepts and institutions of the systems concerned or it may consist in the examination of the socio-economic problems and the legal solutions provided by the system in question.'[245] The second, identification stage, identifies similarities

[240] Judith Sturges and Kathleen Hanrahan, 'Comparing Telephone and Face-to-Face Qualitative Interviewing: A Research Note' (2004) 4 Qualitative Research107

[241] Annie Irvine, Paul Drew and Roy Sainsbury, 'Mode effects in qualitative interviews: a comparison of semi-structured and face-to-face interviews using conversation analysis' (*The University of York Social Policy Research Unit*, March 2010) <https://www.york.ac.uk/inst/spru/pubs/rworks/2010-03July.pdf> accessed 2 October 2018

[242] Vernon Palmer, 'From Lerotholi to Lando: Some Examples of Comparative Law Methodology' (2005) 53 The American Journal of Comparative Law 261, 263

[243] Jaakko Husa, 'Methodology of comparative law today: from paradoxes to flexibility?' (2006) 4 Revue internationale de droit compare < https://www.persee.fr/docAsPDF/ridc_0035-3337_2006_num_58_4_19483.pdf> accessed 2 October 2018

[244] Walter Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 International and Comparative Law Quarterly 485

[245] Walter Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 International and Comparative Law Quarterly 485, 511

and differences between the systems. Finally, the explanatory phase, involves explaining the reasons for those similarities and differences.

These three phases are integrated throughout the discussion in this thesis. The first, descriptive, phase is primarily undertaken in the first two Chapters, where the issues under consideration are outlined. However, Chapters 4 and 5 also contain elements of this undertaking, particularly in relation to identifying these issues in the jurisdictions of Sweden and the Netherlands. Chapters 4 and 5 are also where the identification stage is undertaken. Similarities and differences between the three systems are explored through the lenses of autonomy and care. The explanatory phase is also integrated within this discussion; the social backdrop that produces the various rules is discussed and reflected upon. This discussion is then tied together in Chapters 6 and 7.

3.4 Sample and recruitment

Appendix 1 gives a more detailed overview of the participants in each of the three jurisdictions (all participants have been assigned a pseudonym). This section gives a very brief overview of those participants, before explaining the reasons for selection in more detail. In total, 31 participants were interviewed for this project across three different jurisdictions.

Eighteen parents were interviewed in England and Wales, broken down as follows:

	Formerly Married	**Former Cohabitants**	**Never in a relationship with the other parent**
Mothers	5 (Antonia, Elizabeth, Laura, Ruth and Emily)	4 (Sophie, Alison, Esther and Louise)	1 (Erin)
Fathers	6 (Kenneth, Matthew, David Andrew, Michael and Gareth)	2 (Jason and Neil)	0

Seven lawyers were interviewed in Sweden (5 female and 2 male). Six legal professionals (all female) were interviewed in the Netherlands.

3.4.1 England and Wales

Given the small numbers of participants, rather than aiming for a representative sample, the objective was to capture a range of circumstances that illustrated how the conflict between autonomy and care might be experienced by different types of family. The gendered division of labour typical in England and Wales might, for example, create different issues for mothers and fathers on separation. Thus, it was important to achieve a mix of mothers and fathers, and to capture a range of caretaking experiences, including arrangements that differed from societal norms. A decision was taken to interview only heterosexual couples. As discussed in Chapter 1, this research is conducted against the backdrop of a society in which caretaking is gendered. Cultural expectations for same sex couples cannot be assumed to be the same as for heterosexual couples. Given the relatively small sample size, and the range of theoretical, empirical and comparative work undertaken, it was not possible to engage with these issues in depth. However, this would be an area for future research. The other factors informing sample selection and the approach to recruitment are discussed in the sections that follow.

3.4.1.1 Patterns of care

Given the central concern of this thesis with caretaking responsibilities, it seemed important to capture a range of different experiences to see whether this had an impact on both the visibility of, and value attributed to, caretaking on separation (RQ 1.b). As discussed in Chapters 1 and 2, one of the reasons for the clash between autonomy and care in England and Wales is the relative invisibility of caretaking in society. Might different caretaking patterns affect this?

Elizabeth and Matthew (married to each other), Jason, Andrew and Emily all described their post-separation arrangements as shared care. For Andrew and Jason this was an exactly 50:50 arrangement. For Andrew, this involved the children spending alternate weeks with each parent, although they ultimately ended up living with him. For Jason, it meant his daughter spending three nights

with him one week and four the next, with a very precise division of time: ‘if you’re half an hour late I’m just going to add it on Sunday or Saturday.’ For Elizabeth and Matthew, and Emily and her husband, shared care involved the children spending 5 nights a fortnight with their father (although Elizabeth and Matthew intended to increase this to 7 nights a fortnight as their daughter got older). In both cases, the arrangements were flexible. Matthew, for example, talked about a change of routine to allow him to be with his grandmother after an operation and Emily talked about the children coming back early when her ex-husband was away for work.

In contrast, Michael’s children spent c. 4 nights a fortnight with him, and Neil’s children 6 nights a fortnight with him, but they considered their former partners to be the children’s primary carer. In Michael’s case, this seemed to be because he considered himself to have been the ‘primary parent’ during his marriage (at least for his youngest child) and felt that without his wife’s false allegations of abuse the child arrangements ‘would have been the other way around’. For Neil, the way in which he saw the arrangement was perhaps shaped by the way caretaking had been divided during his relationship, and the fact that his former partner continued to work part-time afterwards. In neither case was there the sort of cooperation and flexibility described by Elizabeth, Matthew and Emily. Like Neil and Michael, Kenneth and Gareth also had regular contact with their children, who lived with their former partners, but it was less extensive. Laura had no contact at all with her children at the time of interview but would very much have liked to see them.

The sample includes 6 parents (Antonia, Sophie, David, Ruth, Alison, Louise) who were the primary caretakers for their children after separation, and whose children had limited contact with their former partners. David was unique in being a male primary caretaker after separation (he had not been beforehand). However, Andrew (who had a shared care arrangement after separation) had been a stay at home father prior to separation. Antonia, Ruth, Alison and Louise would all have liked their former partners to have more contact with their children. This seemed to be both because of the value of such contact to their children and because of the pressures of being a lone parent. Esther’s children had more regular contact with their father than was the case for these other primary

caretakers. However, she also talked about trying to alter contact patterns: ‘for years it was, in the weekends that he had them, it was Saturday lunchtime ‘til Monday taking them to school. So more recently I’ve been pushing for the Friday.’

Finally, Erin had not been in a relationship with her child’s father. It was felt important to capture her experiences because they illustrate one of the difficulties with the models of caretaker outlined in Chapter 2; such models are designed for intact families in which there are two parents between whom work and caretaking can be divided. This is not always the case, and needs to be borne in mind when considering how caretaking responsibilities might be divided within families and as between the family and the state (RQ 2.b).

3.4.1.2 Marital status

The gendered division of caretaking is not a phenomenon limited to married couples; it is also seen amongst cohabitants.[246] However, as discussed in Chapters 1 and 2, whereas the discretionary system of financial provision on divorce offers some protection to married caretakers, there are no such protections for cohabitants. It was, therefore, considered important to interview both former spouses and former cohabitants to see whether there were differences in both the visibility of care and the role of autonomy in these different types of relationship, as there is in the legal framework (RQs 1.a and 1.b). The sample consists of 11 former spouses, 6 former cohabitants, and one participant who was not in a relationship with her child’s other parent.

3.4.1.3 Asset base

As discussed in Chapter 1, the gendered division of caretaking in intact families in England and Wales has gendered financial consequences on separation. However, those financial consequences are experienced differently for couples with different levels of wealth.[247] Whereas women and dependent children tend to see a greater drop in their income than men, ‘these changes are much greater

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[246] See, for example, María-José González, Pau Miret and Rocío Treviño, '"Just Living Together": Implications of Cohabitation for Fathers' Participation of Child Care in Western Europe' (2010) 23 Demographic Research 445 and Charlene Kalenkoski, David Ribar and Leslie Stratton, 'The effect of family structure on parents' child care time in the United States and the United Kingdom' (2007) 5 Review of Economics of the Household 353

[247] See, for example, Mike Brewer and Alita Nandi, 'Partnership dissolution: how does it affect income, employment and well-being? (*Institute for Social & Economic Research*, September 2014) <https://www.iser.essex.ac.uk/research/publications/working-papers/iser/2014-30.pdf> accessed 26 September 2018 and Hayley Fisher and Hamish Low, ‘Recovery from divorce: comparing high and low income couples’ (2016) 30 International Journal of Law, Policy and the Family 338

for those women and children from formerly high-income couples (although such individuals are still better off, on average, than women and children from formerly low-income couples).'[248] Eekelaar and Maclean's research also highlights the very different concerns of parents in big-money cases and those of parents without capital assets:

> In the big-money cases, resources were more than adequate to meet needs, and this is where questions about the role of compensation or equality may emerge, although we did not see this. In the "no-money" cases, resources cannot even meet needs, never mind do more than this, and so we saw questions about disclosure and how to best manage debt and welfare benefit entitlements.
>
> Perhaps the middle-money cases, where both parties are trying to continue to support their present standard of living but with divided resources, is where the division of assets might benefit from further regulation or guidance on principle?[249]

This research, therefore, sought to recruit parents with a range of different financial circumstances to see how they experienced the tension between autonomy and care.

Whilst questions were asked around participants' financial circumstances, the extent to which precise details were given varied. Money is often seen as a private subject, so this issue was not pushed if responses were not forthcoming. Thus, it is difficult to apply a categorisation to the asset base of participants. Nevertheless, from the details that were shared, a range of financial circumstances is apparent. The only participant for whom debt appeared to be a real problem was Laura, who was made bankrupt after transferring her property to her ex-husband. At the time of interview, she was still unable to apply for credit. However, her own position was made less precarious by the presence of a new

[248] Mike Brewer and Alita Nandi, 'Partnership dissolution: how does it affect income, employment and well-being? (*Institute for Social & Economic Research*, September 2014) <https://www.iser.essex.ac.uk/research/publications/working-papers/iser/2014-30.pdf> accessed 26 September 2018, 45
[249] Mavis Maclean and John Eekelaar, 'The Perils of Reforming Family Law' in Jo Miles and Rebecca Probert (eds) *Sharing Lives, Dividing Assets* (Hart 2009), 36

partner. Thus, the insight this sample provides into the issues of people with debt is limited. This is an important area for further research.

There are, however, a number of participants for whom there were no real assets to divide. For example, Louise, David, Ruth and Jason were all in a position where the assets at the end of the relationship were negligible. Sophie and Gareth both received slightly more, but it was insufficient to allow either of them to buy a new property. Further, for Sophie, who had been out of work for some time, the benefits system was an essential safety net. This was also the case for Andrew, Ruth and Alison, all of whom had been primary caretakers for their children during their relationships. Jason was also heavily reliant on the benefits system after separation, although he described this in terms of his choice to reduce his working hours to spend more time with his daughter:

> It became very evident to me that I wasn't going to be able to keep a house going with the fact that I was doing part-time work because I wasn't willing to – I guess most sane adults would say, right, ok, put my daughter into childcare, then I could do more hours to pay for the childcare. But what I realised was… I'm going to – I don't get this time back with her, you know, and there's no refunds on parenting. So, I was, I wanted to put as much as I can into the time with her. Because also that could give her mum justification – well, you're not with her anyway, you're putting her into childcare, she might as well be with me. So I wasn't willing to compromise my time with her. So that means –meant I couldn't work as many hours.
> (**Jason, Father, England & Wales**)

For other participants (Antonia, Elizabeth and Matthew, Kenneth, Neil, Michael, Esther and Emily) there was sufficient property to allow both partners to be rehoused. For the primary caretakers in particular, this meant a much more secure position than for those without net assets. Both Esther and Antonia had brought more assets into their relationships than their former partners, which gave them claims over the family home (particularly important for Esther as a cohabitant). Further, Elizabeth and Emily both had established professional careers which enabled them to support themselves after separation. Thus, it was

not just the asset base, but also their social position, that made them financially more secure than other participants.

For Michael and Neil, there was a perception that they were perhaps less well off than their former partners (both of whom had been the primary caretakers for their children during the relationship). It is hard to tell to what extent this reflects reality; research in general suggests that men tend to recover in income terms more quickly than women after divorce,[250] although of course this does not reflect the position in every case. For Michael, the feeling seemed to be at least partly related to his own greater financial contribution to the assets and his perception of his wife's unreasonable litigation conduct during their divorce, which had the effect of depleting those assets. Kenneth, who like Michael and Neil was the main breadwinner in his household, did not seem to feel this way, but this may be because he appeared to be a particularly high earner who was easily able to meet his own (and his ex-wife's) financial needs.

3.4.1.4 Recruitment

Recruitment aimed to try and achieve a varied sample to meet the criteria outlined above. Recruitment in England and Wales began with an advert through the Family Law Week website. The researcher's previous experience[251] was that the website was receptive to such adverts and that once this website had promoted the research others might be more prepared to do so, perhaps because this made the research seem reputable. It had appeared previously that the Family Law Week newsletters are widely disseminated and a good source of potential participants. This was borne out by responses from parents and legal professionals alike.

It was, however, recognised that those responding to an advert on Family Law Week might not be typical of the separating population. For example, they might be more likely to include parents with legal training or those who were particularly engaged with the legal framework (which might mean more educated parents or parents whose separations had been particularly contested). For this reason,

[250] Hayley Fisher and Hamish Low, 'Recovery from divorce: comparing high and low income couples' (2016) 30 International Journal of Law, Policy and the Family 338
[251] From related MRes research

adverts were posted on the Netmums website and placed in the Primary Times Magazine (a magazine distributed to the parents of primary school children) in one region in the South West of England. These were intended to reach a much wider audience and the hope was that the advert might be passed onto friends and family members even if those reading it did not fulfil the criteria. These methods of recruitment had some success, but the numbers appeared to be more limited than those obtained by recruiting through Family Law Week.

More targeted recruitment was also attempted by posting in local Facebook groups (again in the South West). Adverts were posted both in single parent groups and in general groups aimed at those living in particular postcodes. Finally, during the MRes stage of this project, a number of those who made contact were not interviewed (because of sampling criteria and timescales) but consented to be contacted again as part of the PhD research. Several of these parents were interviewed for this project.

There are, of course, limitations to these methods of recruitment, most notably that many of them involved internet access. The Primary Times advert was intended to redress this to some extent. Adverts were also left with the Personal Support Unit at a court in the South West. Whilst a decision had been made not to interview parents who were still in proceedings for ethical reasons it was hoped that people might pass the advert onto friends or family whose own separations were finalised.

Other methods it had been intended to use to broaden the sample base were ultimately not practical. For example, it had been intended to advertise through the Single Parent Action Network (a Bristol-based charity whose 'vision is to engage and empower one-parent families living in poverty and isolation, from different backgrounds and cultures, to improve their lives and play a great part in society'[252]). However, at the time of recruiting, funding cuts meant the organisation was uncontactable. This is illustrative of a much wider problem in the post-LASPO world. The experiences of those who are perhaps most in need of support are the hardest to capture. This is a crucial area for further research.

[252] Single Parent Action Network 'What we do' <http://spanuk.org.uk/index.php/about-us/what-we-do> accessed 17 August 2018

3.4.2 Sweden and the Netherlands

The first stage of recruitment in Sweden and the Netherlands involved contacting lawyers recommended through known professional networks of lawyers in England and Wales. Specialist directories of overseas family lawyers were also used. This approach had the advantage of identifying lawyers who spoke fluent English. Additionally, it was thought that lawyers who were engaged in such professional organisations may be more engaged with research and more receptive to participating in it.

In the Netherlands, this approach was successful in identifying a number of potential participants. Most were lawyers, but one (Anne) identified herself as a legal adviser who advised lawyers and their clients on particular aspects of the legal framework. Recruitment in the Netherlands was supplemented by Google searches to try and identify lawyers from a broader range of firms; firms who undertake international work tend to be more specialist and may perhaps be more likely to have wealthier clients. The sample is, however, primarily of lawyers whose clients appear to be wealthier than average. This is largely a product of the limited timeframe in which interviews were conducted (a three week period in the Netherlands in the summer of 2017) and the high uptake of interviews by lawyers in the first group. These lawyers were all female.

When recruitment in the Netherlands was undertaken, the researcher was unaware of the VFas (a Netherlands association of family lawyers) and the ability to search its directory. This organisation was mentioned by some participants during interviews. Whilst there are limitations to recruiting through any professional organisation (for example, membership fees may exclude smaller firms from being members, or the organisational priorities may shape the sorts of firms that join), this would be a useful resource for recruiting for future research.

In Sweden, specialist directories of overseas family lawyers proved less successful. However, the writer spent much longer in Sweden than in the Netherlands because it was possible to combine an OIV at the University of Uppsala with the fieldwork in Sweden, which allowed a broader range of contacts to be developed. Contacts developed at the University proved helpful in

identifying family lawyers who might be prepared to take part in the research. This was combined with a review of the Swedish Bar Association list of members in Uppsala, Stockholm, Gothenburg and the surrounding areas. The list was worked through systematically, and firms with no website eliminated on the basis that websites provided a cross-check on the Bar Association information, which was felt important from a researcher safety perspective.

An attempt was made to try and achieve a more gender-balanced sample in Sweden than in the Netherlands. It was noted that several participants in the Netherlands mentioned the importance of financial independence. Research in Sweden has suggested that financial independence was particularly important to women in relationships.[253] It was, therefore, intended to try and understand whether there was a gender dimension to these comments. However, of six male lawyers initially contacted only one was interviewed (the second male participant was, however, recommended by one of those contacted). In contrast, interviews were secured with 5 of 7 female lawyers contacted (although, in the event, a colleague of one of these five was interviewed in her place because of an emergency court hearing). Primarily because of the small sample size, it is not possible to draw any conclusions about the impact of gender on ideas of financial independence in practitioners, but this would be an interesting area for further research.

3.5 Ethical considerations

This research received approval from the University of Exeter (see Appendix 4). Written consent was sought from participants in advance of interviews and written information sheets formed part of the consent forms (see Appendix 3). At the start of each interview, participants were asked whether they had any questions about the form and were reminded about key elements of it. Completed consent forms were scanned and uploaded onto One Drive (the University cloud system) with the original forms shredded. Participants were also assigned a pseudonym following the interview and these were recorded along with real names on a password protected spreadsheet stored only on One Drive. Participants were told that data would be kept confidential unless the researcher was required to

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[253] Charlott Nyman and Lasse Reinikainen, 'Elusive Independence in a Context of Gender Equality in Sweden' in Björn Halleröd, Capitolina Díaz and Janet Stocks (eds) *Modern Couples Sharing Money Sharing Life* (Palgrave Macmillan 2007)

produce it by law or something in the interview caused concern about potential harm. Participants were also advised that digital recordings of interviews would be deleted as soon as there was an authoritative transcript and that confidential information would be deleted after 5 years. Anonymous data would be retained indefinitely and might be uploaded to the UK Data Service.

3.6 Data analysis

Analysis of the interviews was conducted alongside data collection. Interviews were transcribed shortly after they took place. In view of the time involved in the transcription process, a small number of interviews were transcribed by a professional transcriber. The majority were, however, transcribed by the researcher.

Reflexive thematic analysis[254] was chosen as a method of data analysis because it recognises the researcher's role in knowledge production[255]:

> Themes are analytic outputs developed through and from the creative labour of our coding. They reflect considerable analytic 'work,' and are actively created by the researcher at the intersection of data, analytic process and subjectivity. Themes do not passively emerge from either data or coding; they are not 'in' the data, waiting to be identified and retrieved by the researcher. Themes are creative and interpretive stories about the data, produced at the intersection of the researcher's theoretical assumptions, their analytic resources and skill, and the data themselves. Quality reflexive TA is not about following procedures 'correctly' (or about 'accurate' and 'reliable' coding, or achieving consensus between coders), but about the researcher's reflective and thoughtful engagement with their data and their reflexive and thoughtful engagement with the analytic process.

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[254] Thematic Analysis: a reflexive approach <https://www.psych.auckland.ac.nz/en/about/our-research/research-groups/thematic-analysis.html> accessed 17 October 2019

[255] Virginia Braun and Victoria Clarke, 'Reflecting on reflexive thematic analysis' (2019) Qualitative Research in Sport, Exercise and Health 1, 6

Braun and Clarke's[256] 6 steps to data analysis: familiarising yourself with the data, generating initial codes, generating initial themes,[257] reviewing themes, defining and naming themes and producing the report, were followed. Familiarity with the data and the generation of initial codes took place initially through the process of transcription or of reviewing transcripts that were professionally transcribed. The next step was to review the completed transcripts in NVivo and annotate them with initial thoughts about codes. These annotations were coded 'annotation' so that they could easily be retrieved later. The key advantage of using NVivo for this process was the ability to organise large amounts of data.[258] NVivo also offers the ability to switch easily between all text on a particular code or theme and the complete interview transcript. This helps to ensure that the context of a coded passage is not lost.[259]

After several of the transcripts had been reviewed in this way, the interviews were coded. Each subsequent transcript was then coded using the existing codes. Any potentially new codes were initially annotated and coded "annotation". Previously coded and new transcripts were then reviewed in light of this potential new code. The process of generating themes began alongside coding. Thoughts about potential themes were recorded in a notebook. These themes were gradually refined as future transcripts were coded.

As discussed in Chapters 1 and 2, the concepts of autonomy and care and the clash between them are central to this thesis. These concepts must, however, be seen against the backdrop of a gendered division of caretaking in society. The themes identified in the interviews, with parents in England and Wales and practitioners in Sweden and the Netherlands, link to these core concepts of autonomy, care and gender in different ways.

In England and Wales, interviews with parents provide insight into how these ideas applied in particular cases. Whilst these findings cannot be generalised, the

[256] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 Qualitative Research in Psychology 77
[257] Virginia Braun and Victoria Clarke, 'Reflecting on reflexive thematic analysis' (2019) Qualitative Research in Sport, Exercise and Health 1, 5
[258] Udo Kelle, 'Computer-assisted Analysis of Qualitative Data' in Uwe Flick, Ernst von Kardorff and Ines Steinke (eds), *A Companion to Qualitative Research* (Sage 2004), 282 and Sharan Merriam and Elizabeth Tisdell, *Qualitative Research* (Joey Bass Ltd 2015), 221
[259] Udo Kelle, 'Computer-assisted Analysis of Qualitative Data' in Uwe Flick, Ernst von Kardorff and Ines Steinke (eds), *A Companion to Qualitative Research* (Sage 2004), 278

themes identified in the interviews with parents provide an insight into potential implications of the clash between autonomy and care for those separating. For example, the themes of bargaining and sacrifice,[260] discussed further in Chapter 4(iii), suggest that the caretaking roles have an effect on how negotiations are experienced, and the stakes involved in them. This challenges neoliberal ideas of autonomy, which assume bargaining takes place between two equals. The themes identified in the Sweden and Netherlands interview data provide a higher-level picture, looking at the experiences of lawyers. For example, the theme of conflict avoidance suggests that private ordering, which is an important aspect of neoliberal ideas of autonomy in England and Wales, is driven by a desire to avoid conflict between parents. When combined with the findings of doctrinal work, these empirical and comparative insights help to build up a picture of the way in which the three jurisdictions think about the ideas of autonomy and care, whether there is a clash between them and, if so, how this is navigated by the law (see further Chapters 4 and 5).

A reflexive thematic approach to analysis has implications for considering research quality. The notions of reliability, validity and objectivity, key concepts when considering the quality in quantitative research, are problematic for qualitative research methods.[261] Attempts have been made to reformulate these criteria in a more meaningful way. Reliability, rather than focussing on the replicability of the data, can instead focus on making the production of data transparent.[262] Reflexivity, 'the continuous process of self-reflection that researchers engage in to generate awareness about their actions, feelings and perceptions'[263] is central to this process and a key aspect of the reflexive thematic approach.

The notion of validity has also been reinterpreted for qualitative research so that it may be achieved by techniques such as 'triangulation, use of contradictory evidence, respondent validation and constant comparison.'[264] Whilst in qualitative

[260] These themes are discussed further in Chapter 4.iii, but in short the former involved paying more for a better result and the latter accepting less to maintain ongoing relationships or for the benefit of children.
[261] Uwe Flick, *Managing Quality in Qualitative Research* (Sage 2007), 15
[262] Uwe Flick, *Managing Quality in Qualitative Research* (Sage 2007), 16
[263] Wesam Darawsheh, 'Reflexivity in research: Promoting rigour, reliability and validity in qualitative research' (2014) 21 International Journal of Therapy and Rehabilitation 560, 561
[264] Claire Anderson, 'Presenting and Evaluating Qualitative Research' (2010) 74 American Journal of Pharmaceutical Education 141, 142

research triangulation does not necessarily ensure accuracy, Tracy suggests that it 'allow[s] different facets of problems to be explored, increases scope, deepens understanding and encourages consistent (re)interpretation.'[265] This thesis employs a single empirical method, semi-structured interviews, but it seeks to achieve triangulation in the sense described by Tracy through the combination of theory and the findings of other researchers with the empirical interviews.

Constant comparison, meaning that 'one piece of data (for example, an interview) is compared with previous data and not considered on its own'[266] has been considered one method of ensuring the validity of qualitative data.[267] Again, this is compatible with reflexive thematic analysis, which seeks to find themes, 'patterns of shared meaning underpinned by central organising concepts',[268] across the data. All transcripts of parental interviews were reviewed again once all interviews had been concluded and an initial analysis of data in Sweden and the Netherlands undertaken. This process helps to ensure that the data are treated as a whole, rather than being fragmented, and allows for identification of 'emerging/unanticipated themes.'[269]

Respondent validation, allowing participants to read through the data and analyses and provide feedback[270] was not pursued. Participants were offered the chance to review their own interview transcripts, but this was for ethical reasons, rather than as a way of seeking to find an objective truth.

3.7 Conclusion

Having outlined the choice of methods used in this chapter, the next two chapters combine the comparative, empirical and doctrinal findings of this research, and consider what they reveal about understandings of autonomy and care in the three jurisdictions. Chapter 4 considers ideas of autonomy in the three

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[265] Sarah Tracy, 'Qualitative Quality: Eight "Big-Tent" Criteria for Excellent Qualitative Research' (2010) 16 Qualitative Inquiry 837, 843

[266] Claire Anderson, 'Presenting and Evaluating Qualitative Research' (2010) 74 American Journal of Pharmaceutical Education 141, 142

[267] Claire Anderson, 'Presenting and Evaluating Qualitative Research' (2010) 74 American Journal of Pharmaceutical Education 141, 142

[268] Virginia Braun and Victoria Clarke, 'Reflecting on reflexive thematic analysis' (2019) Qualitative Research in Sport, Exercise and Health 1, 1

[269] Claire Anderson, 'Presenting and Evaluating Qualitative Research' (2010) 74 American Journal of Pharmaceutical Education 141, 142

[270] Claire Anderson, 'Presenting and Evaluating Qualitative Research' (2010) 74 American Journal of Pharmaceutical Education 141, 142

jurisdictions (RQ 1.a) and Chapter 5 considers the visibility of, and value attributed to, care in the three jurisdictions (RQ 1.b). Together Chapters 4 and 5 combine to provide an answer to RQ1 (to what extent do each of the jurisdictions take account of caretaking responsibilities on parental separation?) and to RQ 2 (what lessons can be learned in England and Wales from the approaches taken in Sweden and the Netherlands).

The discussion in Chapter 4 also feeds into the question of how far it is possible to reconceptualise the ideas of autonomy underpinning family law (RQ 2.a). Likewise, the discussion in Chapter 5 feeds into the question of whether care should be considered a societal, as well as a familial, responsibility (RQ 2.b). These chapters, therefore, provide a foundation for answering the overall research question of how family law and policy should take account of caretaking responsibilities on parental separation in Chapters 6 and 7.

4. Understandings of Autonomy

4.1 Introduction

As explained at the outset, this thesis explores the tension between neoliberal ideas of autonomy, which are increasingly influential in family law in England and Wales and beyond, and caretaking responsibilities. This chapter examines legal and policy measures in England and Wales, Sweden and the Netherlands to see just how far the influence of neoliberal autonomy has permeated their family law regimes (RQ 1.a). A doctrinal and theoretical comparative analysis is tested against the experiences of lawyers (in the case of Sweden and the Netherlands) and parents (in England and Wales), obtained through empirical work.

Chapter 3 discussed the importance of engaging with a wider range of sources than simply doctrinal legal ones in undertaking a comparative exercise. Nevertheless, it remains important as part of a comparative approach to understand the law in each of the three jurisdictions. The tables at the end of this chapter compare key features of the law in England and Wales, Sweden and the Netherlands. Comparing the provisions dealing with financial arrangements on relationship breakdown is designed to facilitate analysis of the extent to which each of the jurisdictions prioritises autonomy or recognises the responsibilities of caretakers. The tables also include a comparison of the legal provisions that apply to child arrangements on relationship breakdown. These provisions are more relevant to the discussion of how each of the jurisdictions consider care, undertaken in Chapter 5, but are included here with the other family law provisions to give a more complete picture of the legal framework.

In terms of the legal provisions dealing with financial arrangements, pre-nups, which typically deal with the way in which property should be divided on divorce, are a means of private ordering. They are, therefore, an indicator that a jurisdiction values autonomy. As the tables at the end of this chapter reveal, whereas all three jurisdictions allow pre-nups, the way in which they are used differs considerably. In Sweden, for example, there are very few safeguards that limit the use of pre-nups, and such agreements are generally respected. In contrast, in England and Wales, the courts have a wide discretion to override such agreements if they are considered unfair. The Netherlands seem to occupy an intermediate position in which there appear to be more safeguards than in

Sweden, but a limited ability for the courts to override such agreements on divorce.

When considering what pre-nups reveal about autonomy it is also important to consider how assets might be divided in the absence of such agreements. Here too, the courts of England and Wales have a wide-ranging discretion about how to divide property, taking into account the principles of needs, compensation and sharing. The law is, therefore, flexible and capable of responding to the financial needs of caretakers in different factual situations. In contrast, in both Sweden and the Netherlands the division of assets between former spouses is determined by (community of) property law, and there is little flexibility. Such an approach is not heavily focused on individual autonomy; it entitles each partner to an equal share of the assets regardless of their financial contribution to them. Nevertheless, these rules do not offer the same flexibility as the discretionary system in England and Wales to respond to the needs of individual caretakers. When it comes to cohabitants, Sweden, unlike the other jurisdictions, provides for a form of community of property, offering greater protection to cohabitants who are caretakers than England and Wales or the Netherlands.

At the other end of the spectrum, spousal maintenance provisions, which typically provide for the financially stronger spouse (but not cohabitant) to make payments to the financially weaker spouse in certain circumstances, might be seen to indicate a jurisdiction which places less emphasis on individual autonomy and shows greater recognition of the financial consequences of caretaking. In England and Wales, judges have a wide discretion to make spousal maintenance orders for the purposes of meeting a party's financial needs, or in rare cases to compensate them for relationship-generated disadvantage.[271] Further, such orders can be made for whatever period is considered appropriate, up to and including the parties' joint lives. These provisions appear to place limited importance on autonomy (although, as discussed in Chapter 2, spousal maintenance awards are not common in reality[272]). In contrast, in Sweden, spousal maintenance is very rarely ordered, again suggesting a greater role for

[271] *Miller v Miller : McFarlane v McFarlane* [2006] UKHL 24

[272] Emma Hitchings and Joanna Miles, 'Financial remedies on divorce: the need for evidence-based reform' (2018) <http://www.nuffieldfoundation.org/sites/default/files/files/briefing%20paper%20Jun%202018%20FINAL.pdf> accessed 18 July 2018

individual autonomy. The Netherlands takes an intermediate approach; limiting the period of spousal maintenance awards to 12 years (or less in the case of a short marriage with no children).

Finally, the rules relating to the division of pensions between spouses show some similarities to the approaches taken to spousal maintenance. Whereas pension sharing is very limited in Sweden, again suggesting the influence of individual autonomy, in England and Wales there is a wide discretion to order the sharing of pensions based on the principles of need, compensation and sharing, offering flexibility to respond to needs generated by caretaking responsibilities. In contrast, the Netherlands provides for the equalisation between spouses of pension rights acquired during marriage. As with the rules relating to community of property, this automatic sharing does not indicate a strong focus on individual autonomy, but does not go as far as to allow flexibility to respond to the costs of caretaking on an individualised basis.

At first glance, these features might suggest that these jurisdictions exist on a spectrum between autonomy and care, with Sweden at the more autonomous end, England and Wales towards the opposite end, and the Netherlands in the middle. However, looking at the legal provisions in Sweden in isolation overlooks the important context of a society in which the goal of achieving gender equality is pervasive. As discussed in the introduction to this thesis, one of the reasons for the clash between autonomy and care in England and Wales is the conflict between perceptions of gender equality in society and the reality of gender roles. The Swedish experience, therefore, provides a perspective on whether autonomy might be an appropriate guiding principle of family law in a more gender equal society.

The importance of the gender equality dimension when considering the three jurisdictions is illustrative of a wider point, discussed in Chapter 3, around the interplay between legal provisions and the society they exist in. The extent to which caretaking is gendered and interferes with paid work is influenced by factors such as the cost and availability of childcare. Therefore, looking at legal provisions without also considering jurisdictional features that impact on the division of caretaking responsibilities overlooks a vital aspect of the tension

between autonomy and care. It is for this reason that Chapter 5 will undertake a similar exercise to that conducted chapter, focusing on approaches to care, rather than autonomy.

This chapter concludes with a table outlining key features of the law in each of the three jurisdictions. Chapters 4(i) and 4(ii) then combine a doctrinal analysis with an analysis of interviews with practitioners to unpack approaches to autonomy in Sweden and the Netherlands respectively. Chapter 4(iii) takes a slightly different approach, by considering the attitudes of parents to the factors that should guide financial settlements. As explained in Chapter 2, increasingly parents in England and Wales are being left to resolve issues themselves without recourse to legal advice. Whilst, as will be discussed in Chapters 4(i) and 4(ii), private ordering is also an important feature in Sweden and the Netherlands, the discretionary system in England and Wales is more flexible than community of property regimes. It, therefore, seemed important to understand parents' perceptions of the features that should guide financial settlements, and whether ideas of autonomy featured in these perspectives, given that they will increasingly be left to reach such arrangements themselves. Finally, Chapter 4(iv) draws together the findings from the three jurisdictions and considers how influential ideas of autonomy are, and how autonomy is conceptualised (RQ 1.a).

			England and Wales	Sweden	The Netherlands

4.2 Overview of key family law provisions

Pre-separation	**Pre-nuptial agreements**	Nuptial agreements are persuasive but not binding.[273] There are no mandatory safeguards. However, practitioners are advised[274] to have regard to the guidance in *Radmacher*[275] about the circumstances that enhance or detract from the weight of an agreement, and the guidance in the Law Commission's Report on Matrimonial Property, Needs and Agreements.[276] Thus, independent legal advice, financial disclosure and entering into the agreement in good time before the marriage are advised.	Sweden has a deferred community of property regime.[278] Spouses cannot agree to an alternative regime, but they can specify that property is separate property, which therefore falls outside of the deferred community of property regime.[279] A written agreement must be signed by both parties. It must also be registered with Sweden's National Tax Agency.[280] The agreement does not need to be witnessed.[281] There is also no requirement for financial	Both pre- and post-nuptial agreements are possible.[285] To be valid, they must be entered into by notarial instrument.[286] Whilst there is no requirement of financial disclosure,[287] notaries are advised to inform the parties about the content and consequences of the agreement.[288] The parties can derogate from the community regime, but the provisions must not conflict with law, bonos mores or Dutch public policy.[289] The parties cannot: - Provide for a spouse to be liable for a greater share of the debts than his or her

[273] *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42
[274] Resolution, 'Guidance Note: Preparing Pre- and Post- Marital Agreements' (2016) <http://www.resolution.org.uk/site_content_files/files/guidance_note_preparing_marital_agreements.pdf> accessed 20 August 2018
[275] *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42
[276] Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014)
[278] Couples in Europe, 'Couples in Sweden' (Notaries of Europe, European Notarial Network and Uni Graz, 2012) <http://www.coupleseurope.eu/en/sweden/topics> accessed 20 August 2018
[279] Maarit Jänterä-Jareborg, 'Marital Agreements and Private Autonomy in Sweden' in Jens Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012)
[280] Maarit Jänterä-Jareborg, 'Marital Agreements and Private Autonomy in Sweden' in Jens Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012), 379-380
[281] Maarit Jänterä-Jareborg, 'Marital Agreements and Private Autonomy in Sweden' in Jens Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012), 381
[285] Carla Smeets and Caroliene Mellema, 'Family Law in the Netherlands: Overview' (*Practical Law*, 1 September 2017) <http://uk.practicallaw.com/4-578-1948#a440232> accessed 19 July 2018
[286] Carla Smeets and Caroliene Mellema, 'Family Law in the Netherlands: Overview' (*Practical Law*, 1 September 2017) <http://uk.practicallaw.com/4-578-1948#a440232> accessed 19 July 2018
[287] Katharina Boele-Woelki and Bente Braat, 'Marital Agreements and Private Autonomy in the Netherlands' in Jens Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012), 248
[288] Katharina Boele-Woelki and Bente Braat, 'Marital Agreements and Private Autonomy in the Netherlands' in Jens Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012), 249
[289] Carla Smeets and Caroliene Mellema, 'Family Law in the Netherlands: Overview' (*Practical Law*, 1 September 2017) <http://uk.practicallaw.com/4-578-1948#a440232> accessed 19 July 2018

			England and Wales	Sweden	The Netherlands
			An agreement cannot leave one of the parties in a position where their needs are unmet, but can result in a more restrictive interpretation of their needs.[277]	disclosure or independent legal advice.[282] Although registration is required for an agreement to be binding, registration does not guarantee that a court will uphold it if there is a later dispute.[283] However, Jänterä-Jareborg suggests that '[a] marital property agreement which meets the requirements of form and substance is normally respected, even in situations where its effect is that one of the spouses may need to leave a wealthy home empty-handed.'[284]	share under community.[290] - Derogate from legal provisions relating to parental authority or survivorship.[291] A spouse's consent is always required for: - Selling the matrimonial home - Encumbering the matrimonial home with a mortgage - Making gifts.[292] According to Boele-Woelki and Braat: 'Generally, the courts only have a very limited competence to override, modify or set aside a marital contract if the effects thereof are unacceptable in view of

[277] *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42

[282] Maarit Jänterä-Jareborg, 'Marital Agreements and Private Autonomy in Sweden' in Jens Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012), 388-389

[283] Maarit Jänterä-Jareborg, 'Marital Agreements and Private Autonomy in Sweden' in Jens Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012), 382

[284] Maarit Jänterä-Jareborg, 'Marital Agreements and Private Autonomy in Sweden' in Jens Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012), 379

[290] Carla Smeets and Caroliene Mellema, 'Family Law in the Netherlands: Overview' (*Practical Law*, 1 September 2017) <http://uk.practicallaw.com/4-578-1948#a440232> accessed 19 July 2018

[291] Carla Smeets and Caroliene Mellema, 'Family Law in the Netherlands: Overview' (*Practical Law*, 1 September 2017) <http://uk.practicallaw.com/4-578-1948#a440232> accessed 19 July 2018

[292] Carla Smeets and Caroliene Mellema, 'Family Law in the Netherlands: Overview' (*Practical Law*, 1 September 2017) <http://uk.practicallaw.com/4-578-1948#a440232> accessed 19 July 2018

			England and Wales	Sweden	The Netherlands
					the principle of reasonableness and fairness.'[293]
Position on separation	**Property division**	**Cohabitants**	Unregistered cohabitation does not give rise to any rights (although constructive, rather than resulting, trusts tend to be favoured as the basis for establishing an interest in property).[294] Both same sex and opposite sex couples can enter into civil partnerships,[295] which give rise to the same rights to marriage.[296]	Unregistered cohabitation gives rise to deferred community in the family home and household goods only.[297] It is no longer possible to enter into registered partnerships.[298]	Unregistered cohabitation does not give rise to any rights.[299] Both same sex and opposite sex couples can enter into registered partnerships, which are subject to the same legal regime as for married couples.[300]
		Married couples / civil partnerships / registered partnerships	There is no matrimonial property regime. Marriage, per se, does not affect property ownership. The division of property, pensions and spousal	The default marital property regime is deferred community of property.[305] When couples marry, each spouse's property becomes marital property (giftorättsgods). Each spouse	The default marital property regime until January 2018 was universal community of property[310]: • It comprised all present and future property and

[293] Katharina Boele-Woelki and Bente Braat, 'Marital Agreements and Private Autonomy in the Netherlands' in Jens Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012), 250

[294] *Stack v Dowden* [2007] UKHL 17

[295] The Civil Partnership (Opposite-sex Couples) Regulations 2019, SI 2019/1458

[296] The Civil Partnership Act 2004 predated same sex marriage, which was made possible by the Marriage (Same Sex Couples Act) 2013. Civil partnership was only been extended to opposite sex couples in December 2019.

[297] Couples in Europe, 'Couples in Sweden' (Notaries of Europe, European Notarial Network and Uni Graz, 2012) <http://www.coupleseurope.eu/en/sweden/topics> accessed 20 August 2018 and Government Offices of Sweden, 'Cohabitees and their joint homes' (*Ministry of Justice,* printed September 2017) <https://www.government.se/4ac0bb/contentassets/e95d660fd9354c139439e051fd8ed4db/cohabitees-and-their-joint-homes.pdf> accessed 2 October 2018

[298] Until 2009, same sex partners could enter into registered partnerships which gave rise to deferred community in the same way as marriage. The Act on Registered Partnership (1994:1117) was repealed when same-sex couples gained access to marriage.

[299] Couples in Europe, 'Couples in Netherlands' (Notaries of Europe, European Notarial Network and Uni Graz, 2012) < http://www.coupleseurope.eu/en/netherlands/topics> accessed 2 October 2018

[300] Dutch Civil Law, 'Dutch Civil Code' < http://www.dutchcivillaw.com/civilcodegeneral.htm> accessed 2 October 2018, Articles 180a-180g

[305] Couples in Europe, 'Couples in Sweden' (Notaries of Europe, European Notarial Network and Uni Graz, 2012) <http://www.coupleseurope.eu/en/sweden/topics>accessed 3 May 2016

[310] Couples in Europe, 'Couples in Netherlands' (Notaries of Europe, European Notarial Network and Uni Graz, 2012) < http://www.coupleseurope.eu/en/netherlands/topics> accessed 3 May 2016

			England and Wales	Sweden	The Netherlands
			maintenance are dealt with together as a single issue. There is a discretionary system of property division. The court is to have regard to the factors in s 25 Matrimonial Causes Act 1973 and case law principles of fairness[301] (made up of needs, compensation and sharing)[302] in deciding what award to make. The court has the power to make a range of financial orders.[303] These include: - Periodical payments orders - Lump sum orders - Property adjustment orders (transfer of property, settlement of property and variation of settlement orders) - Pension attachment orders	gains a right in the deferred community property after deduction of debts, when the regime is dissolved. However, each spouse continues to own his or her property throughout the marriage and to administer it alone, regardless of the type of property and how it was acquired. All debts remain a spouse's own debts. Separate property and personal property are excluded from the deferred community.[306] Section 7.2 of the Marriage Code sets out separate property, which includes gifts and inheritance which are specified to be separate.[307] Personal property includes clothing and damages for personal injuries.[308] It is possible to depart from the equal division of marital	debts from the date of the marriage.[311] • There were limited exceptions for gifts that the donor / testator decided should be excluded from community, goods and debts specifically attached to one of the spouses and pensions.[312] From January 2018, a more limited form of community applies. The new regime covers assets and debts acquired during the marriage, as well as assets owned jointly by the spouses beforehand.[313] Aside from these pre-marital communal assets and debts, pre-marital property and debts of the spouses fall outside community.[314] Assets excluded from community include those acquired by

[301] *White v White* [2000] UKHL 54
[302] *Miller v Miller : McFarlane v McFarlane* [2006] UKHL 24
[303] Matrimonial Causes Act 1973
[306] Maarit Jänterä-Jareborg, Margareta Brattström and Kajsa Walleng, 'Property relationship between spouses: National report: Sweden' (*CEFL*, October 2008) <http://ceflonline.net/wp-content/uploads/Sweden-Property.pdf> accessed 29 September 2017, 13
[307] Maarit Jänterä-Jareborg, Margareta Brattström and Kajsa Walleng, 'Property relationship between spouses: National report: Sweden' (*CEFL*, October 2008) <http://ceflonline.net/wp-content/uploads/Sweden-Property.pdf> accessed 29 September 2017, 13
[308] Maarit Jänterä-Jareborg, Margareta Brattström and Kajsa Walleng, 'Property relationship between spouses: National report: Sweden' (*CEFL*, October 2008) <http://ceflonline.net/wp-content/uploads/Sweden-Property.pdf> accessed 29 September 2017, 13
[311] P. Vlaardingerbroek, 'Family Law' in Jeroen Chorus, Piet-Hein Gerver and Ewoud Hondius (eds) *Introduction to Dutch Law* (4th edition, Kluwer Law International, 2006), 84
[312] P. Vlaardingerbroek, 'Family Law' in Jeroen Chorus, Piet-Hein Gerver and Ewoud Hondius (eds) *Introduction to Dutch Law* (4th edition, Kluwer Law International, 2006), 84
[313] Couples in Europe, 'Couples in Netherlands' (Notaries of Europe, European Notarial Network and Uni Graz, 2012) <http://www.coupleseurope.eu/en/netherlands/topics> accessed 27 May 2018
[314] Carla Smeets and Caroliene Mellema, 'Family Law in the Netherlands: Overview' (*Practical Law*, 1 September 2017 <http://uk.practicallaw.com/4-578-1948#a440232> accessed 25 February 2019

			- Pension sharing orders. Equivalent provisions apply to civil partnerships.[304]	property in marriages of less than 5 years.[309]	inheritance or gift, as well as pension rights and survivor's pensions under the Act on Equalisation of Pension Rights.[315] There are special arrangements where one of the spouses runs a business.[316] Smeets and Mellema explain: 'In general, spouses share the dissolved (limited) community of property equally. The court will only deviate from this rule when there are special circumstances and the principles of reasonableness and fairness require a deviation from the general rule.'[317]
	Pensions	**Married couples / civil partners / registered partners** (There are no provisions		There are 3 main types of pension in Sweden: state pensions, occupational pensions and individual pensions.[318] Whilst pensions are theoretically part of the deferred community regime, in	Pensions do not form part of community property in so far as they are covered by the Act on the Equalisation of Pension Entitlements at a Separation or if they may be considered an entitlement for surviving

[304] Civil Partnership Act 2004, Schedule 5, Part 5

[309] Maarit Jänterä-Jareborg, Margareta Brattström and Kajsa Walleng, 'Property relationship between spouses: National report: Sweden' (*CEFL*, October 2008) <http://ceflonline.net/wp-content/uploads/Sweden-Property.pdf> accessed 29 September 2017, 30

[315] Couples in Europe, 'Couples in Netherlands' (Notaries of Europe, European Notarial Network and Uni Graz, 2012) <http://www.coupleseurope.eu/en/netherlands/topics> accessed 27 May 2018

[316] Couples in Europe, 'Couples in Netherlands' (Notaries of Europe, European Notarial Network and Uni Graz, 2012) <http://www.coupleseurope.eu/en/netherlands/topics> accessed 27 May 2018

[317] Carla Smeets and Caroliene Mellema, 'Family Law in the Netherlands: Overview' (*Practical Law*, 1 September 2017 <http://uk.practicallaw.com/4-578-1948#a440232> accessed 19 July 2018

[318] Margareta Brattström, *Makars Pensions-Rättigheter* (Uppsala University 2004), 318

			England and Wales	Sweden	The Netherlands
		relating to unregistered cohabitants in any of the three jurisdictions)		practice the "property of a particular kind" rule means that both state and occupational pensions are excluded from community property.[319] Property of a particular kind is exempted from community. Property falls within this definition when it is nontransferable and 'some special reason exists that can justify the exemption of those rights from the division of property.'[320] According to Brattström: 'The right to a state pension is always nontransferable, and the same is often true of the right to an occupational pension as well. The notion that pension rights should safeguard entitled persons' future ability to provide for their subsistence has been deemed a special reason for exempting them from a division of	dependent.[322] This covers virtually all pension rights.[323] On divorce, regardless of the property regime in place between spouses, the Act requires the spouses to equalize all pension rights accrued during their marriage.[324] This gives each spouse an equal share in the other's pension, which claim can be made directly against the pension insurance company.[325] It is, however, possible to derogate from the terms of the Act in a nuptial agreement or divorce agreement.[326]

[319] Margareta Brattström, *Makars Pensions-Rättigheter* (Uppsala University 2004), 318
[320] Margareta Brattström, *Makars Pensions-Rättigheter* (Uppsala University 2004), 318
[322] Dutch Civil Law, 'Act on the Equalisation of Pension Entitlements after a Separation' (*DCL comment*) <http://www.dutchcivillaw.com/legislation/actequalisationpension.htm> accessed 19 July 2018
[323] Dutch Civil Law, 'Act on the Equalisation of Pension Entitlements after a Separation' (*DCL comment*) <http://www.dutchcivillaw.com/legislation/actequalisationpension.htm> accessed 19 July 2018
[324] Dutch Civil Law, 'Act on the Equalisation of Pension Entitlements after a Separation' (*DCL comment*) <http://www.dutchcivillaw.com/legislation/actequalisationpension.htm> accessed 19 July 2018
[325] Dutch Civil Law, 'Act on the Equalisation of Pension Entitlements after a Separation' (*DCL comment*) <http://www.dutchcivillaw.com/legislation/actequalisationpension.htm> accessed 19 July 2018
[326] Dutch Civil Law, 'Act on the Equalisation of Pension Entitlements after a Separation' (*DCL comment*) <http://www.dutchcivillaw.com/legislation/actequalisationpension.htm> accessed 19 July 2018

			England and Wales	Sweden	The Netherlands
				deferred community property.'[321]	
	Spousal maintenance	**Married couples / civil partners / registered partners** (There are no provisions relating to unregistered cohabitants in any of the three jurisdictions)		Maintenance is generally only possible for a transitional period, unless a spouse has difficulty in supporting him or herself after a long marriage or if there are extraordinary reasons.[327]	Maintenance can be requested by a spouse 'who has insufficient means to provide for his own maintenance and who is reasonably not able to obtain such means.'[328] The court may also take non-financial factors, such as hurtful behaviour, into account when deciding whether to grant maintenance.[329] If the maintenance is not paid for a fixed period, which cannot exceed 12 years, then it will expire after 12 years. Where the marriage has lasted for no longer than 5 years and there are no children, then the term of the maintenance cannot generally exceed the length of the marriage.[330] In both cases, the court can extend the period if bringing maintenance to an end 'has such far-reaching implications for the person entitled to it that to standards of reasonableness and fairness it cannot be expected of him to accept his ending'[331].

[321] Margareta Brattström, *Makars Pensions-Rättigheter* (Uppsala University 2004)
[327] Commission on European Family Law, 'Marriage Code of Sweden (Official translation by the Swedish Government with amendments since 1994 unofficially translated by Maarit Jänterä-Jareborg) <http://ceflonline.net/wp-content/uploads/Sweden-Divorce-Legislation.pdf> accessed 8 June 2016
[328] Dutch Civil Law, 'Dutch Civil Code' <http://www.dutchcivillaw.com/civilcodegeneral.htm> accessed 3 October 2018, Article 1:157
[329] Carla Smeets and Caroliene Mellema, 'Family Law in the Netherlands: Overview' (*Practical Law*, 1 September 2017 <http://uk.practicallaw.com/4-578-1948#a440232> accessed 19 July 2018
[330] Dutch Civil Law, 'Dutch Civil Code' <http://www.dutchcivillaw.com/civilcodegeneral.htm> accessed 3 October 2018, Article 1:157
[331] Dutch Civil Law, 'Dutch Civil Code' <http://www.dutchcivillaw.com/civilcodegeneral.htm> accessed 3 October 2018, Article 1:157

			England and Wales	Sweden	The Netherlands
					The amount of maintenance is determined by taking into account the needs of the recipient and the payer's ability to pay.[332] The Working Party of the Dutch Association for the Administration of Justice publishes an annual report (the 'Trema Standards') which contains recommendations for the calculation of maintenance.[333] Although not binding on judges, they are widely used in practice.[334] In cases where both spousal and child maintenance are appropriate, child maintenance takes priority over spousal maintenance.[335] Spousal maintenance cannot be capitalised, except by agreement between the parties.[336]
	Child maintenance	**Married couples / civil partners / registered partners**	Where the payer is the biological parent, the position is the same as for cohabitants (see below). It is also possible for step-parents to be ordered to provide	Child support is payable by the non-resident parent to the resident parent. It is intended to be used for 'the child's housing,	Parents must provide for costs of care and upbringing of their children, in accordance with their financial capacity.[344] The following factors are used to calculate child maintenance:

[332] Dutch Civil Law, 'Dutch Civil Code' <http://www.dutchcivillaw.com/civilcodegeneral.htm> accessed 3 October 2018, Article 1:397
[333] Katharina Boele-Woelki, Olga Cherendychenko and Lieke Coenraad, 'Grounds for divorce and maintenance between former spouses: the Netherlands' (*CEFL*, September 2002) <http://ceflonline.net/wp-content/uploads/Netherlands-Divorce.pdf> accessed 19 July 2018, 33
[334] Katharina Boele-Woelki, Olga Cherendychenko and Lieke Coenraad, 'Grounds for divorce and maintenance between former spouses: the Netherlands' (*CEFL*, September 2002) <http://ceflonline.net/wp-content/uploads/Netherlands-Divorce.pdf> accessed 19 July 2018, 33
[335] Carla Smeets and Caroliene Mellema, 'Family Law in the Netherlands: Overview' (*Practical Law*, 1 September 2017) <http://uk.practicallaw.com/4-578-1948#a440232> accessed 19 July 2018
[336] Carla Smeets and Caroliene Mellema, 'Family Law in the Netherlands: Overview' (*Practical Law*, 1 September 2017 <http://uk.practicallaw.com/4-578-1948#a440232> accessed 19 July 2018
[344] Dutch Civil Law, 'Dutch Civil Code' <http://www.dutchcivillaw.com/civilcodegeneral.htm> accessed 4 October 2018, Article 1:404

			England and Wales	Sweden	The Netherlands
			financial support (both income and capital claims are available) in some circumstances.[337]	food and leisure interests.'[338] Parents must agree the amount payable themselves, but a calculator is available to assist them 'to get an idea of what is reasonable to pay'.[339] This takes into account both parents' incomes and calculations performed by the Swedish Consumer Agency of the expenses associated with children of particular ages.[340] Singer explains the approach to maintenance under the Parental Code as follows: '… parents are to provide maintenance for the child according to what is reasonable having regard to the needs of the child and their collected resources. This	- the child's needs – which can be calculated based on charts drawn up by the Dutch National Institute for Family Finance Information (Nationaal Instituut voor Budgetvoorlichting (NIBUD)[345] - Each parent's financial means / ability to pay – the formula for calculating this is based on the Tremanormen.[346] - Caretaking reduction – if the parents earn enough to meet the child's needs then a reduction is applied based on the average numbers of days a week the child spends with the
		Cohabitants	A cohabiting parent will only have a financial responsibility to the child if they are a biological parent. Parents are encouraged to make private arrangements. The Child Maintenance Service charges for both a calculation of the child support liability and for arranging collection. A statutory formula based on fixed percentages of the payer's income is used if collection is through the state.		

[337] Matrimonial Causes Act 1973, Part II and Children Act 1989, Schedule 1

[338] Försäkringskassan, 'Child support when the child lives with you' <https://www.forsakringskassan.se/privatpers/foralder/for_foraldrar_som_inte_lever_ihop/barnet_bor_hos_dig/underhallsbidrag_nar_barnet_bor_hos_dig/!ut/p/z0/fYxNawIxEIZ_zZ4ngX543SpYFC-rUJvLkK3j7tQ4iZN06c83CJ4Eb88Lz_OCgz048RMPvnAUH-r-dm_48rmY2-XcrGevO2vazey97eyH3XYWtiSwAvdcqi_8e7m4FtxPlEL_BfY3kJIJlXKKknmixiTlyZdEmhtzjOrDgfRO6hVzPCPXEANNpMhjTI3pvQoV7KPiGDMeeGjMn9Ry9CHknms5oNT6UYR0Wn5dARsIT bw!/> accessed 20 August 2018

[339] Försäkringskassan, 'Child support when the child lives with you' <https://www.forsakringskassan.se/privatpers/foralder/for_foraldrar_som_inte_lever_ihop/barnet_bor_hos_dig/underhallsbidrag_nar_barnet_bor_hos_dig/!ut/p/z0/fYxNawIxEIZ_zZ4ngX543SpYFC-rUJvLkK3j7tQ4iZN06c83CJ4Eb88Lz_OCgz048RMPvnAUH-r-dm_48rmY2-XcrGevO2vazey97eyH3XYWtiSwAvdcqi_8e7m4FtxPlEL_BfY3kJIJlXKKknmixiTlyZdEmhtzjOrDgfRO6hVzPCPXEANNpMhjTI3pvQoV7KPiGDMeeGjMn9Ry9CHknms5oNT6UYR0Wn5dARsIT bw!/> accessed 20 August 2018

[340] Försäkringskassan, 'Child support when the child lives with you' <https://www.forsakringskassan.se/privatpers/foralder/for_foraldrar_som_inte_lever_ihop/barnet_bor_hos_dig/underhallsbidrag_nar_barnet_bor_hos_dig/!ut/p/z0/fYxNawIxEIZ_zZ4ngX543SpYFC-rUJvLkK3j7tQ4iZN06c83CJ4Eb88Lz_OCgz048RMPvnAUH-r-dm_48rmY2-XcrGevO2vazey97eyH3XYWtiSwAvdcqi_8e7m4FtxPlEL_BfY3kJIJlXKKknmixiTlyZdEmhtzjOrDgfRO6hVzPCPXEANNpMhjTI3pvQoV7KPiGDMeeGjMn9Ry9CHknms5oNT6UYR0Wn5dARsIT bw!/> accessed 20 August 2018

[345] Carla Smeets and Caroliene Mellema, 'Family Law in the Netherlands: Overview' (*Practical Law*, 1 September 2017 <http://uk.practicallaw.com/4-578-1948#a440232> accessed 19 July 2018

[346] Carla Smeets and Caroliene Mellema, 'Family Law in the Netherlands: Overview' (*Practical Law*, 1 September 2017 <http://uk.practicallaw.com/4-578-1948#a440232> accessed 19 July 2018

			England and Wales	Sweden	The Netherlands
			Where a parent's income exceeds £156,000 per annum (gross) the parent with care can apply to the court for top up provision.[350]	means that each parent should have a share in the costs for the child proportional to his or her economic ability.'[341] No child maintenance is payable if there is shared custody.[342] Thus, this is an exception to the main rule that the child's costs are divided between the parents in accordance to their economic ability.[343]	parent paying maintenance.[347] There are two methods of reaching agreement. 1. Agreement between the parents recorded in the divorce agreement. 2. If the parents cannot agree, the court will determine an equitable maintenance obligation.[348] The National Bureau for the Collection of Maintenance Payments (LBIO) can be used to collect child maintenance if the debtor refuses to pay.[349]
	Post separation child arrangements	**Married couples / civil partners / registered partners**	Where parents are married, both of them automatically have parental responsibility[351] ('all the rights, duties, powers, responsibilities and authority which by law a parent of a child	Where parents are married, there is automatic joint custody of any child born during the marriage.[356] If parents separate, joint custody will continue.[357] [358]	The general principle is that parents have joint custody while they are married / in a registered partnership.[360] Parents who have joint authority over children during their marriage will continue to have

[350] Children Act 1989, Schedule 1
[341] Anna Singer, 'Active Parenting or Solomon's Justice - Alternating Residence in Sweden for Children with Separated Parents' (2008) 4 Utrecht Law Review 35, 43
[342] Anna Singer, 'Active Parenting or Solomon's Justice - Alternating Residence in Sweden for Children with Separated Parents' (2008) 4 Utrecht Law Review 35
[343] Anna Singer, 'Active Parenting or Solomon's Justice - Alternating Residence in Sweden for Children with Separated Parents' (2008) 4 Utrecht Law Review 35, 44
[347] Carla Smeets and Caroliene Mellema, 'Family Law in the Netherlands: Overview' (*Practical Law*, 1 September 2017 <http://uk.practicallaw.com/4-578-1948#a440232> accessed 19 July 2018
[348] Anouk Mullenders, 'FAQ's about maintenance payments' (*Leeman Verheijden Huntjens Advocaten Rotterdam*, 2 May 2016) <http://www.lvh-advocaten.nl/en/faqs-about-maintenance-payments/> accessed 4 October 2018
[349] European e-Justice, 'Maintenance claims - Netherlands' (*European Judicial Network,* last updated 12 September 2018) <https://e-justice.europa.eu/content_maintenance_claims-47-nl-en.do?member=1#toc_10> accessed 4 October 2018
[351] Children Act 1989, s 2(1)
[356] Laura Carlson, *Fundamentals of Swedish Law* (2nd edition, studentlitteratur Ab 2012), 218-219
[357] Laura Carlson, *Fundamentals of Swedish Law* (2nd edition, studentlitteratur Ab, 2012), 220
[358] Note that 'custody' relates to legal decision making, and 'joint custody' does not necessarily entail shared time with children. See further chapter 5(i).
[360] Carla Smeets and Caroliene Mellema, 'Family Law in the Netherlands: Overview' (*Practical Law*, 1 September 2017 <http://uk.practicallaw.com/4-578-1948#a440232> accessed 19 July 2018

			England and Wales	Sweden	The Netherlands
			has in relation to the child and his property'[352]). Arrangements concerning where a child is to live and who the child is to spend time with are governed by the best interests of the child.[353] The court is directed to consider the following factors[354]: (a)the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding); (b)his physical, emotional and educational needs; (c)the likely effect on him of any change in his circumstances; (d)his age, sex, background and any characteristics of his which the court considers relevant;	Carlson describes the approach to child arrangements in Sweden as follows: 'The best interests of the child are to be decisive with respect to all decisions concerning custody, residence and visitation. The wishes of the child are to be considered in such decisions, taking into account the age and degree of maturity of the child. In assessing what is in the best interests of the child, particular weight is to be given to any risk that the child or another person in her family could be exposed to violence or that the child could be unlawfully taken or otherwise harmed, as well as the child's need for close and good contact with both parents.'[359]	joint authority after their marriage ends.[361] [362] It is possible for either parent to apply to the court for sole authority over the child if there is 'an unacceptable risk that the child would get lost or jammed between the parents and it is not to be expected that this situation will sufficiently improve within a foreseeable period of time' or 'for another reason a change in authority over the child is necessary in the best interest of the child.'[363] Where only one parent has custody, the other can apply to the court for contact.[364] Contact can only be refused if: - such contact would seriously harm the mental or physical development of the child, or

[352] Children Act 1989, s 3
[353] Children Act 1989, s1
[354] Children Act 1989, s 1(3)
[359] Laura Carlson, *Fundamentals of Swedish Law* (2nd edition, studentlitteratur Ab, 2012), 219
[361] Carla Smeets and Caroliene Mellema, 'Family Law in the Netherlands: Overview' (*Practical Law*, 1 September 2017 <http://uk.practicallaw.com/4-578-1948#a440232> accessed 19 July 2018
[362] Custody or parental authority 'comprises the duty and right of the parent to care for and raise his minor child'. The words 'care for and raise', 'including caring and taking responsibility for the mental and physical welfare and safety of the child and promoting the development of his personality'. (Dutch Civil Law, 'Dutch Civil Code' <http://www.dutchcivillaw.com/civilcodegeneral.htm> accessed 10 December 2019, Article 1:247). According to Smeets and Mellema, '[t]manner in which parents exercise their (joint) parental authority depends on their own discretion. The law does not include detailed rules on this matter.' (Carla Smeets and Caroliene Mellema, 'Family Law in the Netherlands: Overview' (*Practical Law*, 1 September 2017 <http://uk.practicallaw.com/4-578-1948#a440232> accessed 10 December 2019)
[363] Dutch Civil Law, 'Dutch Civil Code' <http://www.dutchcivillaw.com/civilcodegeneral.htm> accessed 8 January 2019, Article 1:251a
[364] Carla Smeets and Caroliene Mellema, 'Family Law in the Netherlands: Overview' (*Practical Law*, 1 September 2017 <http://uk.practicallaw.com/4-578-1948#a440232> accessed 19 July 2018

			England and Wales	Sweden	The Netherlands
			(e)any harm which he has suffered or is at risk of suffering; (f)how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; (g)the range of powers available to the court under this Act in the proceedings in question. The court is also directed 'to presume, unless the contrary is shown, that the involvement of [both parents] in the life of the child concerned will further the child's welfare.'[355]		- the parent or the person with whom the child maintains a close personal relation is obviously incapable or clearly not in a position to have contact with the child, or; - the child who has reached the age of twelve years expressed at its hearing before the court that it has serious objections against having contact with his parent or the person with whom it maintains a close personal relation, or; - such contact is otherwise in conflict with significant interests of the child.[365]
		Cohabitants	Where the parents are not married, the mother will automatically have parental responsibility.[366] The father will have parental responsibility if he is named on the birth certificate,[367] the parents make a parental responsibility	Where the parents are not married, the mother automatically has custody.[370] Where parents are unmarried, they can obtain joint custody by way of court order or by registering with the tax authority.[371] If the mother does not support the application, the	If cohabiting parents exercise joint authority (including joint custody) outside of a matrimonial relationship, this will continue after they separate. If only the mother has custody then this will continue after separation. However, if the father has acknowledged paternity, he can ask the District

[355] Children Act 1989, s 1(2A)
[365] Dutch Civil Law, 'Dutch Civil Code' <http://www.dutchcivillaw.com/civilcodegeneral.htm> accessed 4 October 2018, Article 1:377a
[366] Children Act 1989, s 2(a)
[367] Children Act 1989, s 4(1)(a)
[370] Laura Carlson, *Fundamentals of Swedish Law* (2nd edition studentlitteratur Ab, 2012), 219
[371] Maarit Jänterä-Jareborg, Anna Singer and Caroline Sörgjerd, 'Parental Responsibilities - Sweden' (*Commission on European Family Law*) <http://ceflonline.net/wp-content/uploads/Sweden-Parental-Responsibilities.pdf> accessed 20 August 2018

			England and Wales	Sweden	The Netherlands
			agreement[368] or the court orders it.[369] The position with respect to where the child is to live / spend time is the same as for married couples.	father will need to apply to court to obtain custody.[372] The position in respect of residence and visitation is the same as for married couples.	court to grant him custody of the child.[373] The position with respect to contact is the same as for married couples.

[368] Children Act 1989, s 4(1)(b)
[369] Children Act 1989, s 4(1)(c)
[372] Maarit Jänterä-Jareborg, Anna Singer and Caroline Sörgjerd, 'Parental Responsibilities - Sweden' (*Commission on European Family Law*) <http://ceflonline.net/wp-content/uploads/Sweden-Parental-Responsibilities.pdf> accessed 20 August 2018
[373] Carla Smeets and Caroliene Mellema, 'Family Law in the Netherlands: Overview' (*Practical Law*, 1 September 2017 <http://uk.practicallaw.com/4-578-1948#a440232> accessed 19 July 2018

4(i) Sweden: Autonomy and gender equality

4(i).1 Introduction

This chapter considers the role of, and understandings of, autonomy in Sweden (RQ 1.a). As discussed in the introduction to Chapter 4, it is crucial in understanding approaches to autonomy in Sweden to recognise the central role of efforts to achieve gender equality within Swedish society. The discussion in Chapters 1 and 2 suggested that neoliberal ideas of autonomy in family law are problematic because they fail to recognise the reality of caretaking responsibilities. The Swedish experience, discussed in this chapter and Chapter 5(i), therefore provides a perspective on whether in a more gender equal society neoliberal autonomy might prove less problematic as a guiding principle of family law. If the costs of caretaking can be more equally shared between parents, might both be more able to achieve the sort of economic independence envisaged by neoliberal autonomy when they separate?

This chapter begins by exploring the Swedish vision of gender equality to provide context for the discussion of autonomy that follows. That discussion unpacks the meaning of autonomy in Sweden by considering how autonomy is reflected in the features of the family law regime. In doing so, it combines the findings of participant interviews with a doctrinal and theoretical analysis.

4(i).2 Gender equality and Swedish identity

Sweden is a forerunner of gender equality worldwide. It topped the EU Gender Equality Index in 2017,[374] and has never finished lower than fourth in the Annual Gender Gap Report introduced by the World Economic Forum.[375] Gender equality has previously been described on the official website of Sweden as 'one of the cornerstones of Swedish society.'[376] Further, the website displays the link to the 'Gender equality in Sweden'[377] webpage prominently on its home page.[378] It describes the 'Swedish approach to gender equality' as follows:

[374] Government Offices of Sweden, 'Sweden Best in the EU on gender equality' (11 October 2017) <http://www.government.se/press-releases/2017/10/sweden-best-in-the-eu-on-gender-equality/> accessed 5 October 2018

[375] The Official Site of Sweden, 'Gender Equality in Sweden' (last updated 10 April 2019) <https://sweden.se/society/gender-equality-in-sweden/> accessed 17 October 2019

[376] The Official Site of Sweden, 'Gender Equality in Sweden' (last updated 28 June 2018) <https://sweden.se/society/gender-equality-in-sweden/> accessed 5 October 2018

[377] The Official Site of Sweden, 'Sweden and gender equality' (last updated 20 August 2018) <https://sweden.se/society/gender-equality-in-sweden/> accessed 15 July 2019

[378] The Official Site of Sweden. 'Sweden' <https://sweden.se/p1/> accessed 5 October 2018

> The overarching Swedish principle for gender equality is that everyone, regardless of gender, has the right to work and support themselves, to balance career and family life, and to live without the fear of abuse or violence.
>
> Gender equality implies not only equal distribution between men and women in all domains of society. It is also about qualitative aspects, ensuring that the knowledge and experience of both men and women are used to promote progress in all aspects of society.[379]

Towns[380] has suggested that in addition to its centrality in society, gender equality is central to Swedish identity:

> In the 1990s, not only did gender equality emerge as a key component of Swedish state identity, helping differentiate the Swedish state from other states, it also became central in the ongoing construction of "Swedes" and their various "immigrant" others among those living within Swedish state borders.[381]

This trend is also noted by Griffin et al who refer to the 'mythical mantra of gender equality as a Swedish national trait'.[382] This idea finds some support in the interviews conducted with Swedish lawyers for this project, albeit that the small number of interviews means that it is not possible to generalise from these statements. Anna, for example, talked about the extent to which fathers wanted to be actively involved in their children's lives and suggested that the position in Sweden was different to that elsewhere:

> No, so it's, it's a little bit hard to, like, but I think it's, uh, maybe in, in like, difference to other countries, uh, like, par- or like fathers in, anyway my

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[379] The Official Site of Sweden, 'Gender Equality in Sweden' (last updated 10 April 2019) <https://sweden.se/society/gender-equality-in-sweden/> accessed 17 October 2019

[380] Ann Towns, 'Paradoxes of (In)Equality: Something is Rotten in the Gender Equal State of Sweden' (2002) 37 Journal of the Nordic International Studies Association 157, 165

[381] Ann Towns, 'Paradoxes of (In)Equality: Something is Rotten in the Gender Equal State of Sweden' (2002) 37 Journal of the Nordic International Studies Association 157, 165

[382] Lena Martinsson, Gabriele Griffin, Katarina Giritli-Nygren, 'Introduction' in Lena Martinsson, Gabriele Griffin and Katarina Giritli Nygren (eds) *Challenging the myth of gender equality in Sweden* (Polity Press 2016), 9

> generation, really want to be home with the kids. And have like the opportunity to be home for a couple of months, anyway, in the beginning of the child's life. So, I think that's pretty good. Ja.
> (**Anna, Lawyer, Sweden**)

Anna draws a direct contrast between the position of fathers in Sweden and 'other countries'. The suggestion is that Swedish fathers want to be more actively involved with their children than fathers elsewhere. There has been a concerted effort through policy initiatives to try and encourage men to take a greater share of domestic responsibilities. This is most obvious in the shared parental leave provisions in which three months of leave are reserved to each parent (see further in Chapter 5(i)). It is, however, notable that Anna describes this desire as 'to be home for a couple of months, anyway' rather than a complete sharing of caretaking responsibilities as such. This suggests that despite the focus on gender equality in Swedish society, there is at least some awareness that the roles of men and women remain different. This is consistent with the different positions of men and women in Swedish society, which will be discussed in more detail in Chapter 5(i).

The second dimension of gender equality as part of Swedish identity, the idea that it separates Swedes from immigrants, was evident in Eric's interview, where he commented on the particular difficulties faced by immigrant families on divorce:

> … The problem we have really is that a lot of... foreigners coming here. Or newly, new Swedes or whatever you wanna call them. Uh, come from countries with different cultures which means that the, the man is supposed to, uh, totally economically and otherwise, support the whole family and his spouse. When they come to Sweden, they find themselves marginalised, language-wise, um, economically-wise, because they tend to live their lives as they used to do in the country where they derived from, so to speak. So that's a, can be a very tough awakening for those women.

> So in that sense, this system is not, um, aligned, with the current situation…. But they haven't taken in this to, to consideration. And, then suddenly they want to divorce here….
>
> Then we have, uh, they are facing the Swedish way of thinking with, which is, uh, uh, self-support, get a job, and, and, um, and that could be tough. If you, sort of, you know, are married woman coming here – There are, this is ninety, over ninety-five per cent women I'm talking about now, the woman, the women's situation. And they comes here, and they don't find, if they don't, if they go into that culture, they don't find any purpose of education, finding a job, stuff like that. But things change over time.
> (**Eric, Lawyer, Sweden**)

This illustrates a particular concern for the position of women coming from other cultures where women are not expected to work. This extract does not brand Swedish culture as superior, or as more gender equal, but in light of the pervasive culture of gender equality in Sweden it is possible to read the extract in this way. Eric's interview highlights the very real difficulty that traditional gender roles cause for women in Swedish society, particularly on divorce. Society is arranged around a different ideal that expects all adults to engage in paid work. However, the stark example of the position of immigrant women may serve to disguise the extent to which inequalities exist between men and women who are native Swedes. Clara, for example, commented that 'since everybody works in Sweden and has been since the fifties, [the very limited availability of spousal maintenance is] not a big issue.' Whilst, as Ebbe explained, '[u]sually, it's kind of a luxury to be able to stay at home', this does not mean that mothers and fathers have the same sort of working patterns:

> … it's not that common that someone in Sweden are like a stay at home mum. Uh, but is some cases, or like most people in Sweden… the female are earning a lot less than the male. And then, or it becomes like, uh, when… you have children, you always, almost, have the wife stay home.
> (**Anna, Lawyer, Sweden**)

…even though Sweden is much more… um… equal… when it comes to day-care, the child and so on, still we can see that there is, a, um… difference between women and men.
(**Filippa, Lawyer, Sweden**)

These differences are reflected in societal differences between men and women. Sweden's gender pay gap, whilst lower than that in England and Wales and the Netherlands, was 13.3% in 2016.[383] As will be discussed in Chapter 5(i), there are also differences in the work undertaken by men and women, with women much more likely to work part-time, and to undertake a greater share of unpaid work. Whilst there are no direct figures on the relative incomes of men and women following separation,[384] the continued existence of the gender pay gap described above may be indicative of a similar position to that in the UK. Further, on average women's pension incomes in Sweden in 2016 were around 68% of men's.[385] It is, however, important to note that pension income figures relate to those over 65 who lived through many of the measures designed to achieve greater gender equality, and who may not have benefitted fully from them. Nevertheless, the continued existence of gender differences in working patterns makes it likely that the gap will continue in some form, albeit perhaps a reduced one.

Some participants recognised the effects of these gender differences in society on women's position following separation. Bertil, for example, commented that the rules on spousal maintenance were part of 'the brutal world that hits back, normally on women'.[386] More widely recognised was the fact that family law did little to address a situation in which one party's income had been much reduced by caretaking responsibilities. As Bertil explained, 'what is done is done. And it won't be repaired by the law system.'

[383] European Commission, '2018 Report on equality between women and men in the EU' (*Justice and Consumers,* 2018) <ec.europa.eu/newsroom/just/document.cfm?doc_id=50074> accessed 5 October 2018
[384] Email from Hans Heggermann of Statistics Sweden to Author (6 December 2017)
[385] Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2018' (*SCB,* 2018) <https://www.scb.se/contentassets/4550eaae793b46309da2aad796972cca/le0201_2017b18_br_x10br1801eng.pdf> accessed 17 October 2019, 86
[386] These rules will be discussed in more detail further below, but in short spousal maintenance is very rare in Sweden.

4(i).3 Gender equality and understandings of autonomy

Understanding the role of gender equality in Swedish society is vital in trying to unpick understandings of autonomy. Gender equality in Sweden started with efforts to get women into work on more equal terms to men.[387] However, the Swedish approach to fairness, outlined above, has been described by Lewis and Åström as 'significantly different from the "equal to men" formulation'.[388] The idea of women having dual roles[389] as mother and worker, has been influential and 'the Swedish equal opportunities strategy has involved, first, defining all adults as workers and providing incentives to ensure that women enter the labour market and, second, providing compensation to women and men for lost earnings with generous recognition of the needs of parents'.[390]

The complexity of gender equality in Sweden has implications for understandings of autonomy. There is a clear state objective to encourage all parents to work and this does not seem to have changed since the early 1990s when Lewis and Åström observed that 'it is still not clear that women are in a position to make a genuine choice between paid and unpaid work'.[391] Autonomy, therefore, does not involve an unconstrained choice about how to live one's life. Adults are expected to be workers:

> …between the lines, in very much of the Swedish legislation, uh, since the sixties I should say that, um, both men and women should get out and work. It's um, it's a political decision that is, um, that has affect [sic] very many laws.
>
> (**Bertil, Lawyer, Sweden**)

Thus, autonomy does not mean the freedom to live one's own version of the good life. Whilst there is recognition of the value of caretaking through the generous

[387] Lena Martinsson, Gabriele Griffin, Katarina Giritli-Nygren, 'Introduction' in Lena Martinsson, Gabriele Griffin and Katarina Giritli Nygren (eds) *Challenging the myth of gender equality in Sweden* (Polity Press 2016), 9

[388] Jane Lewis and Gertrude Åström, 'Equality, Difference and State Welfare: Labor Market and Family Policies in Sweden' (1992) 18 Feminist Studies 59, 65

[389] Jane Lewis and Gertrude Åström, 'Equality, Difference and State Welfare: Labor Market and Family Policies in Sweden' (1992) 18 Feminist Studies 59 and Jet Bussemaker, 'Recent Changes in European Welfare State Services: A Comparison of Child Care Politics in the United Kingdom, Sweden, Germany and the Netherlands' 1997 Program for the Study of Germany and Europe 7.6 <http://aei.pitt.edu/63647/> accessed 29 November 2016

[390] Jane Lewis and Gertrude Åström, 'Equality, Difference and State Welfare: Labor Market and Family Policies in Sweden' (1992) 18 Feminist Studies 59, 72

[391] Jane Lewis and Gertrude Åström, 'Equality, Difference and State Welfare: Labor Market and Family Policies in Sweden' (1992) 18 Feminist Studies 59, 61

system of parental leave, paid work is ultimately the aspiration (see further Chapter 5(i)).

Autonomy does offer freedom of choice when it comes to leaving a marriage. As Sörgjerd explains:

> In the 1970s, the political idea of achieving equality between men and women became more than just a legally established principle. The principle of equality gained ground also in the everyday customs of the Swedes. Ideas and values relating to marriage… were explicitly expressed through… enactments dealing with conclusion and dissolution of marriage and spousal maintenance after divorce. Through the law reforms of the 1970s, the spouses' autonomy in marriage increased, the basic idea being that the spouses were the best judges to decide matters concerning their own personal life, for instance in respect of deciding if their marriage should continue or be dissolved.[392]

Autonomy also means the freedom to move on with one's life free from ongoing financial claims by a former partner; spousal maintenance and pensions claims are very limited. It is, therefore, a conception that is particularly valuable to the financially stronger party. Autonomy is not, however, synonymous with self-sufficiency. A party who cannot support him- or herself financially has recourse to the state. Thus, Booth reports on his interview with Henrik Beggren,[393] in which the latter explained Swedish autonomy as follows:

> Sweden's "statist individualism", as he terms it, enables the very purest form of wholly independent love to blossom between two people. Wives don't stick around because their husband keeps the joint bank account pin code locked in a drawer in his desk, and husbands don't hold their tongues because their wife's father owns the mill… "…The main objective is not to be dependent on your family, the wife shouldn't be dependent on the husband, the children should be autonomous when they are eighteen, old people should not be dependent on their children taking care of them, and

[392] Caroline Sörgjerd, *Reconstructing Marriage* (Intersentia 2012), 91
[393] A Swedish Historian and journalist

> therefore to a large extent the state steps in and provides these things…"[394]

This understanding of autonomy means that there is protection for everyone. Unlike the position in England and Wales, where those who cannot afford legal advice are left in a potentially precarious position, this level of state support provides a safety net for all. However, the standard of living provided by the state is unlikely to be equivalent to that enjoyed by wealthier parties during their marriage. Thus, in such cases it is the breadwinner who benefits. This makes sense in the Swedish context where the state emphasises paid work. Nevertheless, the fact remains that even in Sweden the division of work and caretaking is gendered (see further Chapter 5(i)).

Despite the influence of individual autonomy described above, an idea of marriage premised on individual autonomy has not completely replaced the pre-1970s position in Sweden. Carlson describes the obligations of marriage as follows:

> Certain rights and obligations as between the spouses are set out in the first chapter of the Marriage Code. Under this chapter, spouses are to show each other faithfulness and respect, and together take care of the home and children, consulting with each other and working for the best interest of the family. Each spouse is to own her own property and be liable only for her own debts. The spouses are to divide any expenses and tasks between them, and if necessary, provide each other with the information necessary to assess the family's financial situation.[395]

The law in Sweden, therefore, illustrates a tension in understandings of marriage which seems akin to what Glendon described as the 'eternal tension in matrimonial law, in social attitudes, and in every marriage between the community of life that marriage involves and the separate, autonomous existence of the individuals who are associated in this community of life.'[396] On the one

[394] Michael Booth, *The Almost Nearly Perfect People* (Random House 2014), 360
[395] Laura Carlson, *Fundamentals of Swedish Law* (2nd edition, studentlitteratur Ab 2012), 201-2
[396] Mary Ann Glendon, 'Is there a Future for Separate Property?' (1974) 8 Family Law Quarterly 315, 324

hand, the obligations set out in the first chapter of the Marriage Code, which are not legally enforceable but are ‘policy declarations’,[397] reveal an expectation that spouses will work together and share expenses. This understanding of marriage as a mutual project, accompanied by a more relational view of autonomy, is consistent with the deferred community of property regime. This will be discussed in more detail below, but in short, the regime gives each spouse a right to claim half of the net value of the marital property at the end of the marriage. On the other hand, as discussed above, ideas of individual autonomy are also central to understandings of marriage in Sweden. For example, divorce is not based on fault, and if the divorce is by mutual consent then it can take place ‘as quickly as the court system allows’.[398] A waiting period of 6 months is imposed if there are children involved.[399] Thus, marriage is not necessarily seen as a union for life. Rather, as Sörgjerd describes, it is a relationship between ‘two independent individuals with autonomous rights and needs, equally competent to make decisions concerning their marriage’.[400] These different visions of autonomy are reflected in different features of the family law regime, discussed in the sections that follow.

4(i).4 Autonomy in the family law framework

4(i).4.1 Private ordering

As in England and Wales, private ordering is an important aspect of autonomy in Sweden and seems to be linked to an individualised view of autonomy. Much of the support for the Swedish system of financial remedy claims seems to derive from its perceived simplicity, which assists private ordering. The deferred community of property regime in particular is seen as a private matter. As Jänterä-Jareborg explains, ‘[t]he division of property is primarily a private transaction to be performed by the spouses without the involvement of any public authorities’.[401] Research also suggests that private ordering without legal advice is common in family situations.[402] The simplicity of the regime, which, in outline, involves an equal division of marital property between spouses at the end of their

[397] Laura Carlson, *Fundamentals of Swedish Law* (2nd edition, studentlitteratur Ab 2012), 201, Fn 2
[398] Laura Carlson, *Fundamentals of Swedish Law* (2nd edition, studentlitteratur Ab 2012), 206
[399] Laura Carlson, *Fundamentals of Swedish Law* (2nd edition, studentlitteratur Ab 2012), 206
[400] Caroline Sörgjerd, *Reconstructing Marriage* (Intersentia 2012), 124
[401] Maarit Jänterä-Jareborg, 'Marital Agreements and Private Autonomy in Sweden' in Jens Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012), 376
[402] Margareta Brattström, ‘Bodelning mellan makar – verklighetens betydelse för framtidens regelutformning’ (Särtryck från Tidskrift for Familierett, Arverett og Barnevernsrettslige Spørsmål (FAB), 2011) (translated using Google translate)

relationships, is seen as an important element in making this possible. As Brattström explains:

> In Sweden, simplicity has also been an important reason for the comprehensive set of rules concerning division of property: by dividing up everything, one avoids the problem – among others – of proving ownership of what is to be shared.[403]

This ethos received support from some participants. For example, Ebbe felt that the basic rule of a 50:50 decision was a good one because it provided a starting point: 'if you don't want it, you can change it'. For Clara, because the 'basic assumption is that, you're supposed to work' and that is was 'very rare' that one party did not, 'normally the pure partition of goods, ensure that the one person gets to live quite comfortably anyway'. However, the underlying assumption that couples have knowledge of the regime or that it was simple to apply was not reflected in all interviews:

> … I think most people maybe don't, are aware that all, like, everything, will be divided if you separate, uh, or if you get divorced. Um, like maybe when you… are, uh, not married and just cohabiting. I don't think people understand that if you buy like an apartment together, uh, and then you separate, that if you… but this apartment to, uh, live together in it, that's, uh, a property that can be divided…
> (**Anna, Lawyer, Sweden**)

> The ignorance of what the law actually does and doesn't is quite, it's increasing… And especially by the young people. They don't have a clue what they're doing when they do to be cohabitants… or if they go into marriage…
> (**Eric, Lawyer, Sweden**)

[403] Margareta Brattström, 'Spouses' Pension Rights & Financial Settlement after Divorce', *Scandinavian Studies in Law* (Social Private Law, Volume 50), 334

> [People wrongly think that the position for cohabitants and spouses is the same]. It is and it isn't. But I think… we are telling so much about it in, in the media and, uh, everywhere… I find it very odd that they… can think so… but people do.
> (**Gunilde, Lawyer, Sweden**)

Even if it is the case that people fail to understand the financial implications of their relationships when they enter them, it does not necessarily detract from the idea that simple rules facilitate private ordering on separation. However, Eric and Anna suggested that the growth in asset values in recent years may have increased the role of lawyers in financial arrangements on separation.[404] The data also lend some support to the idea that the real benefit of the rules may lie not so much in people's ability to apply them for themselves as in the avoidance of conflict. For example, Clara said of the rules on spousal maintenance 'I do think we do avoid a lot of angry, uh, going to court'. Likewise, when Ebbe discussed the scenario question relating to cohabitants (see Appendix 5), she explained that she would advise clients not to bother about assets that did not form part of the community: 'So don't fight about those things because it's not worth fighting for. Because it's not included in the dividing. Of assets.'

The strong emphasis on private ordering and conflict avoidance assumes two autonomous individuals who are equally placed to negotiate. However, where there is a significant difference in the financial position of two parties it is the stronger party who benefits from the maintenance of the status quo. Autonomy, in the sense of independence of a former partner or financial self-sufficiency, only works to the extent that this vision is practically possible. Where independence of a partner entails dependence on the state, autonomy for the weaker party is more limited.

As in England and Wales, another important aspect of the trend towards private ordering in Sweden is the use of pre-nups. Swedish law is, however, much less restrictive than English law in terms of safeguards:

[404] Eric referred to this phenomenon specifically in the context of the division of community, whereas Anna made the suggestion in the context of conveyancing transactions.

> A marital property agreement which meets the requirements of form and substance is normally respected, even in situations where its effect is that one of the spouses may need to leave a wealthy home empty-handed.[405]

Once again, this must be understood in the context of more generous welfare state provision. As Jänterä-Jareborg explains, '[i]f the spouse is in true need of support, social welfare benefits are available to him or her.'[406] The requirements as to form and substance are, however, relatively limited:

> To be valid, a marital property agreement must be drawn up in writing, and signed by both spouses or future spouses. In addition, the agreement must be registered by a competent authority.[407]

There is no requirement for legal advice or financial disclosure, nor, as made clear above, that the agreement meets a spouse's needs. Thus, in Sweden a pre-nup could serve to reduce the community in marriage to nothing more than the unenforceable duties set out in chapter 1 of the Marriage Code during the marriage. Where spouses are seen to be autonomous individuals equally capable of making responsible decisions, and where there is a state safety net, this can be viewed as unproblematic:

> … There is no perfect system. Uh, and that – There I think, we need to take more responsibility ourselves. If we want the perfect ending, so to say.
> (**Filippa, Lawyer, Sweden**)

Things become more problematic where these conditions do not exist, or where the presence of children alters the conditions later. As Lady Hale explained in *Radmacher*:

[405] Maarit Jänterä-Jareborg, 'Marital Agreements and Private Autonomy in Sweden' in Jens Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012), 379
[406] Maarit Jänterä-Jareborg, 'Marital Agreements and Private Autonomy in Sweden' in Jens Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012), 377
[407] Maarit Jänterä-Jareborg, 'Marital Agreements and Private Autonomy in Sweden' in Jens Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012), 379

> Above all, perhaps, the court hearing a particular case can all too easily lose sight of the fact that, unlike a separation agreement, the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she – it is usually although by no means invariably she – would otherwise be entitled... Would any self-respecting young woman sign up to an agreement which assumed that she would be the only one who might otherwise have a claim, thus placing no limit on the claims that might be made against her, and then limited her claim to a pre-determined sum for each year of marriage regardless of the circumstances, as if her wifely services were being bought by the year? Yet that is what these precedents do. In short, there is a gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman.[408]

These concerns underpin the deferred community of property regime discussed in the next section, but they are not reflected in the approach to spousal maintenance or pensions in Sweden which are discussed later in this chapter.

4(i).4.2 Deferred community of property

> In its most basic form, community of property originates in the ideology of the community of persons created through the marriage union.[409]

Under the deferred community of property regime, each spouse owns his or her own property and is responsible for his or her own debts, but each spouse also has a right to claim half of the marital property's net value at the end of the marriage.[410] Marital property comprises all property that is not separate (as defined in section 7:2 of the Marriage Code).[411] For cohabitants, a more limited form of community of property exists than for married couples, comprising any home that has been acquired for mutual use and the household goods.[412] The community of property regime in Sweden originated in the Marriage Code of 1920, at a time when equality between spouses meant recognising the traditional

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[408] *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42 [137]

Elizabeth Cooke, Anne Barlow and Thérèse Callus, 'Community of Property A Regime for England and Wales?' (The Nuffield Foundation 2006), 3

[410] Couples in Europe, 'Couples in Sweden' (Notaries of Europe, European Notarial Network and Uni Graz, 2012) <http://www.coupleseurope.eu/en/sweden/topics> accessed 10 October 2018

[411] Laura Carlson, *Fundamentals of Swedish Law* (2nd edition, studentlitteratur Ab 2012), 207

[412] Laura Carlson, *Fundamentals of Swedish Law* (2nd edition, studentlitteratur Ab 2012), 211

division of duties.[413] The regime granted wives, who would not generally be working outside the home, and who would thus have limited property of their own, an equal share in the marital property. As Sörgjerd explains, this recognised the fact that ‘the housewives shouldering of the necessary work in the joint household made the husband’s career possible’.[414]

The protective purpose of the deferred community regime and the idea of marriage as a mutual project provide a potentially protective framework for private ordering. However, there has been a slight move away from the idea of marriage as a mutual project in the law. Since the Marriage Code of 1987 the courts have a discretion to allow for an unequal division where the usual rule would be unfair to the wealthier spouse:

> To the extent it is unfair, taking into consideration particularly the length of the marriage but also the financial circumstances of the spouses, that one spouse in the estate division is to transfer property to the other in accordance with chapter eleven [of the Marriage Code], the division of the estate can be made instead so that the first spouse can retain more of his or her marital goods.[415]

The Marriage Code therefore provides the courts with a discretion to adjust the division of assets in some cases. The legislative preparatory works refer to a period of 5 years, after which the expectation is that marital property is equally divided.[416] Prior to that, as Bradley explains, ‘it is recommended that a one year marriage should give a one-fifth entitlement with pro rata allocation thereafter.’[417] Participants to this research did, however, see an equal division of marital assets as the norm.

The ability in the Marriage Code to depart from an equal division of assets is underpinned by a concern to protect those who bring assets into marriages. This was reflected to some extent in participant concerns with the community of property system:

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[413] Caroline Sörgjerd, *Reconstructing Marriage* (Intersentia 2012), 76
[414] Caroline Sörgjerd, *Reconstructing Marriage* (Intersentia 2012), 76
[415] Laura Carlson, *Fundamentals of Swedish Law* (2nd edition, studentlitteratur Ab 2012), 210
[416] Laura Carlson, *Fundamentals of Swedish Law* (2nd edition, studentlitteratur Ab 2012), 210
[417] David Bradley, *Family Law and Political Culture* (Sweet & Maxwell 1996), 78

> But in one way I think… in the light of the community today where people won't… live together for their whole lives any more, then I think that maybe it's too generous in one way… So, it would be good with a more flexible system maybe. But then we have the problem that that would probably lead to more disputes.
> (**Filippa, Lawyer, Sweden**)

The concern that an equal division may be unfair in these circumstances reflects the expectation in Sweden, central to the rules on spousal maintenance discussed below, that all adults should work outside the home.[418] It is consistent with a view of marriage where spouses are seen as autonomous individuals, responsible for their own support. This vision is made possible by the greater role of the state in Swedish society than in England and Wales or the Netherlands. However, this model ignores the realities of gender equality in Sweden (see further Chapter 5(i)). State support is designed to support those who cannot support themselves. Thus, in cases where an equal division of the marital property would not meet the needs of a spouse who has undertaken the greater share of caretaking, the state provides a safety net. However, the state does not attempt to redress inequalities arising from the different roles performed by parents during their relationships.

Participants in this research were asked to consider two scenario questions. The first involved a cohabiting couple with three children (2, 4 and 6). As cohabitants, the only property available for division would be their shared home worth SEK 2,500,000, meaning that each would receive around SEK 1,250,000 (c. £125,000).[419] However, the male cohabitant, who had been the children's primary caretaker, was earning only SEK 80,000 (c. £8,000) per annum. In contrast, his partner was working full-time and earning SEK 300,000 (c. £30,000) per annum. On these facts, it is possible that the male cohabitant and three children could struggle to find rented accommodation, whereas the female cohabitant might be able to purchase a new property by herself. The result would be similar in Sweden

[418] Mary Ann Glendon, 'Is there a Future for Separate Property?' (1974) 8 Family Law Quarterly 315, 323
[419] If the couple had been spouses, the only difference would be that the wife's savings would also form part of community, adding SEK 150,000 (c £15,000 to the overall pot).

if the couple were married (and, as discussed in Chapter 4(ii), the same position could arise in the Netherlands). This tended to be recognised by participants without concern:

> Yes. Uh, the Swedish courts look very little to… the financial situation. (**Bertil, Lawyer, Sweden**)

In England and Wales, the result would not necessarily be different for a cohabiting couple (and could be worse if the property was not in joint names). However, if this couple were married the result would be unlikely to meet the case law requirements for fairness[420] because it would leave the needs of the father and children unmet.[421] In contrast to the threefold objectives of need, compensation and sharing in England and Wales, Swedish community of property law only deals with the sharing of marital property. The responsibility for meeting needs falls on the individual or the state, subject to the provisions on spousal maintenance discussed in the next section. The scope of this sharing has the potential to be broader than in England and Wales in that pre-acquired assets are not so easily removed from its scope (something that has changed in the Netherlands following the introduction of a more limited form of community). However, given that, at least in England and Wales, needs are more often a concern than sharing, the role of the state is likely to be of central importance in most cases. Viewing marriage as a relationship between two autonomous individuals explains this approach. It is, however, more problematic where caretaking responsibilities inhibit the ability of one spouse to compete in the labour market on equal terms. The freedom of the financially stronger party to leave a marriage free of support obligations to a former spouse suggests a relatively impoverished concept of autonomy for the would-be recipient.

4(i).4.3 Spousal maintenance

In 1989, Bradley claimed:

> Of the three potential sources of income support for spouses on divorce – income from employment, social welfare from the state and maintenance

[420] *White v White* [2000] UKHL 54
[421] *Miller v Miller : McFarlane v McFarlane* [2006] UKHL 24

from a former spouse – maintenance allowances are now of minor importance in principle and in practice in Sweden.[422]

Spousal maintenance in Sweden is rare. As Sörgjerd describes, in 1978, 'financial independence after divorce was made the guiding principle, which signalled to society that this was the desirable goal to strive for',[423] albeit that only 25% of all married women were financially independent at the time.[424] Spousal maintenance remained available but 'primarily for a transitional period following the divorce.'[425] The Marriage Code of 1987 provides that '[f]ollowing divorce, each spouse shall be responsible for his or her own support.'[426] Spouses are, therefore, treated 'as two capable and independent individuals'[427], 'each responsible for his or her own material well-being'.[428]

All participants stressed the exceptional nature of spousal maintenance in practice. Bertil, for example, described it as 'very rare' and Gunilde, said that she '[v]ery seldom' saw it. Likewise, Ebbe suggested 'it's not very common at all' and Eric went so far as to say 'it doesn't really exist'. Anna and Clara gave examples of just how rare it was:

> … it's, like, very, very, very uncommon. Um, like… I've both been working here and at court, uh, and you, you never see it.
> (**Anna, Lawyer, Sweden**)

> You never get it…. Well, I think the last case I heard about, um, was a colleague of mine, and I think that was around two thousand ten somewhere.
> (**Clara, Lawyer, Sweden**)

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[422] David Bradley, 'Sexual Equality and Maintenance Allowances in Sweden' (1989) 9 Oxford Journal of Legal Studies 403, 413-4
[423] Caroline Sörgjerd, *Reconstructing Marriage* (Intersentia 2012), 111
[424] Caroline Sörgjerd, *Reconstructing Marriage* (Intersentia 2012), 111
[425] Caroline Sörgjerd, *Reconstructing Marriage* (Intersentia 2012), 111
[426] Commission on European Family Law, 'Marriage Code of Sweden (Official translation by the Swedish Government with amendments since 1994 unofficially translated by Maarit Jänterä-Jareborg) http://ceflonline.net/wp-content/uploads/Sweden-Divorce-Legislation.pdf accessed 15 November 2017
[427] Caroline Sörgjerd, *Reconstructing Marriage* (Intersentia 2012), 110
[428] Caroline Sörgjerd, *Reconstructing Marriage* (Intersentia 2012), 111

Several participants recognised the rules on spousal maintenance as a policy decision based on the desirability of both men and women being in work. Eric, for example described 'the Swedish way of thinking' as 'self-support, get a job'. Nevertheless, the difficulty in securing spousal maintenance could lead to outcomes that, at least from the perspective of reported case law in England and Wales, would appear deeply unfair because they might not meet one party's financial needs. The potential unfairness of the rules on spousal maintenance was recognised by some participants. For example, Anna noted that whilst it was unusual in Sweden to have a stay-at-home parent, 'in some cases, or like most people Sweden, the, the wife, or like, the, the female are earning a lot less than the male'. Bertil described the rules as 'the brutal world that hits back, normally, on women'. Despite this, Gunilde was the only participant who expressed clear dissatisfaction with the system:

> **Interviewer:** Um, and what do you think about the law on alimony? Um, is it, is it good?
> **Gunilde:** No. It's… because, um, some women, there are still women they, that are home, at home very much and don't work, when the children are small as well. And um, they, they have an awful situation when they separate. I, I don't like it.
> **Interviewer:** Ok.
> **Gunilde:** All the, Swedish law thinks that everyone are working full-time but it is not so.
> (**Gunilde, Lawyer, Sweden)**

Most participants supported the spousal maintenance regime. For example, Bertil, who jokingly referred to the rules as 'the black side of the feminist movement', was broadly supportive of the rules because 'there were very many reasons why people get married'. Others recognised that the rules were based upon societal assumptions about all adults working. For example, Clara commented that the tax regime in Sweden meant that most couples could not afford to have one parent stay at home:

A-and since that is the basic structure, of the Swedish society, I do think that it's kind of fair. There is a possibility, but… it's very rare. And, uh, uh, since we have a pretty good, uh, social security network, um, I do think that it's ok.
(**Clara, Lawyer, Sweden**)

Ebbe also noted the role of the state in providing financial support, and stressed the importance of independence for the would-be recipient of spousal maintenance:

Ebbe: And, um, I think it's good for, if you have been married for long time and just been, you know a house-, it's not just, but being in, being in a housewife, I think, just to keep up being a housewife wouldn't help the housewife in the long run, because she needs an independent to be able to, uh, go on in the, in the real life. So even if it's hard in the beginning to be forced out to, to the working market again, I think that's, in the long run, is helping her. So that's why I think it's good to have this spouse, um... support in a limited way.
Interviewer: And is that because it enables her to be independent and start a new life? Those sorts of –
Ebbe: [Overspeaking] Yes. Otherwise she would be stuck in a, you know, in, in a prison really because she can't do anything and she's depending on somebody else. Or he.
(**Ebbe, Lawyer, Sweden**)

Eric also felt that the absence of spousal maintenance was ultimately beneficial, even though it might be harsh in individual cases:

... The equalities could be harsh for some people, but equality says that you are responsible for yourself, and you have to take care of yourself and the kids that you, sort of, bring up. Um, the other system, if you have a spouse alimony and support, could tend to do the opposite. It could be a, a trap for, for women really....
(**Eric, Lawyer, Sweden**)

This sort of thinking reflects the intention behind the Marriage Code. As Bradley[429] explains, ‘the attenuation in Sweden of a spouse’s right to maintenance on divorce represents a conscious and deliberate effort to promote sexual equality’.[430] It is also consistent with some of the statements made by lawyers in the Netherlands (discussed in Chapter 4(ii)) and parents in England and Wales (discussed in Chapters 4(iii) and 5(iii)) about the importance of independence at the point of separation. Further, the greater role for the state in Sweden may enable that independence to a greater extent than is the case in the other jurisdictions. Where there is a power imbalance between the parties, being able to rely on the state enables the would-be recipient of spousal maintenance to have independence from a former partner without being left in a predicament of real need. This has a value insofar as the autonomy of the financially weaker party is concerned. However, this view of sexual equality, and the accompanying assumptions of autonomy, ignores the impact of caretaking responsibilities. These are implicitly cast as a choice for which the caretaker bears the cost.

4(i).4.4 Pensions

The unique character of pensions rights demonstrates particularly clearly the disconnect between the underlying rationales for the division of marital assets and the payment of spousal maintenance. On the one hand, pensions have a capital value and therefore generally constitute deferred community property in Sweden.[431] On the other, it is possible for pensions to be considered to be maintenance under EU law,[432] and the treatment of pensions under Swedish law provides at least some support for a view of pensions as such. Under section 10:3 of the Marriage Code, pension rights are exempted from deferred community if they are non-transferable and some special reason exists which can justify the exemption of those rights from the division of property.

[429] David Bradley, 'Sexual Equality and Maintenance Allowances in Sweden' (1989) 9 Oxford Journal of Legal Studies 403

[430] David Bradley, 'Sexual Equality and Maintenance Allowances in Sweden' (1989) 9 Oxford Journal of Legal Studies 403, 415

[431] Margareta Brattström,'Spouses' Pension Rights & Financial Settlement after Divorce', *Scandinavian Studies in Law* (Social Private Law, Volume 50), 334

[432] Anna Heenan, 'Scuppering Schofield: The impact of the EU Maintenance Regulation on claims for pension sharing' [2012] Family Law 191

There are three types of pension in Sweden: occupational pensions, the state pension and private pensions. Of these, only private pensions form part of the community pot. As Brattström explains:

> The right to a state pension is always nontransferable, and the same is often true of the right to an occupational pension. The notion that pension rights should safeguard the entitled persons' ability to meet their economic needs in the future – when there is no mutual duty of maintenance between the spouses – has been deemed as a special reason for exempting them from a division of deferred community property.
>
> Transference of private pension saving is not prohibited during a division of deferred community. Consequently, in cases of divorce, private pension savings are included in the division of deferred community property. However, the entitled persons' possibilities of disposing private pension savings are limited by the rules concerning the tax advantages for such savings.[433]

The resistance to sharing pensions because of their role in securing spouses' economic needs in the future is consistent with a view of pensions as maintenance. Viewed in this way, there is no reason that a spouse should have any obligation to support his or her former partner in retirement if not obliged to do so immediately following divorce. The inability to share pensions was, however, considered problematic by several participants:

> … You mention pension, and I would say that that is a very, very, very, very bad issue. Because when young people start, to form a family, and they start to work, they very little think about that. They very little think of that. And that ends up with the man with the good pension and the, the separate woman with the bad pension. I'm sorry to say. But that is, that is absolutely the main rule. Yes.
> (**Bertil, Lawyer, Sweden**)

[433] Margareta Brattström, 'Spouses' Pension Rights & Financial Settlement after Divorce', *Scandinavian Studies in Law* (Social Private Law, Volume 50), 334

> [The law could be] a bit more generous and especially when it comes to the pension rights. So… I think that could also be good for the whole community because if one party doesn't have enough pension then it's the state that had to… cover that up.
> (**Filippa, Lawyer, Sweden**)

Arguments about the desirability of pension sharing encapsulate both viewpoints on the nature of pensions (as property and as maintenance). For example, Brattström[434] argues:

> … the size of a pension today is largely determined by a person's lifetime earnings. If those earnings are lowered as a consequence of part-time employment pension rights will to a certain extent be lost and will not be recoverable later. As long as their combined pension rights are not shared after a divorce, the spouse working part-time in favour of the family, will, on that situation, be obliged to alone bear the consequences of the spouses' division of employment during their marriage. This state of affairs does not harmonize well with the provisions, under property law for spouses, that their interests be paid due heed and cannot be a good way of balancing the spouses' interests. Moreover, a sharing of pension rights might be particularly desirable from a social welfare perspective, since their benefits would help provide for a spouses' subsistence at a time of life when gainful employment could no longer be expected. Sharing of accrued pension rights would indeed prove an important protection for the financially weaker spouse.[435]

On the one hand, the reference to the division of labour during the marriage draws on the marital property rationale. The division of marital property recognises the community in marriage and exists to protect the financially weaker spouse. Thus, a spouse whose ability to save for their own pension during the marriage has been compromised by part-time work has a legitimate claim to a share in the pension that has been built up during that period. On the other, the reference to

[434] Margareta Brattström, 'Spouses' Pension Rights & Financial Settlement after Divorce', *Scandinavian Studies in Law* (Social Private Law, Volume 50)
[435] Margareta Brattström, 'Spouses' Pension Rights & Financial Settlement after Divorce', *Scandinavian Studies in Law* (Social Private Law, Volume 50), 342

the social welfare perspective under which pensions provide future support is suggestive of a perspective that views pensions as maintenance. The latter viewpoint is supported by the exemption of occupational and state pensions from the division of marital property, on the basis that pensions are seen to exist to meet their economic needs of the pension holder into the future. The rules on spousal maintenance assume that spouses are equally able to support themselves financially and are based on a premise of gender equality in society, despite the reality. It is, therefore, difficult to see why, on the basis of a maintenance or social welfare perspective, pensions should be treated differently from ongoing spousal maintenance or, indeed, why the role of the state should be considered differently. However, this example serves to underline the complexity of autonomy in the Swedish context, and the fact that historic understandings of marriage have not been entirely displaced by modern attitudes towards gender equality.

4(ii) The Netherlands: Autonomy and the erosion of solidarity

4(ii).1 Introduction

This chapter considers the role of autonomy, and how autonomy is understood in the Netherlands (RQ 1.a). Developments in law and policy in the Netherlands illustrate the growing influence of individual ideas of autonomy on separation, and a move away from traditional ideals of marriage based on the interdependence of a breadwinner and homemaker. In common with Sweden and England and Wales, ideas of individual self-sufficiency, at least partly underpinned by an assumption of the equality of men and women, appear to be gaining traction. This can be seen both in recent changes to the universal community of property regime and the gradual erosion of spousal maintenance provision.

These developments need to be understood against relatively rapid developments in traditional gender roles in the Netherlands. For example, in 1960, only 7% of married women were employed, compared to 30% in England.[436] Further, in 1965, 84% of the Dutch population objected to combining motherhood and a paid job whereas this had decreased to 20% by 1991.[437] The traditional gendered division of labour in the Netherlands was accompanied by an idea of family solidarity, which underpinned both the law regarding spousal maintenance and, until recently, the 'rather unique'[438] system of universal community of property. However, as gender roles develop, the role of solidarity is also shifting.

As will be discussed further below, solidarity allows for greater constraints on individual autonomy than is possible in a system where individual autonomy is considered of the foremost importance. However, even within a framework based upon solidarity, the autonomy of the individual to enter into a marital property agreement was recognised (see further below). Autonomy in the sense of freedom of choice can also be seen in the ability for couples in the Netherlands to choose between two formal institutions, marriage and registered partnerships, which confer the same legal rights. In England and Wales, the option of civil

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[436] Justine Ruitenberg, 'A Typology of Dutch Mothers' Employment Narratives: Drifters, Privilegeds, Balancers, Ambitious' (2014) 31 Gender Issues 58, 59

[437] Gijs Beets, Aart Liefbroer and Jenny De Jong Gierveld, 'Combining Employment and Parenthood: A Longitudinal Study of Intentions of Dutch Young Adults' (1997) 16 Population Research and Policy Review 457, 462

[438] P. Vlaardingerbroek, 'Family Law' in Jeroen Chorus, Piet-Hein Gerver and Ewoud Hondius (eds) *Introduction to Dutch Law* (4th edition, Kluwer Law International 2006), 84

partnerships for heterosexual couples has become available very recently,[439] and Sweden has abolished registered partnerships altogether.

This chapter explores the growth of ideas of individual autonomy in Dutch family law and the decline in the notions of solidarity. The analysis combines a doctrinal review of some of the key elements of Dutch family law and the insights of family law practitioners to help build a picture of the functioning of the law in practice. It begins with a discussion of the concept of solidarity, which was the basis of the universal community of property system that existed in the Netherlands until January 2018, and the rationale for spousal maintenance. However, as the later part of the chapter explores, the growing influence of a more individual idea of autonomy can be seen in more recent changes to the family law regime.

4(ii).2 Solidarity

> In Dutch social policy, partner dependencies (horizontal dependencies) have always been assumed and promoted, and also the modernisation of care – the ideal of parental sharing – is built upon solidarity within couples.[440]

This chapter considers the idea of solidarity in the context of the financial obligations between partners when they separate. Kremer's description of partner dependencies above highlights that solidarity, which is associated with relationships of dependency between partners, appears in various aspects of Dutch policy. The particular example of parental sharing will be considered in more detail in Chapter 5(ii). The idea of solidarity as an underlying principle on separation was present in several participant interviews in the Netherlands. Anne, for example, explicitly referred to the concept as underpinning both the universal community of property regime and the law relating to spousal maintenance. Bente explained that the rules on spousal maintenance following divorce were based on the idea that 'if you, if you, if you're married then, um, you basically are obliged to take care of each other.' For Daphne, those same rules were the expression of the fact that when you marry 'It's kind of fate. I, I don't know how to say it, connection with the fate.'

[439] The Civil Partnership (Opposite-sex Couples) Regulations 2019, SI 2019/1458
[440] Monique Kremer, *How Welfare States Care* (Amsterdam University Press 2007), 205

In a study of family solidarity in the Netherlands, Dykstra et al take the concept to mean a 'feeling of mutual affinity within family relationships and how these are expressed in behavioural terms'.[441] Whilst this is understandable in a work that explores the extent to which families feel solidarity, it is not necessarily appropriate for the law to limit the concept in this way; as Douglas notes, legal obligations may be imposed when '"commitment" has been lost (eg on divorce)'.[442] Thus, for the purposes of this chapter, Barlow's understanding of solidarity will be adopted:

> The term 'family solidarity' is… an evolving concept which encapsulates the joint enterprise, mutual support and obligations which modern family life (in all its different forms) encompasses from a moral and economic perspective and which is often reflected and reinforced in legal regulation. It stands in contrast to individualistic notions of autonomy and recognises the altruism which is often required to fulfil its demands.[443]

This understanding of solidarity, therefore, has implications for understanding autonomy. Rather than the individualistic neoliberal conception discussed in Chapter 2, a more relational vision of autonomy is required alongside solidarity. Perhaps the best illustration of this in the Netherlands is the universal community of property regime that existed until January 2018, a regime which was unique in Europe. With limited exceptions, that regime comprised all present and future property and all debts from the date of the marriage.[444] The next section considers what that regime meant for understandings of autonomy in the Netherlands. This provides an important backdrop to the discussion that follows about how more individual ideas of autonomy are becoming more influential in the Netherlands.

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[441] Pearl Dykstra, Matthijs Kalmijn, Trudie Knijn, Aafke Komter, Aart Liefbroer and Clara Muler, *Family Solidarity in the Netherlands* (Dutch University Press 2006), 15

[442] Gillian Douglas, 'Towards an Understanding of the Basis of Obligation and Commitment in Family Law' (2016) 36 Legal Studies 1, 1

[443] Anne Barlow, 'Solidarity, Autonomy and Equality: Mixed Messages for the Family?' (2015) 27 CFLQ 223, 224

[444] P. Vlaardingerbroek, 'Family Law' in Jeroen Chorus, Piet-Hein Gerver and Ewoud Hondius (eds) *Introduction to Dutch Law* (4th edition, Kluwer Law International 2006), 84

4(ii).3 Autonomy within a framework of solidarity

4(ii).3.1 Community of property and marital property agreements

Scherpe explains the rationale for community of property regimes as follows:

> … in the community of property jurisdictions the couple from the day of the marriage own some assets jointly. This is said to be an expression of the solidarity the spouses owe each other, as in this system the spouses immediately participate in the 'fruits of the joint labour'… No distinction is made based on the roles of the spouses in the marriage, and this marriage is treated as a partnership of equals… By creating an immediate joint pool of property, community of property systems, to a certain extent, ensure equality at the beginning and throughout the marriage by allowing immediate participation in the accrued wealth. It can be said that this system is particularly well-suited for more 'traditional' marriages in which there is a financial dependency of one spouse on the other, as it secures immediate ownership of the assets and hence affords a dependent spouse greater autonomy – of course at the expense of the autonomy of the other spouse.[445]

The focus on solidarity, and the recognition of the different positions of the parties in a marriage or registered partnership, recognises that the autonomy of one partner may require constraints on the autonomy of the other. Seen against this background of solidarity, autonomy is a more relational concept than is seen in Sweden and, to an increasing extent, in England and Wales. It recognises Herring's observation that '[i]ntimate relationships inevitably lead to a loss of freedom of choice as to how to live your life on a daily basis'.[446] It also recognises the financial effects of such relationships, and it takes these into account in the rules applied to property. This type of autonomy is a different creature from the more individualistic autonomy seen in the spousal maintenance rules in Sweden, for example, and is consistent with the expectation that a partner, rather than the state, should be the first recourse for financial support on separation.

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[445] Jens Scherpe, 'Marital Agreements and Private Autonomy in Comparative Perspective' in Jens Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012), 474-5
[446] Jonathan Herring, *Relational Autonomy and Family Law* (Springer 2014), 17

This is not to say that individual autonomy was entirely absent in the Netherlands under the universal community regime. As Boele-Woelki and Braat explain, 'thanks to private autonomy, married couples are not to be forced to be subjected to [the universal community of property] regime: spouses' freedom to enter into marital agreements is extremely broad, though not unlimited'.[447] The provisions of a nuptial agreement cannot conflict with rules of mandatory law, morality or public order.[448] The agreement cannot stipulate that one party 'is accountable for a larger share of debts than his share in the assets of the community of property'[449] and the parties cannot derogate from the rights derived from parental responsibility or the rights granted to a surviving spouse.[450] There are also procedural protections for those entering into nuptial agreements. For example, they must be made in the form of a notarial instrument[451] and notaries must explain the content and consequences of the agreement to the future spouses.[452] The ability of the court to depart from such an agreement does, however, appear to be more limited than in England and Wales. For example, Boele-Woelki and Braat explain:

> Generally, the courts only have a very limited competence to override, modify or set aside a marital contract if the effects thereof are unacceptable in view of the principles of reasonableness and fairness.[453]

Anne, one of the participants in the Netherlands, suggested that one circumstance where this might happen was where the parties had entered into a so-called 'cold exclusion' agreement (in which 'no community property regime exists between the spouses. The word "cold" refers to the fact that the spouses do not set-off their income and increase their wealth in any way whatsoever.'[454]) and one of the parties 'has not been honest and actually profit a lot from that.'

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[447] Katharina Boele-Woelki and Bente Braat, 'Marital Agreements and Private Autonomy in the Netherlands' in Jens Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012), 230
[448] Dutch Civil Law, 'Dutch Civil Code' <http://www.dutchcivillaw.com/civilcodegeneral.htm> accessed 11 October 2018, Article 1: 121
[449] Dutch Civil Law, 'Dutch Civil Code' < http://www.dutchcivillaw.com/civilcodegeneral.htm> accessed 11 October 2018, Article 1: 121
[450] Dutch Civil Law, 'Dutch Civil Code' < http://www.dutchcivillaw.com/civilcodegeneral.htm> accessed 11 October 2018, Article 1: 121
[451] Katharina Boele-Woelki and Bente Braat, 'Marital Agreements and Private Autonomy in the Netherlands' in Jens Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012), 248
[452] Katharina Boele-Woelki and Bente Braat, 'Marital Agreements and Private Autonomy in the Netherlands' in Jens Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012), 242
[453] Katharina Boele-Woelki and Bente Braat, 'Marital Agreements and Private Autonomy in the Netherlands' in Jens Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012), 250
[454] Carla Smeets and Caroliene Mellema, 'Family Law in the Netherlands: Overview' (*Practical Law*, 1 September 2017) <http://uk.practicallaw.com/4-578-1948#a440232> accessed 19 July 2018

Despite the difficulty of departing from the terms of a pre-nuptial agreement, several participants noted that people often failed to live according to the terms of their agreement in practice. Elise, for example, said that ‘[n]obody does. No. That’s the thing. Nobody does.’ Floor agreed:

> Yeah, and if they were married for twenty years, they made it twenty years ago, afterwards a lot happened.
> (**Floor, Lawyer, Netherlands**)

The potential unfairness in such cases was noted by Carlijn:

> … for a lawyer those pre-nuptial agreements are very important, you build your case on it, and I think its very unnatural and in a way unfair, because the people never acted, um, like they were married on some conditions of the pre-nuptial agreements. But we build our case on it, we, we make those documents very, very, very important. And the people themself, almost didn’t realise that they have pre-nuptial agreements. And when you ask, why did you make it, yes, my, my father advised me.
> (**Carlijn, Lawyer, Netherlands**)

Procedural safeguards do offer some protection for the individuals entering into these agreements. Autonomy is not simply assumed; the safeguards act to try and prevent one party being taken advantage of. However, there is limited scope to challenge the provisions of an agreement. Thus, the safeguards do not prevent people from making decisions that may impair their ability to act autonomously immediately or in the future. This vision of autonomy is not relational. It pays very little attention to the changes that may, and indeed often do, occur to the positions of the parties as a result of their relationship. Thus, freedom of contract at a single point in time can have the effect of limiting individual autonomy in the future. This more individualistic autonomy is becoming increasingly influential, and the erosion of solidarity can be seen in several areas of Dutch family law.

4(ii).4 The increasing influence of individual autonomy

4(ii).4.1 Community of property

Perhaps the most obvious example of a more individualistic idea of autonomy can be seen in the 2018 changes to the universal community of property regime. A website for expats living in the Netherlands explained these changes on the basis of increased individualism in society:

> There is a consensus that the system of a general community of property has become outdated as it is no longer consistent with public perceptions of marriage as an institution. Society has become much more individualised than it used to be.[455]

Under the new community of property regime, only assets and debts acquired following the marriage (unless jointly acquired prior to the marriage) are included, and gifts and inheritance are excluded.[456] There was support for the new system amongst participants. Floor, for example, was 'happy that it will change.' Elise noted the exceptional nature of the universal community system within Europe, and Daphne commented on the tension between it and the trend towards individualisation in social security policy, for example. There was, however, a recognition that the new system would bring complexities as well as benefits:

> The new system will have a lot of complications, which I can't oversee, uh, yet, because that will, most likely, have a lot of issues. 'Cause you then have to start, uh, looking into who, what, what's capital is private and what's communal and how do you divide that but I think, ja, a lot of people that get married in community of property have no clue what they're getting themselves into.
> (**Elise, Lawyer, Netherlands**)

This statement illustrates the complexity of autonomy in this regard. If the system is imposed on people without their knowledge or understanding, then it may be

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[455] Marina Maric, 'New Dutch matrimonial property regime: a "limited community of property" since 1 of January 2018' (*Expat leiden region*, 31 January 2018) <https://www.expatcentreleiden.nl/en/about-expat-centre-leiden/news-and-calendar/news/new-dutch-matrimonial-property-regime-a-limited-community-of-property-since-1-of-january-2018> accessed 11 October 2018

[456] Barbara Reinhartz, 'New Matrimonial Property Law in the Netherlands' (ISFL conference, Amsterdam, July 2017) <https://pure.uva.nl/ws/files/17208637/New_Matrimonial_Property_Law_in_the_Netherlands_ISFL_2017.pdf> accessed 1 June 2018

seen as an infringement of their autonomy. However, as discussed above, there may be a justification for this based on the position of the other partner and the roles that parties have played during their relationship. This illustrates the tension between individualistic concepts of autonomy which, at least in relation to financial provision, tend to be resistant to the imposition of such obligations, and the more relational approach evident in a regime based upon solidarity.

The potential complexities of the new system were also noted by Carlijn. Reinhartz has commented that ‘this system only works if the spouses keep close records of their private property.’[457] Carlijn was concerned about the extent to which this would happen:

> … I think, that the married people won’t register. Because now they also don’t register what’s their own property. I think, well, it’s difficult. It makes the system even more difficult.
>
> So I don’t see the use of it to be honest. I think it will make law practice more complicated, or work for lawyers.
> (**Carlijn, Lawyer, Netherlands**)

Carlijn appeared to favour the previous system of universal community because it was simpler in practice and reduced the scope for lawyers to argue. This reflects attitudes in the Netherlands more generally to the ideas of private ordering discussed later in this chapter.

4(ii).4.2 Spousal maintenance

Spousal maintenance obligations in the Netherlands are underpinned by the idea of solidarity.[458] However, individual ideas of autonomy seem to be behind recent restrictions in its availability. Boele-Woelki and Braat explain the basis of spousal maintenance as follows:

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[457] Barbara Reinhartz, 'New Matrimonial Property Law in the Netherlands' (ISFL conference, Amsterdam, July 2017) <https://pure.uva.nl/ws/files/17208637/New_Matrimonial_Property_Law_in_the_Netherlands_ISFL_2017.pdf> accessed 1 June 2018

[458] Carla Smeets and Caroliene Mellema, ‘Family Law in the Netherlands: Overview’ (*Practical Law*, 1 September 2017) <http://uk.practicallaw.com/4-578-1948#a440232> accessed 19 July 2018, 16

> Securing the economic well-being of a former spouse is in principle not considered a duty of the State, and the other former spouse may be obliged to pay maintenance as part of his or her post-marital duties. However, if the former spouse does not have the ability to pay then the State will take over.[459]

Spousal maintenance awards are made by reference to the applicant's lack of means and the respondent's ability to pay.[460] In common with the historic universal community of property regime, this reflects a relational approach, which considers the positions of both parties to the relationship in reaching an outcome. Several participants explained that an application for spousal alimony must be made before claiming certain benefits, underlining the idea that it is the spouse and not the state against whom a party should have first recourse (in direct contrast to the position in Sweden). Additionally, unlike the position in England and Wales, there are no clean break provisions in the Dutch legislation[461] so a clean break cannot be imposed by the courts. It is, however, possible for the spouses to agree to one,[462] giving effect to the same sort of autonomy that underpins the freedom to make pre-nuptial agreements.

There are, however, signs that solidarity is being eroded in relation to spousal maintenance. First, the maximum term of spousal maintenance was reduced from joint lives to 12 years (or five years for a marriage of less than that period where there are no children) in 1994.[463] In practice, Carlijn and Daphne noted that whilst it was theoretically possible to make a claim for spousal maintenance for twelve years after the end of the marriage, even if no award was made at separation, such a claim was unlikely to succeed. Further, spousal maintenance is becoming increasingly uncommon in practice, although participants had different experiences of this based on their own case load, presumably reflecting the relative wealth of their clients. Daphne, for example, said that it was paid 'not

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[459] Katharina Boele-Woelki and Bente Braat, 'Marital Agreements and Private Autonomy in the Netherlands' in Jens Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012), 242

[460] Katharina Boele-Woelki, Olga Cherendychenko and Lieke Coenraad, 'Grounds for divorce and maintenance between former spouses: the Netherlands' (*CEFL*, September 2002) <http://ceflonline.net/wp-content/uploads/Netherlands-Divorce.pdf> accessed 1 June 2018, 23

[461] Katharina Boele-Woelki and Bente Braat, 'Marital Agreements and Private Autonomy in the Netherlands' in Jens Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012), 242

[462] Katharina Boele-Woelki and Bente Braat, 'Marital Agreements and Private Autonomy in the Netherlands' in Jens Scherpe (ed*) Marital Agreements and Private Autonomy in Comparative Perspective* (Hart 2012), 251-2

[463] Centraal Bureau voor de Statistiek, 'Partner alimony' <https://www.cbs.nl/en-gb/artikelen/nieuws/2014/44/fewer-women-receive-alimony-lower-amounts-involved/partner-alimony> accessed 11 October 2018

often. But sometimes' whereas Carlijn said that '[i]t is common, ja, absolutely' and Bente thought that it was paid in around eighty percent of her cases.

Overall, maintenance awards appear to be made relatively rarely in the Netherlands. In 2013, women were granted alimony in 16% of cases and men in 1% of cases.[464] As Anne explained:

> [Spousal maintenance is] not very common. No. 'Cause child support has got priority. Most cases there's nothing left for a partner. So it's only, most of the time it's only for the people who didn't have children, or for the one with the higher income.
> (**Anne, Legal Adviser, Netherlands**)

Further, the quantum of awards in the Netherlands appears to be declining. The average spousal maintenance payment of 980 euros per month in 2013 was lower than in 2009, when it exceeded 1,000 euros a month.[465] Additionally, participants suggested that even where awards were made, they were rarely made for twelve years in practice:

> **Interviewer:** And is it common for spousal maintenance to be made for the full twelve years? Or, are they –
> **Bente:** No, no.
> (**Bente, Lawyer, Netherlands**)

> …But, um, last year you see, um, that judges are more willing than in the past to… shorten the twelve years period.
> (**Carlijn, Lawyer, Netherlands**)

As in England and Wales and Sweden, the decreasing popularity of spousal maintenance has been accompanied by changing gender roles in the

[464] Centraal Bureau voor de Statistiek, 'Fewer women receive alimony, lower amounts involved (29 October 2014) <https://www.cbs.nl/en-gb/news/2014/44/fewer-women-receive-alimony-lower-amounts-involved> accessed 26 May 2018
[465] Centraal Bureau voor de Statistiek, 'Fewer women receive alimony, lower amounts involved (29 October 2014) <https://www.cbs.nl/en-gb/news/2014/44/fewer-women-receive-alimony-lower-amounts-involved> accessed 26 May 2018

Netherlands. For example, in 2015 71% of women aged 20-64 were in work.[466] There has also been a decline in the popularity of the traditional breadwinner model in which only the father works (18% in 2015); the most common arrangement is a full-time working male partner and part-time working female partner (58%) but there has also been an increase in the proportion of dual earner couples (10%).[467] However, these working patterns demonstrate that a gendered division of paid and unpaid work still exists in the majority of cases. There is also some evidence that more traditional attitudes to childcare persist. For example, a majority of the population[468] think that the ideal arrangement for mothers of young children is to work for two or three days a week and just over four out of ten men feel that women are better suited to care for young children.[469]

Participants took very different views about the desirability of spousal maintenance. Several talked about the importance of financial independence for women. This echoes the language of Government policy documents. For example, the 2013-16 Dutch Gender and LGBT equality policy suggests:

> Economic independence also plays a not to be underestimated role in the achievement of autonomy.[470]

This statement was, however, made in the context of a policy that envisages a more equal sharing of work and care between men and women to facilitate this, a vision that will be discussed further in Chapter 5(ii). However, the complexity of the current position was recognised by some participants:

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[466] Wil Portegijs (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2016' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS),* 13 December 2016) <https://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2016/Emancipation_Monitor_2016> accessed 11 October 2018

[467] Wil Portegijs (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2016' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS)*, 13 December 2016) <https://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2016/Emancipation_Monitor_2016> accessed 11 October 2018

[468] Wil Portegijs (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2016' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS)*, 13 December 2016) <https://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2016/Emancipation_Monitor_2016> accessed 11 October 2018 (Percentage not stated)

[469] Wil Portegijs (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2016' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS)*, 13 December 2016) <https://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2016/Emancipation_Monitor_2016> accessed 11 October 2018

[470] Rijksoverheid, 'Dutch gender and LGBT-equality policy 2013-2016' (*Ministry of Education, Culture and Science*) <https://www.government.nl/documents/reports/2013/11/01/dutch-gender-and-lgbt-equality-policy-2013-2016> accessed 11 October 2018

> I think as a person that everybody, whether you are a wife or a man, that you have to be, um, um, self-supporting in life. So, but it's a very, that's a personal, uh, opinion and, um… and I also think that people who get married or get registered as partners, that they have to be well aware that their relation is not only based on emotion and love but it's a very important um, uh contract. So that they have to be aware of the financial, um, consequences of that contract. Um… And that you, during the marriage, you have to check your, your financial balance and, but, on the other hand, I understand that, that doesn't happen, or I understand that's difficult to have that, um, uh, business-like, uh, relation in a marriage. So… well, I don't. Well, I don't think that the law has to be changed.
> (**Carlijn, Lawyer, Netherlands**)

> I think it's good that there's a tendency that, um, uh, ex-spouses, um, should do their best to become independent as soon as possible. But I also think that when there are young children involved they – the children also depend on the, um, the financial position of the main caretaker. So, um, and I think that should be respected. Uh, um, because, of course, uh, uh the main caretaker will receive child alimony, but, um, if, if the main caretaker wants to give the children, um, a position, uh, uh environment like they were used to during the marriage then, yeah, there must also be money income, um, uh, for the main caretaker to, to be able, uh, to pay for that. So, and I, I think, that was the advice of the Radforstadter[?] about the legislative proposal regarding the, uh, alimony, the spousal alimony and that was one of the, uh, the critics, uh, that, um, that wasn't taken into account enough. And I, I think the Radforstadter[?] has a point there. Ja, ja.
> (**Floor, Lawyer, Netherlands**)

It must, however, be noted that both of these participants appeared to work for clients who were wealthier than average, and so there were more likely to be sufficient resources for one of the spouses to pay spousal maintenance. It is less clear whether the interconnection between the ability to be financially independent and the presence of caretaking responsibilities can be recognised in the same way for all separating couples.

4(ii).4.3 Private ordering and conflict avoidance

As in England and Wales and Sweden, the influence of individual autonomy in the Netherlands can be seen through increased moves towards private ordering, albeit that private ordering in the Netherlands seems to be slightly different. For example, whilst Daphne described pressures on legal aid in the Netherlands, there did not seem to be quite the same emphasis on removing lawyers from the system as in England and Wales, or on designing (and preserving) a system that is navigable without lawyers as in Sweden. Daphne for example, explained that lawyers were keen to preserve the existing legal aid system because it is compulsory for parties to be represented by a lawyer in court in family law cases. Therefore, without legal aid people would not be able to go to court. Further, maintenance (both spousal and child) is calculated by reference to the TREMA guidelines which are designed for use by lawyers. Anne, for example, said this about the calculation of child maintenance:

> So it's not – it's really a system by professionals for professionals. So also the systems, it's not, unless you have really a lot of knowledge about fiscal uh, you know, like (inaudible) it's really not something… that people can do themselves…and, uh, uh, alimony for, uh, spouses is even more complicated…
>
> (**Anne, Legal Adviser, Netherlands**)

Likewise, Bente explained that recent changes to the child support formula were not to make the system easier for the lawyers but rather to ensure that more parents would pay child alimony, albeit that 'parents with high incomes, uh, they, uh, they are paying less alimony at the moment than they were obliged to pay when we had the calculation, uh, before. So, uh, it missed its purpose a bit I think.'

Nevertheless, the goal of conflict avoidance, which underpins measures in England and Wales and Sweden seeking to reduce the use of lawyers, was seen as an explicit policy goal in the Netherlands:

> … there is a really strong tendency at the moment from, also, from the government to have less, um, uh, how do you say that, battle, um… divorce battles.
> (**Anne, Legal Adviser, Netherlands**)

> …. we don't have a lot of fight divorces. They are… always in the media but its only, I thought, um, I, I hear last that it was only ten percent maybe of all cases who are, uh, before the courts but, ja usually we work out an arrangement.
> (**Bente, Lawyer, Netherlands**)

> …it's very popular and hot, to talk about the fight divorce. And that's also what is picked out in the papers and the media etcetera, that most people are talking about fight divorces. And there are fight divorces, but *most* of the divorces aren't fight divorces. But there are fight divorces and the fight divorces are getting, I think, worse than they have been…
> (**Carlijn, Lawyer, Netherlands**)

In contrast, Daphne said that she saw fight divorces 'rather often'. She did not go on to talk about the issues that parents fought about, but there are suggestions elsewhere in her interview that this was different for different clients. For example:

> We have a lot of clients, uh, from Turkish, uh Moroccan, um… um, background. And in my opinion, not about the money but about the children, a lot of times they are easier – a lot of easier with making, uh, agreements about the children.

> That you say, he's the father, so he can see them. While Dutch women often say, well he is a bad father, he does this or –
> (**Daphne, Lawyer, Netherlands**)

Insofar as these 'fight divorces' related to money, a tentative explanation may lie in the fact that many of her clients 'don't have any belongings, assets or – They… only have debts.' Many of Daphne's clients received state help with paying their legal fees. It is possible that for clients who have no assets to lose, and whose

legal fees are subsidised, the imperative of reducing their liability for debts on divorce may be a more pressing concern than the norm of a ‘good’, conflict free, divorce.

Where participants did talk about the perceived causes of conflict, there were similarities with the observations made by Swedish lawyers. For example, Carlijn, like Swedish lawyers Anna and Eric, considered one cause was that there was ‘much more money than there has been in the past. So sometimes it’s worth fighting for something’. The presence of bad advisers was also considered to be a contributing factor. Another perceived cause of conflict was changing societal norms, particularly around the role of fathers. Daphne considered that the requirement for parents to complete a parenting plan (ouderschapsplan), which came into effect in 2009[471] had been responsible for increased conflict between parents:

> … after, uh, the, the ouderschapsplan, the father say, hey, I have more rights, and I want my right. I want [bangs table] my right. I want to take care for my children. Although they're working forty hours a week, or sixty hours a week, I want half of the taking care of my children.
>
> And then the women said, during the marriage, he never took care of the children. Why should he take 50% of the time for the children.
> (**Daphne, Lawyer, Netherlands**)

This suggests that it is changes in fathers’ attitudes at the point of separation which is responsible for creating conflict. This fits with Smart & Neale’s research in England and Wales,[472] which found that, following divorce, fathers were more likely to feel that being a caring parent was a core part of their identity (see further Chapter 5(iii)). However, for Carlijn it was mothers’ attitudes towards how far they were willing for fathers to play a role in their children’s lives, as well as changes in fathers’ attitudes, that changed on separation and perhaps generated the conflict:

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[471] Simon de Bruijn, Anne-Rigt Poortman and Tanja van der Lippe, ‘Formerly cohabiting parents and parenting plans: Who makes the effort? [2016] Family & Law <http://www.familyandlaw.eu/tijdschrift/fenr/2016/06/FENR-D-16-00005/fullscreen> accessed 11 October 2018

[472] Carol Smart and Bren Neale, *Family Fragments* (Polity Press 1999), 53

> … because the society is changing… in the past, um, it was very easy the'um, uh agreement around children, they were very easy. Ah, the children go to mummy and they see their daddy, uh, once a week or twice a week or… once every two weeks. So, it was, for a long time, it wasn't accepted, I don't think that was a good thing, but it was accepted by the men by, so I think that the changed role of the man… especially in the, his role to the children, um men are more involved in the care for the children during the marriage or the partnership. Uh, that means that afterwards they don't accept, uh, to be, uh, a weekend father… And also the changed role of mothers, are working more. Um, um and who liked to share the… care for the children during the marriage. Um, well sometimes they don't want to share the care after the marriage. So that's the kind of strange…
> (**Carlijn, Lawyer, Netherlands**)

Reece,[473] writing about England and Wales, argued that there has been a rise in 'post-liberalism in social theory'.[474] For the 'responsible post-liberal subject',[475] 'responsibility is no longer about discrete decisions; responsible behaviour has become a way of being, a mode of thought; the focus has shifted from the content of the decision to the process of making the decision.'[476] Thus, behaving responsibly when exercising autonomy requires 'the adoption of an attitude rather than any particular decision'.[477] The emphasis on avoiding conflict and on private ordering can be seen as a part of a post-liberal (or neoliberal) view of autonomy: provided that parents can reach a decision themselves and without conflict then the content of that decision is less important:

> ...there's a very strong pressure from society, and it was also a divorce challenge where, yeah, that was started from the Government to see what are the best options to solve conflicts. And that, at the moment… [is] seen as the most important in the Netherlands, while there is less attention for the, well if people have a good deal, about, um, also in a financial sense.
> (**Anne, Legal Adviser, Netherlands**)

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[473] Helen Reece, *Divorcing Responsibly* (Hart 2003)
[474] Helen Reece, *Divorcing Responsibly* (Hart 2003), 24
[475] Helen Reece, *Divorcing Responsibly* (Hart 2003), 209
[476] Helen Reece, *Divorcing Responsibly* (Hart 2003), 209-10
[477] Helen Reece, *Divorcing Responsibly* (Hart 2003), 217

4(iii) England and Wales: Autonomy and the idea of choice

4(iii).1 Introduction

Having considered approaches to autonomy in Sweden and the Netherlands, this chapter draws on the discussions in Chapter 2 and the findings of interviews with parents to unpack understandings of autonomy in England and Wales (RQ 1.a). Of the three jurisdictions, England and Wales offers the most flexible legal framework when it comes to dividing assets on divorce. At least in theory, the discretionary system allows a court to reach a result that suits the particular circumstances of the case. For example, if one partner has given up work to care for children, the court can make an award that reflects this. A court might award that partner a greater share of the capital to recognise the difference in the parties' respective earning, and therefore mortgage, capacities, or order the other party to make on-going periodical payments. Thus, at least in theory, the law can respond to a wide range of different circumstances, giving the parties a choice about how to organise their lives. Theoretically at least, this seems to reflect a vision of autonomy that recognises the value of choice. In reality, however, the influence of neoliberal ideas in family law and policy, have resulted in a far more impoverished concept of autonomy, which tends to assume that individuals act in an individualistic and economically rational way.

As was discussed in Chapter 2, there has been a strong drive towards private ordering in England and Wales which is couched in the language of responsibility.[478] Additionally, autonomy has become increasingly influential as a substantive legal principle.[479] Underpinning both developments is an assumption that autonomous individuals make free choices shaped by self-interest. However, there are a whole host of structural and cultural factors which restrict an individual's ability to do this. For example, the division of caretaking responsibilities within intact families is often shaped by considerations such as the cost and availability of childcare, and societal expectations of mothers and fathers. These issues are discussed further in Chapter 5(iii).

[478] See, for example, Gov.uk, 'Proposals for reform of Legal Aid in England and Wales' (*Ministry of Justice,* November 2010) <https://www.gov.uk/government/publications/proposals-for-reform-of-legal-aid-in-england-and-wales> accessed 26 September 2018, 4.210

[479] See, for example, *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42

Notwithstanding these constraints on choice, in the interviews with parents in England and Wales discussed in this chapter, ideas of autonomy seemed to be influential. When it came to the factors that shaped financial settlements, there was evidence of power imbalances between the parties in some cases, but these tended to be disguised by statements around the value of financial independence. Likewise, when considering caretaking responsibilities, despite the potential impact of these on a parent's financial position, ideas of choice seemed to be important. These themes suggest a vision of marriage and similar relationships which is akin to a contractual one between two autonomous individuals, not dissimilar to the Swedish view of marriage, but without the added dimension of support from the state.

In the discussion that follows, the distinction between Tronto's phases of caregiving (referred to here as caretaking) and caring about / taking care of is key (see the discussion in Chapter 2). It is caretaking that most impinges on the ability to be financially independent in the post-separation world, a key element of neoliberal understandings of autonomy. Yet it is this aspect of caring that is often invisible. This distinction is helpful because it focuses on the nature of the care being carried out by a parent, something that can otherwise be obscured in discussions of care. The caretaking required of a good mother, for example, may be very different from that required of a good father, although the language of care may be used interchangeably. This distinction between caring about / taking care of and caretaking also more readily enables the experiences of non-female caretakers to be taken into account, than does an approach based only on gender. Whilst the distinction between caring about / taking care of and caretaking is gendered in practice, it is not treated here as an inherently gendered division. Instead, as Smart suggests, 'this difference arises out of social structural difference, not out a psychological process in the formation of personalities.'[480] Thus, it is not that 'women *are* more caring, but that they also *do* more caring and… this gives rise to a moral position and social perspective.'[481]

[480] Carol Smart, 'The Legal and Moral Ordering of Child Custody' (1991) 18 Journal of Law and Society 485, 489
[481] Carol Smart, 'The Legal and Moral Ordering of Child Custody' (1991) 18 Journal of Law and Society 485, 489

4(iii).2 Influences on financial settlements

4(iii).2.1 Key factors

The table below outlines some of the factors that appeared most influential in the financial settlements and child arrangements reached by participants. In some cases, these factors were mentioned explicitly, whereas in others the factor was not linked to the result by the participant but appeared to be important nonetheless.

Bargaining	A party sets off one interest against another. Most commonly paying more than they felt they had to in return for (the hope of) a more favourable child arrangement. This factor can be seen as the flip side of 'sacrifice' below.
Contributions	The idea that the division of assets should reflect the parties' respective contributions. However, there were differences in what the parties felt was a contribution. In some cases, contributions were envisaged as purely financial. This was most common where one party had brought more into the relationship or had inherited property. For others, contributions were seen as encompassing a wider range of actions, including looking after children.
Independence	The idea of financial independence or economic self-sufficiency as a goal in its own right.
Power imbalance	Cases involving some disparity in the bargaining positions of the parties. This may be due to economic factors, or to violent or controlling behaviour by one of the parties, for example.
Relationality	The idea that a settlement should best meet the needs of both parties to the relationship. This has similarities to the idea of 'reasonableness' (which Barlow et al found influential in their research into family dispute resolution and defined as wanting 'to reach an outcome that was fair to the other party'[482]) but reflects a more holistic approach, which focuses on reaching the best result for everyone.

[482] Anne Barlow, Rosemary Hunter, Janet Smithson and Jan Ewing, *Mapping Paths to Family Justice* (Palgrave Socio-Legal Studies 2017), 176

	The terminology of relationality, rather than reasonableness, is used to distinguish this approach from an approach whereby an outcome is cross-checked to see that it did not offend particular values (such as a party's rights as a father), which was the sense in which one of the participants used the term 'reasonable'. It also reflects the fact that the autonomy envisaged by those reaching these sorts of agreements tended to be more relational.
Sacrifice	This factor also appeared in Barlow et al's research and was defined as 'the party was prepared consciously to settle for less than their legal entitlements in order to maintain good relations with the other party or achieve some other objective they considered more important'.[483]

As discussed above, caretaking responsibilities are a key constraint on the choices caretakers make. However, for many participants the effects of such responsibilities were invisible because of prevailing conceptions of autonomy. A number of interconnected explanations are evident in the interviews. First, ideas about what makes a good parent, and the division of caretaking responsibilities within families, remain gendered. The possibility of being seen as an involved father with a relatively limited input of time can serve to disguise the much higher time and other involvement required to be a good mother; this encompasses both the unpaid work of caretaking and the impact of caretaking on participation in paid work. Additionally, these different experiences can result in caretaking being seen as the easier or more attractive option by the parent not performing it. Second, narratives of choice served to disguise the cultural and structural constraints that shape the ways in which caretaking responsibilities are shared. These issues are considered further in Chapter 5.

Notwithstanding prevailing understandings of autonomy, there were some cases in which the care of children was a much more explicit focus in the financial settlements reached. In these cases, there seemed to be several common themes. For example, parents prioritised the wellbeing of their child and were

[483] Anne Barlow, Rosemary Hunter, Janet Smithson and Jan Ewing, *Mapping Paths to Family Justice* (Palgrave Socio-Legal Studies 2017), 17

conscious of trying to do the right thing by the other parent to achieve this. These cases were characterised by a more relational understanding of autonomy and a more relational approach.

4(iii).3 Factors in action: a neoliberal approach to autonomy?

4(iii).3.1 Contributions

The importance of contributions tended to be raised in cases where a participant felt that their own contribution had been undervalued. This idea was raised in relation to both financial and non-financial contributions. For the purposes of this discussion, both are termed contributions in what follows. However, the financial contributions discussed here encompass a broader range of legal concepts than just contributions. For example, in some cases participants were concerned with pre-acquired or inherited assets, which are treated differently in the law from contributions.

On a neoliberal understanding of autonomy, the value of the parties' respective contributions would be a matter for negotiation and a bad bargain felt to be the responsibility of the individual. This is not, however, the position in the law that applies to divorcing couples in England and Wales. Broadly speaking, contributions are rarely a reason to depart from an equal division of assets,[484] and financial and non-financial contributions are seen to be of equal value,[485] except if a special contribution can be demonstrated.[486] Inherited or pre-acquired assets may, however, be considered to be non-matrimonial property,[487] which may not be shared equally between the parties if their needs can be met without recourse to them.[488] Given the level of assets involved in most participants' cases, the needs of the parties and their children would have been the most important factor in the financial settlements they reached in the eyes of the law. Thus, the fact that financial contributions were perceived to be undervalued in some cases is perhaps unsurprising. Where caretaking contributions are perceived to be undervalued this may be more concerning if it results in a party receiving less than is required to meet his or her financial needs.

[484] *Charman v Charman* [2007] EWCA Civ 503
[485] *White v White* [2000] UKHL 54
[486] *Charman v Charman* [2007] EWCA Civ 503
[487] *Miller v Miller : McFarlane v McFarlane* [2006] UKHL 24
[488] *Miller v Miller : McFarlane v McFarlane* [2006] UKHL 24

The perceived undervaluation of financial contributions was most common where one party had brought assets into the relationship. Antonia, for example, explained that her ex-husband 'never put a penny into the properties. I mean literally not a penny. I didn't have mortgages. I paid off my properties. So he really never put a penny into the properties.' She did not, however, think that such assets should always be excluded in their entirety:

> Um, so I think financially [intake of breath], if one person's come into it. What you, what you earn during the marriage is different. That's what you've done together. But if somebody's come in with a lot, I do believe that's theirs, you know. And, um, even if it is the man. As long as, as long as the, the children are looked after. I mean that's the priority. The children shouldn't have to suffer [pause] because the parents have decided not to live together any more.
> (**Antonia, Mother, England & Wales**)

Likewise, Michael felt that his contribution of a three-bed house, owned outright, at the start of his marriage (in contrast to his wife's five percent ownership of a two-bed flat that was mortgaged) should have been recognised in the overall financial settlement in his case. However, 'it's not an absolute rule. It's an as- it's an aspiration.

For Sophie and Andrew, the importance of different financial contributions was felt to diminish over time. Andrew commented on news stories about the division of multi-million-pound companies. Whilst he felt that some of the reports about claims against such companies didn't 'sit right', he felt them to be much less problematic in the context of a long marriage. Sophie's parents had contributed to the purchase of her home with her ex-partner. She insisted on this contribution being repaid before the balance of the equity was divided. She explained:

> Um, I think… I think if you've brought something into the relationship then you're entitled to take that. Um, I think what you develop during the relationship should be split 50:50. So I think kind of along that way. I think the longer you're with someone though that becomes much greyer.
> (**Sophie, Mother, England & Wales**)

This sort of analysis seems to reflect Eekelaar's idea that parties are seen as '"earning" an entitlement to share in each other's property during the course of their life together. The most, of course, which they could earn would be an equal share.'[489] However, Eekelaar makes clear that this is:

> … not the *only* element in the award. For example, as a matter of principle, one or the other party's needs, or the needs of the children, would provide grounds for one to receive an enhanced share or to make a reduced transfer. Length of marriage (or actual cohabitation) should be seen as establishing a baseline, which can be departed from if some other factor becomes sufficiently compelling.[490]

There is some support in the case law for taking a more restrictive approach in cases involving short, dual-career marriages in which there are no children and where needs are met.[491] However, such an approach is problematic in relationships where there are children and where assets are more limited. Not only would such an approach have the potential to leave the caretaker in a very precarious financial position, but it is inherently discriminatory. Contrary to the decision in *White*[492] caretaking and financial contributions are not seen as being of equal value. Instead, financial contributions are seen as inherently valuable whereas domestic contributions only develop that value over time. This argument has been made by Eekelaar for example, who claims that duration is an 'inherent aspect' of the value of homemaking because '[h]omemaking for 1 day, however brilliantly done, is in itself of relatively little value (or, to be precise, is of only 1 day's value).'[493] The same could, however, be said of breadwinning. Further, it is entirely possible that the one day of homemaking is the very thing that enables

[489] John Eekelaar, 'Asset distribution on divorce - the durational element' (2001) 117 LQR 552, 556-7
[490] John Eekelaar, 'Asset distribution on divorce - the durational element' (2001) 117 LQR 552, 558
[491] *Sharp v Sharp* [2017] EWCA Civ 408
[492] *White v White* [2000] UKHL 54
[493] John Eeekelaar, 'Asset Distribution on Divorce – Time and Property' [2003] Family Law 828, 831

the breadwinner to undertake a day of work. This is particularly likely to be the case where the party staying at home is looking after the parties' children.

The perceived undervaluation of caretaking responsibilities was most common amongst female cohabitants who had been the primary caretaker during a relationship. Alison, for example, felt that whilst the legal profession recognised the value of caretaking, her ex-partner did not. Her own financial position was precarious. She had limited claims as a former cohabitant and, in particular, no claim for spousal maintenance. Esther likewise felt that caretaking was not given the same value as breadwinning 'particularly from a male point of view'. Esther was less clear than Alison about whether these different roles were equally valuable. One explanation for this might be that Alison had legal advice directly on the point, whereas Esther saw a solicitor 'just for the free half an hour advice'.

These examples illustrate the dangers of assumptions of autonomy for those with caretaking responsibility. First, the absence of a legal claim for cohabitants leaves caretakers without any legal protection. They are dependent on the goodwill of a former partner or the ever-reducing safety net of the state. This is certainly not conducive to their autonomy. Second, reductions in legal aid mean a lack of awareness about the availability of any legal entitlement. This has particular implications for caretakers who are spouses, who may have a legal claim but be unaware of it. Third, where there are power imbalances in the relationship between the parties, private ordering means that these remain unchecked. For the stronger party, autonomy in this situation is the freedom from constraint. For the weaker party, a result that leaves them with little or nothing financially is likely to undermine their autonomy.

4(iii).3.2 Power imbalances and independence

Power imbalances were evident in several participant accounts and serve to reinforce the points made above about the danger that unchecked private ordering poses for the autonomy of the financially weaker party. These power imbalances were not, however, generally articulated by the parties and were often disguised by discussions around the value of financial independence. Andrew and Ruth, for example, had both received very little in the way of child support from their former partners. Their ability to survive financially without assistance

from their partners appeared to be a matter of pride, which is perhaps understandable in the context of the power imbalances in their relationships. Ruth, for example, alluded to violence in her relationship. Andrew had been at home with the children while his wife worked, so there was a clear economic disparity between them. Following separation, he and his wife agreed a shared care arrangement. She then claimed child benefit for one of the children, meaning that she was no longer obliged to pay child support at a level he had described as ‘pocket change’, but which made a big difference to him financially. He described his reaction as ‘”sod ya”. I’m going to get through this i-in spite of you.’ Had Ruth and Andrew’s partners been more cooperative, pride might have been less of an issue: the cost to one’s pride receiving a payment seen as fair by both parties is likely to be far less than of receiving a payment that has to be fought for on the basis of dependence.

Independence of a partner did not, however, equate to self-sufficiency, either in theory or reality. Jason, for example, considered it preferable that a former partner claim tax credits than spousal maintenance, an attitude shared by Ruth:

> I just think, oh my God, it’s like, we’re like 2017 not in the like Victorian times. We, if you’re a woman and you can work, go out and work. You don’t, you shouldn’t rely – I’d be, I’d be devastated if I had to rely on a man to, um, to keep me when I’m not even with them. Um, I just think, I just think, yeah, you need to just get out and work. ‘Cause I mean especially now, I think at this point in time, obviously rightly or wrongly, tax credits help massively, especially for me, I wouldn’t be able to work without them. (**Ruth, Mother, England & Wales**)

The invaluable role of state support was also mentioned by other caretakers. Alison, for example, said that if it wasn’t for the tax credits and disability benefit she received for one of her children, ‘I couldn’t live’. Andrew referred to the role state benefits played in topping up his part-time income. These examples illustrate the significance of state support, and how important it can be in redressing power imbalances in intimate relationships, something the Swedish approach, favouring state support, potentially allows for. Whilst Ruth’s situation is perhaps the most extreme example of a power imbalance in the relationships

of participants, all these examples demonstrate the extent to which ideas of choice can be misleading.

In Esther's case the power imbalance was perhaps less evident and its impact subtler. Her partner worked full-time earning much more money than she did. She said this when discussing the factors that were most important in the arrangements she reached with her ex-partner:

> I was terrified of losing the house and, and that headache of well I'd have to move and I'd have to do it all by myself. Um… that was the biggest factor for me, losing the house. I mean it was only like that for, for a bit when things got really nasty and he was threatening this and that and – [sigh] I mean he said, oh, I would have never let it go that far but who knows. But then, you know, people get very nasty.
> (**Esther, Mother, England & Wales**)

In this case, the power imbalance did not evidently lead to Esther receiving a worse settlement than she would have otherwise. She and her ex-partner were not married, so her legal claims against his income were very limited. She borrowed money from her parents to buy out his interest in their joint home, for which she had provided the deposit, but her partner's child maintenance payments enabled her to meet the ongoing mortgage and other expenses. However, Esther was left in a situation where she felt 'beholdened [sic]' to her ex-partner who 'constantly, even to this day, throws it back in my face about the money.' This is an example of what Smart & Neale term 'debilitative power, which is experienced as the effacement of the self'.[494] This has implications for autonomy. To the extent that someone is dependent on their partner to meet their financial needs and feels beholden to them, it is hard to see those two individuals as equally able to lead autonomous lives.[495]

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[494] Carol Smart and Bren Neale, *Family Fragments* (Polity Press 1999), 146
[495] Alasdair Maclean, *Autonomy, Informed Consent and Medical Law a Relational Challenge* (Cambridge University Press 2009)

4(iii).3.3 Bargaining and sacrifice

The themes of bargaining and sacrifice are similar in that they both involve trade-offs. However, whereas the former tended to be the preserve of the economically more powerful party, the latter was more common in interviews with the economically weaker party. These patterns were gendered in practice, reflecting the relative positions of men and women in society. However, like the distinction between caretaking and caring about / taking care of, the distinction is not considered to be inherently gendered.

Bargaining, which was associated with the parent in the economically more powerful position, involved paying more than it was felt was strictly necessary to achieve a better result. Neil, for example, considered that 'I'm giving up money and I'm, for that money I am buying access to my children.' When asked whether this meant he was more generous financially than he might otherwise have been, he responded:

> No, I think that's probably true. I hadn't really thought about it in those terms, hence the sort of reflective pause before I answered but, um, yes I think that, that is probably true. Um, had that linkage not been there, then I would probably have coughed up less.
> (**Neil, Father, England & Wales**)

For Gareth the link was more conscious:

> I pay my second wife more money for one son than I do my first wife for the two. For a, for a few reasons but one of them is that I worry that if I don't then she'll move to [another part of the country where they met] which will really mess my life up.
> (**Gareth, Father, England & Wales**)

In both these cases, the trade-offs were, therefore, to achieve a better result. This is consistent with neoliberal understandings of autonomy, which presume two autonomous individuals negotiating with one another. This does not mean that there are no power dynamics at play. The bargaining in these cases reflects a different sort of power imbalance from those described above; what Smart &

Neale refer to as ‘situational power’, a concept Smart & Neale describe as deriving from a parent’s position as the children’s primary carer.[496] For Gareth, his second wife’s status as the primary caretaker of his son meant a potential loss of control over where his son lived, which might make it more difficult for Gareth to spend time with him. The law does offer redress for these sorts of power imbalances,[497] albeit that legal aid cuts increasingly mean that parents may be left to fend for themselves in making private law applications. Further, the availability of legal remedies does not mean that the decision about whether or not to pursue them is straightforward. The cost of legal fees and the effect of further litigation on the parental relationship or on the children are, for example, factors that make such remedies unattractive.

Whereas bargaining was concerned with conceding a financial advantage for some other perceived benefit, sacrifice involved accepting less than one was entitled to for some greater purpose, often to do with the children. Unlike bargaining, sacrifice did not necessarily confer a quantifiable benefit, and in some cases there was a clear financial disadvantage. Laura, for example, agreed to her partner receiving 75-80% of the equity in a property that she had owned before their marriage in return for a shared care arrangement which was later reneged upon. She subsequently went bankrupt. Likewise, Louise sacrificed an increase in child support she was due on the basis that her former partner had said he would never see their children again if she claimed her full entitlement. It is hard to see these sorts of decisions as being autonomous acts and is certainly difficult to construe financial sacrifices of this magnitude as being consistent with the ability to live an autonomous life.

4(iii).4 A more relational approach to autonomy?

The cases in which caretaking was more visible were characterised by a more relational approach. Financial settlements were explicitly framed by reference to the interests of all family members and their needs, financial and otherwise:

[496] Carol Smart and Bren Neale, *Family Fragments* (Polity Press 1999), 146
[497] In this case through the ability to apply for specific issue or prohibited steps orders under Children Act 1989, s 8

> [the financial and children arrangements] were very much interlinked because it was about doing what we needed to do for [daughter]. And working out the arrangements that were, were good for all three of us.
> (**Elizabeth, Mother, England & Wales**)

Elizabeth and Matthew, for example, made financial arrangements that were guided by the need for their daughter to enjoy a good standard of living with them both. They were also both focused on how best to ensure that Matthew could buy a house of his own. This was reflected, for example, in their discussions around child maintenance:

> Elizabeth's said, look, I don't want to push for getting the absolute maximum that I could out of you because you, when [daughter's] with me we need, you know, she needs to she needs to be able to have a good time, and then for you to be able to go and do things um and all that kind of stuff…
> (**Matthew, Father, England & Wales**)

Like Elizabeth and Matthew, Emily and her husband agreed a shared care arrangement on separation. For her, similar considerations came into play:

> There was no point, you know, some people sort of say well, you know, take him to the cleaners. I don't, there's not, I don't think there's any point in doing that because, it, it would have meant that he wouldn't have been able to have somewhere that the children could go and be safe, and have room and be happy. And the, I think it would have massively affected our ongoing relationship, really badly.
> (**Emily, Mother, England & Wales**)

Whereas Matthew had taken a significant role in the care of his daughter prior to separation, Emily and her husband had had a more traditional relationship, with him working full-time in a senior IT role and her working two days a week from home. This more traditional set up was also the case for Kenneth. He worked in a very demanding job and his wife was the primary caretaker of their children. He too, indicated a more relational approach to the division of finances:

> … you've gotta try and do your best to make sure that everybody's looked after. What needs to be acknowledged is that you're now… supporting two households.
> (**Kenneth, Father, England & Wales**)

It may be that the nature of these relationships were such that caretaking was more visible than it might have been in other cases. Matthew's greater involvement in his daughter's care throughout his marriage may have made him more aware of the sacrifices involved in caretaking. Likewise, it may be that for Kenneth and for Emily's husband the demanding nature of their jobs (Emily's husband's job, for example, involved international travel), and the difficulty of reconciling them with childcare, made them more aware of the value of caretaking in its own right. It must, however, be noted that both Elizabeth and Emily commented on the fact that their ex-husbands felt very guilty about having had affairs (which preceded the breakdown of their marriages). Emily thought this may have been why she had never had to chase her husband for maintenance payments and Elizabeth wondered whether Matthew may have been less forceful in their negotiations on account of feeling guilty.

In these cases, autonomy, in the sense of financial independence, was far less of an explicit focus and, whilst not greeted with enthusiasm, it was recognised that spousal maintenance might be required in appropriate cases. Matthew, for example, referred to *Parlour v Parlour*[498] and noted that in cases where one person had sacrificed their career it wasn't 'necessarily always right to say look you know what, you're going to have to go and get a full-time job now and you're going to have to pay your own way.'

For these couples, autonomy, in the sense of financial independence, was not their main driver. Instead, they sought to achieve a result that worked best for the family as a whole. Similarly, there was little private ordering in the sense of reaching agreements without recourse to the law. Legal advice or legal knowledge meant that the parties were aware of the baseline provided by the law.

[498] *Parlour v Parlour* [2004] EWCA Civ 872

Elizabeth was a lawyer and she and Matthew made use of her knowledge in reaching their settlement. Their bargaining positions were also made more equal by the fact that both were in professional careers and were each able to secure mortgages themselves. For Kenneth and Emily, there were financial imbalances between them and their former partners. However, both couples received legal advice, albeit that Kenneth's protracted court proceedings contrasted with Emily's experience of reaching a resolution through one joint collaborative law session.

These couples also recognised that their ability to make completely autonomous decisions after separation would be compromised. Matthew, for example, spoke about the difficulties of trying to balance the arrangements for his daughter with his new relationship. For Kenneth, his post-separation arrangements meant frequent flights to see his children. These constraints are, however, a necessary fact of life where parents split up and both want to continue to play a role in their children's lives. Autonomy in these cases is not the freedom to do exactly as you choose. It is rather the freedom to live the best version of your life within these constraints.

4(iv) Conclusion

What does this mean for the question of how influential ideas of autonomy are and how autonomy is conceptualised (RQ 1.a)? In short, the increasing influence of individual autonomy can be seen in all three jurisdictions. However, the way in which autonomy is conceptualised differs, and, in particular, the weight given to the values of financial independence and choice varies.

In Sweden, understandings of autonomy prioritise financial independence. Marriage is seen as a relationship between two autonomous individuals who are free to walk away with few claims against one another. It is this understanding that underpins the Swedish approach to private ordering: if parties are self-supporting and fully engaged in paid work then there is less obvious need for concern about power imbalances in negotiations between partners. This perhaps explains the relatively limited requirements for safeguards for pre-nups and the attitude that the division of community property is primarily a private matter. In practice, however, as will be discussed further in Chapter 5(i), gendered differences in working and caretaking patterns persist.

To achieve the aim of economic independence for both partners on separation, the Swedish state is prepared both to limit citizen's choices and to provide a safety net for those who cannot support themselves. The theme of choice will be explored more fully in Chapter 5, which explores ideas of care in each of the three jurisdictions. At this stage, it is sufficient to note that the state encourages both parents to engage in paid work, and it is difficult to make a choice to care. The goal of gender equality, which encompasses economic equality, is considered so important that such constraints are legitimate to achieve this aim. These constraints on choice more readily enable couples to achieve financial independence on separation than elsewhere. Nevertheless, there remain vestiges of more traditional understandings of the family in the law, most notably through the community of property system and the calls for a greater ability to share pensions on divorce.

In the Netherlands, understandings of autonomy are shifting. To a greater extent than in Sweden, there remains an acceptance that caretaking has financial consequences, and the law provides redress for these through spousal

maintenance, in addition to the system of community of property (also present in Sweden). This understanding also perhaps underpins the continued emphasis on the role of lawyers within the legal system. However, in the Netherlands (as in Sweden) it is possible for one lawyer to represent both parties, something that is not permitted in England and Wales because of the potential for a conflict of interest (albeit that the removal of legal aid in private family law matters serves to limit legal representation in any event).

Nevertheless, participants in the Netherlands recognised the value of financial independence for separating couples. This is also recognised by the law, under which spousal maintenance and community of property are gradually being eroded. Thus, a relational approach to autonomy, which accepts ongoing financial constraints, is becoming far less acceptable. Financial independence is, however, difficult to achieve in a system where caretaking remains gendered. Further, unlike the position in Sweden, there is little emphasis on a role for the state; solidarity holds a former partner financially responsible. As will be discussed in Chapter 5(ii), the idea of choice is complex in the Netherlands, particularly insofar as it involves caretaking. There is little formal state action to shape citizens' behaviour around caretaking, as there is in Sweden. Thus, choices continue to be made against the background of pervasive cultural norms about mothers and fathers. It, therefore, seems to be the case that both choice and financial independence are valued, with little consideration of the potential incompatibility between them.

In England and Wales, choice appears to be central to understandings of autonomy. The way in which choice is perceived in the context of caretaking will be explored more fully in Chapter 5(iii), However, this chapter illustrates the extent to which power imbalances are rendered invisible by the norms of neoliberal autonomy (discussed in Chapter 2), which assume that all adults, regardless of their particular situation, are equally placed to negotiate. The discretionary regime provided for by the law addresses this to some extent by being flexible enough to adapt to individual circumstances. However, the

increasing drive towards a clean break in practice[499] suggests that financial independence is becoming increasingly important, with potentially insufficient regard for what this means for the position of caretakers. This position is exacerbated by the strong drive towards private ordering without lawyers, which is neither underpinned by a greater role for the state (as in Sweden), nor a vision of caretaking which envisages parents sharing care during and after their relationship (as in the Netherlands, see further Chapter 5(ii)). Participants who spoke of financial independence assumed a role for state support. This is illustrative of a wider point: if people are to be free to make their own decisions about the division of caretaking responsibilities, then the financial independence of a partner can only be achieved if a greater role for the state is assumed, unless we are content to leave children and their caretakers in financially precarious positions.

Finally, having considered understandings of autonomy in all three jurisdictions, what lessons can be learned about autonomy from the approaches taken in Sweden and the Netherlands (RQ2)? This chapter illustrates the complexity, discussed in Chapter 3, of drawing on ideas from other jurisdictions. The social context, and in particular ideas around gender equality and the role of the state, is vital in understanding how legal systems work. As will be discussed further in Chapter 7, one of the arguments in favour of reform of the law of financial remedies in England and Wales is that making the law more equal will improve the position of women in society.[500] The discussion of autonomy in this chapter illustrates the complex interplay between the law and other factors, and the difficulty of simply transplanting law from elsewhere into the legal system of England and Wales.

[499] Emma Hitchings E and Joanna Miles, 'Financial remedies on divorce: the need for evidence-based reform' (2018) <http://www.nuffieldfoundation.org/sites/default/files/files/briefing%20paper%20Jun%202018%20FINAL.pdf> accessed 18 July 2018

[500] Ruth Deech, 'Financial Provision Reform' [2018] Family Law 1251

5. Caring in the comparator jurisdictions

5.1 Introduction

Having explored ideas of, and the role played by, autonomy in each of the three jurisdictions in Chapter 4, this chapter considers approaches to care in those same jurisdictions. Together, the findings of these two chapters provide a perspective on the extent to which each of the jurisdictions takes account of caretaking responsibilities on parental separation (RQ 1).

The way in which law and policy approach caretaking responsibilities offers an important perspective on how autonomy is understood, and on the extent to which autonomy it is a realistic goal on parental separation. In England and Wales, most caretaking, particularly of children who are under school age, takes place within families. It is this privatisation of caretaking responsibilities that makes neoliberal ideas of autonomy so problematic on separation; caretaking responsibilities interfere with the caretaker's ability to become economically self-sufficient. A different way of organising caretaking within society or within families might, however, ease this tension. Considering approaches to care is, however, also important in its own right. As was discussed in Chapters 1 and 2, care is valuable to society. Exploring the way in which each of the three jurisdictions approaches caretaking responsibilities also allows an assessment of the extent to which that value is recognised (RQ 1.b).

As in Chapter 4, this chapter concludes with a set of tables comparing key features of the three jurisdictions to give an overview of how they approach caretaking responsibilities. The choice of features to compare was shaped by the goal of trying to understand how the tension between autonomy and care is experienced. For example, the way in which paid and unpaid work is divided between men and women, and the size of the gender pay gap, are indicators of how caretaking responsibilities are divided within families and between the family and society. Attitudes to paid work and care, and structural features of society, such as the availability of state childcare, parental leave provisions, and state benefits for families, may in turn help to explain such divisions of paid work and caretaking.

Looking first at the division between paid and unpaid work in the three jurisdictions, the statistics suggest that women are both most likely to engage in paid work in Sweden, and to work the longest hours, perhaps made possible by state nursery provision. This is consistent with the Swedish approach to autonomy, discussed in Chapter 4(i), and a vision of gender equality in which all adults are expected to work. However, attitudes to childcare in Sweden also suggest the greatest support of the three jurisdictions for both parents playing an equal role in childcare, which may be facilitated by the very generous parental leave provision. This is also consistent with the understanding of gender equality in Sweden, discussed in Chapter 4(i), which recognises women's roles as mothers as well as workers. Chapter 5(i), therefore, explores the visibility and value of care in Sweden against the backdrop of the pervasive goal of gender equality.

The position of women in England and Wales lies between those in Sweden and the Netherlands. Women in England and Wales tend to work more hours than those in the Netherlands but are more likely to work part-time than women in Sweden. This perhaps reflects the complexity of a society in which policy measures such as shared parental leave allow for the sharing of paid and unpaid work but where, unlike Sweden, there are no periods of leave reserved to each parent. Further, nursery care is expensive, which shapes the choices parents are able to make around paid work. The position in England and Wales is also likely to reflect continued gendered attitudes to the care of children. This complexity provides an important perspective on a vision of autonomy which emphasises choice, a theme that will be explored throughout Chapter 5.

Finally, whereas the Netherlands appeared to occupy an intermediate position on a spectrum of approaches to autonomy, it seems to be the least interventionist of the three jurisdictions when it comes to caretaking responsibilities. There is support for both parents working part-time, and the percentage of men working part-time is the highest of all three jurisdictions. However, women work part-time in far greater proportions than men, or women in Sweden or England and Wales, and parental leave is very limited, particularly for fathers. As will be explored in Chapter 5(ii), this can be understood in the context of the Combination Model,

under which men and women were expected to share paid and unpaid work between them, with a limited role for the state.

This chapter concludes with a set of tables comparing key features of the three jurisdictions. Chapters 5(i) and 5(ii) combine a doctrinal analysis with an analysis of interviews with family law practitioners to evaluate the legal approaches to caretaking in Sweden and the Netherlands respectively. Chapter 5(iii) considers how participant parents in England and Wales perceived caretaking responsibilities. As explained in Chapter 2, increasingly parents in England and Wales are being left to resolve issues themselves without recourse to legal advice. Whilst, as discussed in Chapter 4, private ordering is also an important feature in Sweden and the Netherlands, the discretionary system in England and Wales is more flexible than community of property regimes. It, therefore, seemed important to understand parents' perceptions of caretaking, and its relevance or otherwise, to reaching financial settlements, given that they will increasingly be left to reach such arrangements themselves. Finally, Chapter 5(iv) draws together the common themes in all three jurisdictions to consider the lessons that can be learned in England and Wales from the approaches taken in Sweden and the Netherlands (RQ 2).

5.2 Overview of key family policy measures

The table below compares some of the key family policy provisions of the three jurisdictions. There is a need for caution in comparing national statistics because they are not necessarily calculated in the same way. The UK data service describes OECD data as 'accurate and reliable and [they] provide an authoritative means to compare economic indicators across national boundaries'.[501] Therefore, where possible, OECD data has been used to facilitate a cross-jurisdictional comparison. Where it has not been possible to provide directly comparable data there is a need for caution in drawing cross-jurisdictional conclusions. However, national data is still useful in helping to build a more nuanced picture of how each jurisdiction thinks about caretaking and how it is divided. It is because of this greater level of detail that can be gleaned through national data that national data is used in the jurisdiction-specific chapters that follow.

	Jurisdiction		
	England and Wales (UK)	**Sweden**	**The Netherlands**
OECD labour force participation rate (2016)[502]	Women: 58% Men: 69.3%	Women: 69.6% Men: 74.4%	Women: 58.7% Men: 69.6%
OECD Minutes per day spent in paid and unpaid work[503]	**Paid work** Women: 216.2 Men: 308.6 **Unpaid work** Women: 248.6 Men: 140.1	**Paid work** Women: 268.7 Men: 321.9 **Unpaid work** Women: 206.5 Men: 154.0	**Paid work** Women: 205.5 Men: 354.0 **Unpaid work** Women: 254.3 Men: 132.9

[501] UK Data Service, 'Organisation for Economic Co-operation and Development' <https://www.ukdataservice.ac.uk/deposit-data/owners-producers/oecd/oecd> accessed 12 July 2018

[502] OECD.Stat, 'Labour force participation rate, by sex and age group' (Data extracted on 12 July 2018: 15.48 UTC (GMT) from OECD.Stat) <https://stats.oecd.org/index.aspx?queryid=54757> accessed 12 July 2018

[503] OECD.Stat, 'Employment: Time spent in paid and unpaid work, by sex' (Data extracted on 12 July 2018: 15.01 UTC (GMT) from OECD.Stat) <https://stats.oecd.org/index.aspx?queryid=54757> accessed 12 July 2018

	Jurisdiction		
	England and Wales (UK)	**Sweden**	**The Netherlands**
OECD Part-time employment rate[504] (people in employment who work less than 30 hours per week in their main job)[505] **EU average (women): 26.952%** **EU average (men): 8.203%**	Women: 36.95% (UK) Men: 11.461% (UK)	Women: 17.513% Men: 10.443%	Women: 58.695% Men: 18.906%
Nature of paid work undertaken by men and women	Men tend to work in professional occupations associated with higher levels of pay and are more likely to be employed in higher skilled jobs than women. Women are more likely to work in caring and leisure occupations.[506] According to the ONS: 'As men and women increased in age, the percentage of the top 10% [of earners] that were female tended to decrease. The greatest fall in the percentage of the top	The labour market in Sweden is heavily gender segregated. In 2014, 16% of employed women and 15% of employed men had occupations with an even distribution of the sexes.[508] Further, 70% of women had occupations dominated by women and 67% of men were in occupations dominated by men.[509] In 2014, the most female-dominated occupations were assistant nurses, home help services, home based personal care	Although gender segregation by employment sector decreased from 2010 to 2015, segregation remains.[516] In 2015, almost half of working women (17.2% of men) worked in the civil service or care sector.[517] In contrast, men 'were represented principally in the industry, energy and construction sectors.'[518] Women are more likely to have a permanent employment contract than men; men are more

[504] OECD, 'Part-time employment rate <https://data.oecd.org/emp/part-time-employment-rate.htm> accessed 12 July 2018
[505] OECD, 'Part-time employment rate <https://data.oecd.org/emp/part-time-employment-rate.htm> accessed 12 July 2018
[506] ONS, 'Women in the labour market: 2013' (25 September 2013) <http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/womeninthelabourmarket/2013-09-25> accessed 11 October 2018
[508] Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2016' (*SCB*, 2016) <http://www.scb.se/contentassets/7516e7d2f0834a7b94bfd87593405c7b/le0201_2015b16_br_x10br1601eng.pdf> accessed 6 December 2017, 59
[509] Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2016' (*SCB*, 2016) <http://www.scb.se/contentassets/7516e7d2f0834a7b94bfd87593405c7b/le0201_2015b16_br_x10br1601eng.pdf> accessed 6 December 2017, 59
[516] Wil Portegijs (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2016' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS)*, 13 December 2016) <https://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2016/Emancipation_Monitor_2016> accessed 11 September 2018
[517] Wil Portegijs (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2016' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS)*, 13 December 2016) <https://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2016/Emancipation_Monitor_2016> accessed 11 September 2018
[518] Wil Portegijs (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2016' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS)*, 13 December 2016) <https://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2016/Emancipation_Monitor_2016> accessed 11 September 2018

	Jurisdiction		
	England and Wales (UK)	**Sweden**	**The Netherlands**
	10% of earners that were women was between the 25-29 and 30-34 age groups, coinciding with women having children in their late twenties. Therefore, the percentage of women in the highest paid reduces after the average age that women tend to give birth to their first child'[507]	and nursing homes.[510] In 2016, this was preschool teachers (96% women).[511] In both 2014 and 2016, the most male dominated occupation was 'wood workers, carpenters, etc'.[512] The private sector is the biggest employer of both men and women.[513] However, women make up the majority of public sector employees and men the majority of private sector employees.[514] Nevertheless, men are over-represented at management level in both sectors.[515]	likely to be self-employed.[519] Similar percentages of men and women who work are employed at the highest occupational levels.[520]

[507] ONS, 'Women in the labour market: 2013' (25 September 2013) <http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/womeninthelabourmarket/2013-09-25> accessed 11 October 2018

[510] Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2016' (*SCB*, 2016) <http://www.scb.se/contentassets/7516e7d2f0834a7b94bfd87593405c7b/le0201_2015b16_br_x10br1601eng.pdf> accessed 6 December 2017, 59

[511] Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2018' (*SCB,* 2018) <https://www.scb.se/contentassets/4550eaae793b46309da2aad796972cca/le0201_2017b18_br_x10br1801eng.pdf> accessed 17 October 2019

[512] Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2016' (*SCB*, 2016) <http://www.scb.se/contentassets/7516e7d2f0834a7b94bfd87593405c7b/le0201_2015b16_br_x10br1601eng.pdf> accessed 6 December 2017, 59 and Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2018' (*SCB,* 2018) <https://www.scb.se/contentassets/4550eaae793b46309da2aad796972cca/le0201_2017b18_br_x10br1801eng.pdf> accessed 17 October 2019, 67

[513] Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2016' (*SCB*, 2016) <http://www.scb.se/contentassets/7516e7d2f0834a7b94bfd87593405c7b/le0201_2015b16_br_x10br1601eng.pdf> accessed 6 December 2017, 50 and Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2018' (*SCB,* 2018) <https://www.scb.se/contentassets/4550eaae793b46309da2aad796972cca/le0201_2017b18_br_x10br1801eng.pdf> accessed 17 October 2019, 110

[514] Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2016' (*SCB*, 2016) <http://www.scb.se/contentassets/7516e7d2f0834a7b94bfd87593405c7b/le0201_2015b16_br_x10br1601eng.pdf>, accessed 6 December 2017, 99 and Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2018' (*SCB,* 2018) <https://www.scb.se/contentassets/4550eaae793b46309da2aad796972cca/le0201_2017b18_br_x10br1801eng.pdf> accessed 17 October 2019, 110

[515] Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2016' (*SCB*, 2016) <http://www.scb.se/contentassets/7516e7d2f0834a7b94bfd87593405c7b/le0201_2015b16_br_x10br1601eng.pdf>, accessed 6 December 2017, 99 and Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2018' (*SCB,* 2018) <https://www.scb.se/contentassets/4550eaae793b46309da2aad796972cca/le0201_2017b18_br_x10br1801eng.pdf> accessed 17 October 2019, 110

[519] Wil Portegijs (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2016' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS)*, 13 December 2016) <https://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2016/Emancipation_Monitor_2016> accessed 11 September 2018

[520] Wil Portegijs (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2016' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS)*, 13 December 2016) <https://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2016/Emancipation_Monitor_2016> accessed 11 September 2018

	Jurisdiction		
	England and Wales (UK)	**Sweden**	**The Netherlands**
OECD Gender Wage Gap (Total % of male median wage, 2017 or latest available)[521] **EU average: 19.13%**	16.84% (UK)	13.42%	14.11%
Attitudes to work and child care	Where a child is under school age:[522] - 19% think that a mother should stay at home - 32% think that a mother should work part-time - 6% think that both parents should work full-time - 9% think that both parents should work part-time - 30% can't choose When children have started school:[523] - 2% think that a mother should stay at home. - 49% think that a mother should work part-time. - 27% think that a mother should work full-time. - 19% can't choose.[524]	67% of Swedes agree that "men should take as much part in child care as women[525] (73% of women and 61% of men).[526]	Just over four in ten men feel that women are better suited to care for children than men. Amongst women with children this figure is 32% and for women without children the figure is 22%.[527] According to the 'Emancipation Monitor' report prepared by the Netherlands Institute for Social Research and Statistics Netherlands: 'A majority of the Dutch population think that having a job for two or three days a week is ideal for women with young children. For mothers with school-aged children a work week of three or four days is considered ideal. Between 2014

[521] OECD, 'Gender wage gap' <https://data.oecd.org/earnwage/gender-wage-gap.htm> accessed 12 July 2018
[522] John Curtice, Elizabeth Clery, Jane Perry, Miranda Phillips and Nilufer Rahim (eds) *British Social Attitudes 36* (The National Centre for Social Research, 2019) <https://www.bsa.natcen.ac.uk/media/39363/bsa_36.pdf> accessed 27 September 2019
[523] Eleanor Attar Taylor and Jacqueline Scott, 'Gender' in Phillips D, Curtice J, Phillips M and Perry J (eds) *British Social Attitudes: The 35th Report* (The National Centre for Social Research, 2018) <http://www.bsa.natcen.ac.uk/latest-report/british-social-attitudes-35/gender.aspx> accessed 11 October 2018
[524] NB these figures need to be treated with caution. There was a significant change between 2017 and 2018 figures in relation to a child under school age. There are no 2018 figures for children of school age, but it is possible that similar changes have taken place.
[525] Jørgen Goul Anderson & Ditte Shamshiri-Peterson, 'Attitudes towards gender equality in Denmark, Sweden and Norway' (Annual meeting of the Danish Political Science Association, Vejle, 27-28 October 2016) <http://dpsa.dk/papers/Shamshiri-Petersen%20Goul%20Andersen.Gender%20equality%20attitudes.DPSA%20paper(1).pdf> accessed 13 July 2018, 6
[526] Jørgen Goul Anderson & Ditte Shamshiri-Peterson, 'Attitudes towards gender equality in Denmark, Sweden and Norway' (Annual meeting of the Danish Political Science Association, Vejle, 27-28 October 2016) <http://dpsa.dk/papers/Shamshiri-Petersen%20Goul%20Andersen.Gender%20equality%20attitudes.DPSA%20paper(1).pdf> accessed 13 July 2018, 7
[527] Wil Portegijs (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2016' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS)*, 13 December 2016) <https://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2016/Emancipation_Monitor_2016>, accessed 11 September 2018

	Jurisdiction		
	England and Wales (UK)	**Sweden**	**The Netherlands**
			and 2016 a full-time job became less popular for fathers with young children. Currently only 22% of the population considers this to be the ideal working week for them. Almost three-quarters of men and women approve a situation in which children go to childcare while their mother is in paid employment…. Half of men and women express a preference for an egalitarian division of work and care tasks between men and women…'[528]
Parental leave provisions	Mothers are entitled to up to 52 weeks of maternity leave (39 weeks paid).[529] After the compulsory maternity leave period (usually 2 weeks) the mother can curtail her maternity leave and the remainder can be taken as shared parental leave.[530] The mother and her partner (who does not need to be the biological father) can then share the remaining leave	Mothers and fathers are entitled to share around 480 days of paid parental leave when a child is born, which can be taken until the child is 8.[533] For 390 days, parents receive 80% of their pay (up to a statutory maximum). The remainder is paid at a flat rate.[534] 90 days of the leave are specifically allocated to each parent	Mothers are entitled to at least 16 weeks of pregnancy and maternity leave.[537] Pregnancy leave can begin from up to six weeks before the due date and should not start later than 4 weeks before the due date.[538] After giving birth, mothers are entitled to at least ten weeks'

528 Wil Portegijs (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2016' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS)*, 13 December 2016) <https://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2016/Emancipation_Monitor_2016> accessed 11 September 2018

529 Gov.UK, 'Maternity pay and leave' <https://www.gov.uk/maternity-pay-leave> accessed 12 July 2018

530 Shared Parental Leave Regulations 2014, SI 2014/3050, Regulation 6, Employment Rights Act 1996, s 72, Maternity and Parental Leave etc Regulations 1999, SI 1999/3312, Regulation 8, Public Health Act 1936, s 205

533 The Official Site of Sweden, '10 things that make Sweden family friendly' (last updated 10 January 2018) <https://sweden.se/society/10-things-that-make-sweden-family-friendly/> accessed 13 July 2018

534 The Official Site of Sweden, '10 things that make Sweden family friendly' (last updated 10 January 2018) <https://sweden.se/society/10-things-that-make-sweden-family-friendly/> accessed 13 July 2018

537 Government of the Netherlands, 'Q&A Pregnancy and Maternity Leave' (*Ministry of Social Affairs and* Employment, 24 August 2011) <https://www.government.nl/government/documents/leaflets/2011/08/24/q-a-pregnancy-and-maternity-leave> accessed 2 May 2017

538 Government of the Netherlands, 'Q&A Pregnancy and Maternity Leave' (*Ministry of Social Affairs and* Employment, 24 August 2011) <https://www.government.nl/government/documents/leaflets/2011/08/24/q-a-pregnancy-and-maternity-leave> accessed 2 May 2017

	Jurisdiction		
	England and Wales (UK)	**Sweden**	**The Netherlands**
	between them as they wish during the period from the child's date of birth to the day before his or her first birthday.[531] Thus, up to 50 weeks of shared parental leave and 37 weeks of shared parental pay is available.[532]	and cannot be transferred. The remainder can be transferred.[535] Parents are also entitled to up to 120 days of temporary parental leave which enables them to take time off up when children under 12 are sick.[536]	maternity leave.[539] However, it is possible to return to work 42 days after giving birth.[540] The Employee Insurance Agency pays 100% of income during the leave period (up to a statutory maximum).[541] Partners of employees who give birth are entitled to a week's parental leave, paid at 100% of salary.[542] This can be taken at any time in the first four weeks after a child is born.[543] From 1 July 2020, 5 weeks unpaid parental leave will also be available in the first 6 months of the child's life at 70% pay.[544] Parents who have been employed for a year are entitled to take up to 26 weeks of unpaid parental leave until the child is 8.[545]

[531] Shared Parental Leave Regulations 2014, SI 2014/3050, Regulation 7(1)
[532] Gov.UK, 'Shared Parental Leave and Pay' <https://www.gov.uk/shared-parental-leave-and-pay> accessed 12 July 2018
[535] Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2016' (*SCB*, 2016) <http://www.scb.se/contentassets/7516e7d2f0834a7b94bfd87593405c7b/le0201_2015b16_br_x10br1601eng.pdf>, accessed 6 December 2017, 9
[536] The Official Site of Sweden, '10 things that make Sweden family friendly' (last updated 10 January 2018) <https://sweden.se/society/10-things-that-make-sweden-family-friendly/> accessed 10 July 2018
[539] Government of the Netherlands, 'Q&A Pregnancy and Maternity Leave' (*Ministry of Social Affairs and* Employment, 24 August 2011) <https://www.government.nl/government/documents/leaflets/2011/08/24/q-a-pregnancy-and-maternity-leave> accessed 2 May 2017
[540] Government of the Netherlands, 'Q&A Pregnancy and Maternity Leave' (*Ministry of Social Affairs and* Employment, 24 August 2011) <https://www.government.nl/government/documents/leaflets/2011/08/24/q-a-pregnancy-and-maternity-leave> accessed 2 May 2017
[541] European Commission, 'Netherlands - Parenthood (*Employment, Social Affairs & Inclusion*) <http://ec.europa.eu/social/main.jsp?catId=1122&langId=en&intPageId=4987> accessed 16 October 2018
[542] Business.gov.nl, 'Leave Schemes' <https://business.gov.nl/regulation/leave-schemes/> accessed 25 February 2019
[543] Business.gov.nl, 'Leave Schemes' <https://business.gov.nl/regulation/leave-schemes/> accessed 25 February 2019
[544] Business.gov.nl, 'Leave Schemes' <https://business.gov.nl/regulation/leave-schemes/> accessed 25 February 2019
[545] Karin Bodewes, 'Employment and employee benefits in the Netherlands: Overview' (*Practical Law*, 1 August 2012) <http://uk.practicallaw.com/7-503-3884?source=relatedcontent> accessed 7 February 2017

	Jurisdiction		
	England and Wales (UK)	**Sweden**	**The Netherlands**
Attitudes to shared parental leave / parental leave uptake	When asked how a full-time working couple with a new baby should divide paid leave between them:[546] - 12% think that the mother should take the entire paid leave period, the father none. - 40% think that the mother should take most of the paid leave, the father some. - 34% think that the mother and father should each take half. - Fewer than 0.5% think that the father should take all or most of the paid leave and the mother some or none. - 13% can't choose. Parental leave uptake is low; the government estimate is 2%[547] and research conducted by a law firm (based on HMRC figures) suggests the figure is just over 1%.[548]	According to Anderson et al, 62% of Swedes agreed that "It is best for all parties if men take parental leave" (64% of women and 57% of men).[549] The question does not, however, specify how long a period of leave men and women should take. Given that three months are reserved to each parent (see further below) it may be, for example, that it is this period that is assumed. Mothers took 72% of parental allowance and 62% of temporary parental allowance in 2017.[550]	N/A

[546] John Curtice, Elizabeth Clery, Jane Perry, Miranda Phillips and Nilufer Rahim (eds) *British Social Attitudes 36* (The National Centre for Social Research, 2019) <https://www.bsa.natcen.ac.uk/media/39363/bsa_36.pdf> accessed 27 September 2019

[547] Gov.UK, 'New "Share the joy" campaign promotes shared parental leave rights for parents' (12 February 2018) <https://www.gov.uk/government/news/new-share-the-joy-campaign-promotes-shared-parental-leave-rights-for-parents> accessed 11 September 2018 and Owen Walker, 'Shared parental leave suffers inauspicious start' *Financial Times* (London, 8 August 2018) <https://www.ft.com/content/9b6cd2b6-9724-11e8-b67b-b8205561c3fe> accessed 11 September 2018

[548] EMW, 'Shared Parental Leave 2017/2018 Update' (*EMW*, 25 June 2018) <https://www.emwllp.com/latest/shared-parental-leave-the-gender-pay-gap/> accessed 11 September 2018 and Owen Walker, 'Shared parental leave suffers inauspicious start' *Financial Times* (London, 8 August 2018) <https://www.ft.com/content/9b6cd2b6-9724-11e8-b67b-b8205561c3fe> accessed 11 September 2018

[549] Jørgen Goul Anderson & Ditte Shamshiri-Peterson, 'Attitudes towards gender equality in Denmark, Sweden and Norway' (Annual meeting of the Danish Political Science Association, Vejle, 27-28 October 2016) <http://dpsa.dk/papers/Shamshiri-Petersen%20Goul%20Andersen.Gender%20equality%20attitudes.DPSA%20paper(1).pdf> accessed 13 July 2018, 7

[550] Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2018' (*SCB*, 2018) <https://www.scb.se/contentassets/4550eaae793b46309da2aad796972cca/le0201_2017b18_br_x10br1801eng.pdf> accessed 17 October 2019, 46

	Jurisdiction		
	England and Wales (UK)	**Sweden**	**The Netherlands**
Availability and use of state childcare	3 to 4 year olds are entitled to 570 hours of free early education / childcare per year (usually taken as 15 hours each week for 38 weeks of the year).[551] The majority of childcare is provided by private and voluntary providers.[552] 26.1% of children aged 0-3 and 72.8% of children aged 3+ were in formal childcare provision in 2015.[553]	All children aged 1-5 are guaranteed a place in a public preschool.[554] Pre-school is free for children aged between 3 and 6 for up to 15 hours per week.[555] Sweden's maximum fee policy is designed to limit childcare costs. Fees are based on income: for low income families it is free and fees are capped at SEK 1,425 per month.[556] 64% of children aged 1-3 and 96.3% of children between 3 and 6 are enrolled in formal childcare.[557]	Parents who meet certain criteria (for example, they work, pay the costs themselves and the child goes to registered childcare) can claim a childcare allowance under which a maximum of 230 hours per child are reimbursed. [558] According to the 2016 Emancipation Monitor report: 'The use of formal childcare (day nurseries, out-of-school childcare or registered childminders) decreased between 2011 and 2014, but increased slightly between 2014 and 2015. Informal childcare provided by family or friends (in many families combined with formal childcare), has become more common over the last five years. In 2015 72% of families with children aged up to 4 years used this form of

[551] Gov.UK, 'Help Paying for Childcare' (6 April 2016) <https://www.gov.uk/help-with-childcare-costs/overview> accessed 12 July 2018
[552] Department for Education, 'Provision for children under five years of age in England, January 2017' (29 June 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/622632/SFR29_2017_Text.pdf> accessed 11 September 2018
[553] European Commission, 'Country profiles – United Kingdom: Policies and progress towards investing in children' (European Platform for Investing in Children, *Employment, Social Affairs & Inclusion,* last updated December 2017) < http://ec.europa.eu/social/main.jsp?catId=1248&langId=en&intPageId=3659> accessed 11 September 2018
[554] European Commission, 'Country profiles – Sweden: Policies and progress towards investing in children' (European Platform for Investing in Children, *Employment, Social Affairs & Inclusion*, last updated February 2018) < http://ec.europa.eu/social/main.jsp?catId=1248&langId=en&intPageId=3658> accessed 16 October 2018
[555] European Commission, 'Country profiles – Sweden: Policies and progress towards investing in children' (European Platform for Investing in Children, *Employment, Social Affairs & Inclusion*, last updated February 2018) < http://ec.europa.eu/social/main.jsp?catId=1248&langId=en&intPageId=3658> accessed 11 September 2018
[556] The Official Site of Sweden, 'Preschool - A place to grow' <https://sweden.se/society/play-is-key-in-preschool/> accessed 7 August 2019
[557] European Commission, 'Country profiles – Sweden: Policies and progress towards investing in children' (European Platform for Investing in Children, *Employment, Social Affairs & Inclusion*, last updated February 2018) < http://ec.europa.eu/social/main.jsp?catId=1248&langId=en&intPageId=3658> accessed 11 September 2018
[558] Belastingdienst, 'My child goes to a childcare centre' <https://www.belastingdienst.nl/wps/wcm/connect/bldcontenten/belastingdienst/individuals/benefits/moving_to_the_netherlands/my_child_goes_to_a_childcare_centre/> accessed 7 August 2019

	Jurisdiction		
	England and Wales (UK)	**Sweden**	**The Netherlands**
			childcare, compared with 58% in 2011. Among employed parents with school-aged children, the use of informal care increased from 44% in 2011 to 52% in 2015.'[559] The 2014 Emancipation Monitor report concluded: 'Formal childcare is most used by families with a highly educated mother, being the primary form of care in 56% of cases compared with 35% and 23%, respectively, for mothers with an intermediate and low education level.'[560]
State benefits / payments for children	**Child benefit**- This is a benefit paid to those responsible for children under 16 (or under 20 in approved education or training).[561] It is paid at the rate of £20.70 a week for the eldest child and £13.70 a	**Child allowance (barnbidrag)** – This is a paid to parents who live and have children under 16 in Sweden.[568] It is paid at the rate of SEK 1,250 per child per month.[569] Where parents have joint custody then half is paid to each.	**Child benefit (Kinderbijslag)** – this is a non-means tested benefit.[574] It is payable if someone is: - Covered by national insurance

[559] Wil Portegijs (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2016' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS)*, 13 December 2016) <https://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2016/Emancipation_Monitor_2016> accessed 11 September 2018

[560] Ans Merens (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2014 Summary' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS)*, 16 December 2014) <http://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2014/Emancipation_Monitor_2014> accessed 13 June 2016, 232

[561] Gov.uk, 'Claim Child Benefit' <https://www.gov.uk/child-benefit> accessed 7 August 2019

[568] Försäkringskassan, 'Child allowance' <https://www.forsakringskassan.se/privatpers/foralder/nar_barnet_ar_fott/barnbidrag/!ut/p/z0/fYzLDoIwEAC_puctqNwJKD4OxpAo9tIUKaRKtmW7IX6-6Ad4m0kmAwoaUGhmNxh2Hs24-F1Ier0vi6Qq5Om8qUuZZ4dLcq236S5dQW0RjqD-R8vFPadJ5aAeHtm-GZofIEerycbgMbrZChnIzYaDpShk78mMnSUh0ZBuDaFlvVDvmYX8eus6MgOEV3X7AGdh2ls!/> accessed 7 August 2019

[569] Försäkringskassan, 'Child allowance' <https://www.forsakringskassan.se/privatpers/foralder/nar_barnet_ar_fott/barnbidrag/!ut/p/z0/fYzLDoIwEAC_puctqNwJKD4OxpAo9tIUKaRKtmW7IX6-6Ad4m0kmAwoaUGhmNxh2Hs24-F1Ier0vi6Qq5Om8qUuZZ4dLcq236S5dQW0RjqD-R8vFPadJ5aAeHtm-GZofIEerycbgMbrZChnIzYaDpShk78mMnSUh0ZBuDaFlvVDvmYX8eus6MgOEV3X7AGdh2ls!/> accessed 7 August 2019

[574] European Commission, 'Netherlands - Child benefits' (*Employment, Social Affairs and Inclusion*) <http://ec.europa.eu/social/main.jsp?catId=1122&langId=en&intPageId=4985> accessed 2 May 2017

	Jurisdiction		
	England and Wales (UK)	**Sweden**	**The Netherlands**
	week for additional children.[562] If parents separate then a claimant will get £20.70 a week for the eldest child who stays with him or her.[563] Tax charges may apply to parents with an income in excess of £50,000.[564] **Universal Credit** - this benefit, which is in the process of being rolled out, combines a number of pre-existing benefit claims, including child tax credit and working tax credits. It is payable to those who are on low incomes or out of work.[565] The benefit consists of a standard allowance plus additional elements for various costs, including childcare costs.[566] The childcare element is £231.67 for each of two children (although a higher amount is paid for a first	A parent with sole custody receives the full payment. A large family supplement is paid for families with 2 children or more.[570] **Maintenance support** – this benefit is available to the parent with care of children after separation in circumstances where the other parent does not pay any child support at all, pays less than the set amount for maintenance support or does not pay on time.[571] If the other parent does not pay at all, parents in receipt receive between SEK 1,573 and 2,073 per month, depending on the age of the child. If the paying parent does not pay the full amount, the recipient receives	- Has one or more children under 18 - Cares for or supports the child.[575] The benefit is paid for adopted children, foster children, step children and other children cared for 'as if they were your own children' as well as biological children.[576] Rates per child per quarter, as from January 2019, are: - €219.97 (0-5 years old) - €267.10 (6-11 years old)

[562] Gov.uk, 'Claim Child Benefit' <https://www.gov.uk/child-benefit> accessed 7 August 2019
[563] Gov.uk, 'Claim Child Benefit' <https://www.gov.uk/child-benefit> accessed 7 August 2019
[564] Gov.uk, 'Claim Child Benefit' https://www.gov.uk/child-benefit> accessed 7 August 2019
[565] Gov.UK, 'Universal Credit' <https://www.gov.uk/universal-credit> accessed 16 October 2018
[566] Gov.UK, 'Universal Credit' <https://www.gov.uk/universal-credit> accessed 16 October 2018
[570] Försäkringskassan, 'Child allowance' <https://www.forsakringskassan.se/privatpers/foralder/nar_barnet_ar_fott/barnbidrag/!ut/p/z0/fYzLDoIwEAC_puctqNwJKD4OxpAo9tIUKaRKtmW7IX6-6Ad4m0kmAwoaUGhmNxh2Hs24-F1Ier0vi6Qq5Om8qUuZZ4dLcq236S5dQW0RjqD-R8vFPadJ5aAeHtm-GZofIEerycbgMbrZChnIzYaDpShk78mMnSUh0ZBuDaFlvVDvmYX8eus6MgOEV3X7AGdh2ls!/> accessed 7 August 2019
[571] Försäkringskassan, 'Maintenance support when the child lives with you' <https://www.forsakringskassan.se/privatpers/foralder/for_foraldrar_som_inte_lever_ihop/barnet_bor_hos_dig/!ut/p/z1/tZZNk6lwEIZ_yxw8ptIhCR9HUERxZxQYdeRC8RGVXQUGKd3ZX79xq7a2RledKoVLJ1XNk7c76U5wiN9wWMT7fBU3eVnEGzlfhGrEBr0ucbow0vkrAfNZ10yfWCQIGJ7hEIdVmmd4kaRGDDQjiFNFRywRGooznSCaZrCEVGgK04_eadFUzRov0rJoRNHsRFSLXVUWu3wvOlDV-T5uKlHvOrAs63iTifrvqI7raFduo1z-GG3EXtRRvi6rDiRxXYgmSso6Wpe7KMtXeP5HOVz4TMDh9cDmR6k3CCcMh3lwvQmhbKy4bnDmMOZBD0x16JFZYCu2pZwRPqlgL4ADUeCFjES7SPE1PN_n4oCnRVlv5ZYF_3ZkyTnXloyjFBINMa5zFBM5UpY8oSKmhkF1PIDTFRxHVcAkngejyYg6mnrnCqf4wJMBkKmvDHwVRor2WPzY7loyP3TofeN9EgwfrP4k_VrLeN4unj0W__kAQ-_RJ2c0k4VnW_bUNZnjK2qb6tndleXeKn_ZXfPv7--hKZvisRn-bPDb17viDfl9cll-BgYRWZogLhIVMV03kAEQo0xI-QY3DJVn53WlSvwAuByOPLvHHos_Va-1ip-1q36mPhbv9C3Z0ya-5RkqA9DvTY57696572TeuK-vJy9QrvS8L70xruOHpF08vRPv3nqZtLo3_31LVdutTj_QD39wOLwu16tt9GxTftE0uvTadpMT80F_WS9o4e6PJlyYT0-_AefElIA!/?1dmy&urile=wcm%3apath%3a%2Fcontentse_responsive%2Fprivatpers%2Fforalder%2Fforaldrar_som_inte_lever_ihop%2Fbarnet_bor_hos_dig%2Funderhallsstod_nar_barnet_bor_hos_dig> accessed 7 August 2019
[575] European Commission, 'Netherlands - Child benefits' (*Employment, Social Affairs and Inclusion*) <http://ec.europa.eu/social/main.jsp?catId=1122&langId=en&intPageId=4985> accessed 11 September 2018
[576] Sociale Verzekeringsbank, 'Child Benefit - Can you get child benefit? <https://www.svb.nl/int/en/kinderbijslag/kinderbijslag_voor_kind/kunt_u_kinderbijslag_krijgen/index.jsp> accessed 11 September 2018

	Jurisdiction		
	England and Wales (UK)	**Sweden**	**The Netherlands**
	child if he or she was born before 6 April 2017).[567]	the difference between what is paid and these amounts.[572] In addition, housing allowance is available for families with children who need help to pay rent or the monthly fee for their housing.[573]	- €314.24 (12-17 years old)[577] **Child budget (Kindgebonden budget)** – this supplementary child benefit is means-tested.[578]

[567] Gov.UK, 'Universal Credit' <https://www.gov.uk/universal-credit> accessed 8 August 2019

[572] Försäkringskassan, 'Maintenance support when the child lives with you' <https://www.forsakringskassan.se/privatpers/foralder/for_foraldrar_som_inte_lever_ihop/barnet_bor_hos_dig/!ut/p/z1/tZZNk6IwEIZ_yxw8ptIhCR9HUERxZxQYdeRC8RGVXQUGKd3ZX79xq7a2RledKoVLJ1XNk7c76U5wiN9wWMT7fBU3eVnEGzlfhGrEBr0ucbow0vkrAfNZ10yfWCQIGJ7hEIdVmmd4kaRGDDQjiFNFRywRGooznSCaZrCEVGgK04_eadFUzRov0rJoRNHsRFSLXVUWu3wvOlDV-T5uKlHvOrAs63iTifrvqI7raFduo1z-GG3EXtRRvi6rDiRxXYgmSso6Wpe7KMtXeP5HOVz4TMDh9cDmR6k3CCcMh3lwvQmhbKy4bnDmMOZBD0x16JFZYCu2pZwRPqlgL4ADUeCFjES7SPE1PN_n4oCnRVlv5ZYF_3ZkyTnXloyjFBINMa5zFBM5UpY8oSKmhkF1PIDTFRxHVcAkngejyYg6mnrnCqf4wJMBkKmvDHwVRor2WPzY7loyP3TofeN9EgwfrP4k_VrLeN4unj0W__kAQ-_RJ2c0k4VnW_bUNZnjK2qb6tndleXeKn_ZXfPv7--hKZvisRn-bPDb17viDfl9cll-BgYRWZogLhIVMV03kAEQo0xI-QY3DJVn53WlSvwAuByOPLvHHos_Va-1ip-1q36mPhbv9C3Z0ya-5RkqA9DvTY57696572TeuK-vJy9QrvS8L70xruOHpF08vRPv3nqZtLo3_31LVdutTj_QD39wOLwu16tt9GxTftE0uvTadpMT80F_WS9o4e6PJlyYT0-_AefElIA!/?1dmy&urile=wcm%3apath%3a%2Fcontentse_responsive%2Fprivatpers%2Fforalder%2Fforaldrar_som_inte_lever_ihop%2Fbarnet_bor_hos_dig%2Funderhallsstod_nar_barnet_bor_hos_dig> accessed 7 August 2019

[573] Försäkringskassan, 'Housing allowance for families with children' <https://www.forsakringskassan.se/privatpers/foralder/!ut/p/z1/tZRbb4IwAIV_yx58JL1Rio_chsI2BbzBi0EsG5tcBILz36_ubSbOGLEvbZPmO6cn7QERWIGoiLvsPW6zsoh3Yh9GyloemQayDehOaGBCTRl7aBFY2NIxWIAIRFWSbUGYUkpZKlMpgRsmyVSlUozECqd0Q3hMhkOink4nRVu1HyBMyqLlRdvwdc2bqiyarOMDWNVZF7cVr5sBTMs63m15DZa_NuCFoUEQ_e9yedK9QvjLUG1CoeZNEZEn2HECCAJegFD4YBeFfAaWXcYPYF6UdS7SC24MZwTPFWxbwVBDngfdqUtsptypcI4PPHEBNPfxyFegi1m_-Ill6ClfMvZe6DMKxj27P4ufPRhPH4uX-8WrdIag9qoyzUc6gmbfL8ddiG9j6dbc0WTbx8oj3ct3_yznWkOIoss-9_tIE_106qXvFqxuKKgqz1VylL5SU3-TbGOjHmZpfmk6Hp5-ANwtT90!/?1dmy&urile=wcm%3apath%3a%2Fcontentse_responsive%2Fprivatpers%2Fforalder%2Fbostadsbidrag> accessed 7 August 2019

[577] Sociale Verzekeringsbank, 'Child Benefit - How much child benefit will you get?' <https://www.svb.nl/int/en/kinderbijslag/betaling/hoeveel_kinderbijslag_krijgt_u/> accessed 25 February 2019

[578] Sociale Verzekeringsbank, 'Child Benefit - What is child budget?' <https://www.svb.nl/int/en/kinderbijslag/kinderbijslag_voor_kind/kindgebonden_budget/> accessed 11 September 2018

5(i) Sweden: Prioritising paid work?

5(i).1 Introduction

Like the Swedish concept of autonomy, the Swedish approach to care is underpinned by the pervasive ideal of gender equality. It is seen as central to gender equality that women can be economically independent of a partner.[579] A number of Swedish policies are designed to facilitate this. For example, there is a strong emphasis on both parents engaging in paid work. The corollary is that men and women are expected to share caretaking and other unpaid tasks equally.[580] However, the state also has a significant role to play in caretaking, and extensive day care provision is designed to allow parents to work.

This context is essential in trying to understand both the visibility and value of care in Sweden (RQ 1.b). Understanding this approach to caretaking also helps to explain the emphasis on financial independence at the point of separation (see further Chapter 4(i)). This chapter begins by exploring the Swedish vision of gender equality and the extent to which this is achieved in reality. This discussion provides context for the discussion which follows, which explores the visibility of caretaking responsibilities in Sweden and the value attributed to care by the legal framework.

5(i).2 Care and gender equality

> The Swedish system has a clear **child-oriented perspective.** It is child-friendly by being woman-friendly. It emphasizes the "equal right of working women to also have children" instead of "the right of mothers to have employment" (a formulation due to Alva Myrdal). There is nothing about the system that works towards enabling mothers to stay home and take care of their children; quite on the contrary, the whole system encourages women to get a job and keep it ("*arbetslinjen*").[581]

[579] Swedish Gender Equality Agency, 'Sweden's Gender Equality Policy' (last updated 16 January 2018) <https://www.jamstalldhetsmyndigheten.se/en/about-gender-equality/swedens-gender-equality-policy> accessed 14 September 2018

[580] Swedish Gender Equality Agency, 'Sweden's Gender Equality Policy' (last updated 16 January 2018) <https://www.jamstalldhetsmyndigheten.se/en/about-gender-equality/swedens-gender-equality-policy> accessed 14 September 2018

[581] Jan Hoem, 'Why does Sweden have such high fertility?' (2005) 13 Demographic Research 559, 569 (emphasis in original)

The core of the Swedish welfare state has been described as 'workfare'[582]: 'men and women alike have been regarded as self-supporting individuals within a labour market in line with the ideal of a dual income-earner family ideology'.[583] Svensson and Gunnarsson explain that '[w]ithin Swedish welfare policies the individual right to self-sufficiency is emphasized and the social security system is consequently based on the individuals' rights rather than on the needs of the family… Labour market participation is expected from both men and women independent of family situation…'[584] The Swedish individual income tax regime, introduced in 1971,[585] underpins the model of the individual worker. As Gunnarsson explains:

> A basic fundament in the Swedish welfare state is the recognition of the lack of sex equality produced by the division of paid market labour and unpaid domestic work. This division is officially resisted by a political strategy to promote the reconciliation of paid work and family life in a dual-earner family. Individual obligations via income tax, and individual social rights based on earnings-related social security schemes are measures that, as one of several objectives, aim to increase economic autonomy for married women.[586]

This approach aims to achieve gender equality. As de los Reyes explains, 'the Swedish gender-equality model is inscribed within a paradigm in which a high rate of female labour-market participation is considered an important achievement not only for women as a group but also for the whole nation'.[587]

A number of policies have been designed to facilitate the reconciliation of paid work and care in Sweden. Perhaps the best known is subsidised state childcare;

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[582] Eva-Maria Svensson and Asa Gunnarsson, 'Gender Equality in the Swedish Welfare State' (2012) 2 Feminists@Law <http://journals.kent.ac.uk/index.php/feministsatlaw/article/view/51/160> accessed 10 July 2018

[583] Eva-Maria Svensson and Asa Gunnarsson, 'Gender Equality in the Swedish Welfare State' (2012) 2 Feminists@Law <http://journals.kent.ac.uk/index.php/feministsatlaw/article/view/51/160> accessed 10 July 2018

[584] Eva Sundström, 'Should mothers work? Age and attitudes in Germany, Italy and Sweden' (1999) 8 International Journal of Social Welfare 193, 197

[585] Åsa Gunnarsson, 'Introducing independent income taxation in Sweden in 1971' (2016) FairTax Working Paper Series No. 2, Forum for Studies on Law and Society <https://umu.diva-portal.org/smash/get/diva2:930244/FULLTEXT01.pdf> accessed 10 July 2018

[586] Åsa Gunnarsson, 'Introducing independent income taxation in Sweden in 1971' (2016) FairTax Working Paper Series No. 2, Forum for Studies on Law and Society <https://umu.diva-portal.org/smash/get/diva2:930244/FULLTEXT01.pdf> accessed 10 July 2018, 5

[587] Paulina de los Reyes, 'When feminism became gender equality and anti-racism turned into diversity management' in Lena Martinsson, Gabriele Griffin and Katarina Giritli Nygren (eds) *Challenging the myth of gender equality in Sweden* (Polity Press 2016), 29

the Official Website of Sweden explains, '[y]ou can send your child to preschool (förskola) for a maximum cost of SEK 1,425 per month'.[588] Sweden was also the first country to introduce paid parental leave for fathers in 1974,[589] when a gender neutral parental leave replaced maternity allowance.[590] Such reforms were motivated by a concern to achieve gender equality:

> The political discourse at the time [that policies relating to parental leave and child care were introduced] also stressed that equality between men and women was important to the reform. Individual and mutual responsibility for family subsistence was seen as necessary for gender equality to be accomplished. Both parents were regarded as responsible for the care of children and for domestic work.[591]

Swedish parents are entitled to 480 days of paid parental leave, which can be taken until a child is 8.[592] Parents are also entitled to up to 120 days of temporary parental leave which enables them to take time off work when children under 12 are sick.[593] Of the 480 days of parental leave, 90 are reserved to each parent.[594] However, whilst not gender specific, the reserved months tend to be referred to as 'daddy months',[595] with mothers taking the majority of the leave (see further below). The introduction of the first of these reserved months in 1995 was explicitly couched in the language of gender equality:

> It is important that fathers take parental leave. An increased use of parental leave by fathers should contribute to a change in attitudes among managers; they will view parental leave as something natural to consider when planning and organizing the work. This change in attitudes is

[588] The Official Site of Sweden, '10 things that make Sweden family friendly' <https://sweden.se/society/10-things-that-make-sweden-family-friendly/> accessed 7 August 2019

[589] Ann-Zofie Duvander, Tommy Ferrarini and Sara Thalberg, 'Swedish parental leave and gender equality - Achievements and reform challenges in a European perspective (*Institute for Future Studies*, 2005) <https://www.iffs.se/media/1118/20051201134956filU8YIJLRAaC7u4FV7gUmy.pdf> accessed 10 July 2018

[590] Ann-Zofie Duvander, Tommy Ferrarini and Sara Thalberg, 'Swedish parental leave and gender equality - Achievements and reform challenges in a European perspective (*Institute for Future Studies*, 2005) <https://www.iffs.se/media/1118/20051201134956filU8YIJLRAaC7u4FV7gUmy.pdf> accessed 10 July 2018

[591] Ulla Björnberg, 'Ideology and choice between work and care: Swedish family policy for working parents' (2002) 22 Critical Social Policy 33, 35

[592] The Official Site of Sweden, '10 things that make Sweden family friendly' <https://sweden.se/society/10-things-that-make-sweden-family-friendly/> 7 August 2019

[593] The Official Site of Sweden, '10 things that make Sweden family friendly' <https://sweden.se/society/10-things-that-make-sweden-family-friendly/> 7 August 2019

[594] The Official Site of Sweden, '10 things that make Sweden family friendly' <https://sweden.se/society/10-things-that-make-sweden-family-friendly/> 7 August 2019

[595] See, for example, John Ekberg, Rickard Eriksson and Guido Freibel, 'Parental Leave - A Policy Evaluation of the Swedish "Daddy-Month" Reform' (2013) 97 Journal of Public Economics 131

> necessary for both men and women to dare to take parental leave without a feeling of jeopardizing their career or development opportunities at work. Another reason for increasing fathers' use of parental leave is that women's prospects of achieving equal opportunities to men in the labor market will be limited, as long as women are responsible for practical housework and children. A shared responsibility for the practical care of children would mean a more even distribution of interruptions in work between women and men, and women would thereby gain better opportunities of development and making a career in their profession.[596]

This passage recognises both the necessity of parental leave for children and the effects that such leave, and caretaking responsibilities more generally, may have on women's labour market participation. It is, however, important to note that the emphasis here is on paid work, rather than caretaking. These measures are designed to enable parents to engage in the labour market so they can achieve the economic independence seen as crucial for autonomy (see further Chapter 4(i)). This reflects a wider approach which views paid work, rather than caretaking, as the responsibility of good citizens, albeit that it is recognised that parents must be able to engage in caretaking too. This suggests that caretaking, at least insofar as it is performed by parents, may be perceived as less valuable to society than paid work. There may also be implications of this approach for the visibility of caretaking in society. If caretaking is not in fact shared equally, despite strong messages that it should be, this may serve to create a false picture of the work involved by those who are not performing it.

This emphasis on paid work seems to have made some impact on perceptions of parenthood in Sweden. In a 2012 national survey of Swedish mothers,[597] 52% considered that there was greater pressure than in the past 'for mothers to contribute to the household income and take on the role of significant "breadwinner".[598] The increased pressure to contribute as a breadwinner was the

[596] Government Bill 1993/94: 147 Gender Equality Policy: Shared Power – Shared Responsibility. Translation from John Ekberg, Rickard Eriksson and Guido Freibel, 'Parental Leave - A Policy Evaluation of the Swedish "Daddy-Month" Reform' (2013) 97 Journal of Public Economics 131, 132

[597] Social Issues Research Centre, 'The changing face of motherhood in Western Europe: Sweden' (*Commissioned by P&G*, 2012) < http://www.sirc.org/publik/motherhood_in_Sweden.pdf> accessed 16 October 2018

[598] Social Issues Research Centre, 'The changing face of motherhood in Western Europe: Sweden' (*Commissioned by P&G*, 2012) < http://www.sirc.org/publik/motherhood_in_Sweden.pdf> accessed 16 October 2018, 10

biggest perceived change in motherhood in contemporary Sweden.[599] This research will be referred to again later in this chapter, but it is worth noting at this stage that there are some reasons for caution in relying on these findings. First, this research is industry funded[600] (although there is not an obvious vested interest by the funder in the findings). Second, and perhaps more fundamentally, it is not clear that the sample is representative. This means that the figures cannot be assumed to apply across the whole population. Nevertheless, the numbers involved are large: 1,010 mothers were interviewed in Sweden as part of a total sample of 9,582 mothers across 13 Western European countries,[601] a sample claimed to be one of the largest studies of its kind.[602] The findings are, therefore, useful in contextualising the findings of this thesis and the other academic research referred to in this chapter.

The apparent support for women's participation in paid work in Sweden is accompanied by antipathy to the traditional gendered division of labour, only 4% of the population support such an arrangement,[603] and high support for parental leave being shared between parents, favoured by 70%.[604] Additionally, in Sweden, respondents to the European Social Survey were far less likely than those in the UK or the Netherlands[605] to say that a woman should be prepared to cut down on paid work for the sake of the family.[606]

The emphasis on parents engaging in paid work does not mean that care is seen as unimportant in society. Instead, the approach has been to meet that need by state investment in childcare facilities. As Strandbrink and Pestoff explain:

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599 Social Issues Research Centre, 'The changing face of motherhood in Western Europe: Sweden' (*Commissioned by P&G*, 2012) < http://www.sirc.org/publik/motherhood_in_Sweden.pdf> accessed 16 October 2018, 10

600 See David Miller and Marisa De Andrade, 'The Social Issues Research Centre' (2010) BMJ 484

601 Social Issues Research Centre, 'The changing face of motherhood in Western Europe: Sweden' (*Commissioned by P&G*, 2012) <http://www.sirc.org/publik/motherhood_in_Sweden.pdf> accessed 16 October 2018 and Social Issues Research Centre, 'The changing face of motherhood in Western Europe: Cross-cultural perspectives' (*Commissioned by P&G*, 2012) <http://www.sirc.org/publik/motherhood_cross-cultural_perspectives.pdf> accessed 3 January 2019

602 Social Issues Research Centre, 'The changing face of motherhood in Western Europe: Cross-cultural perspectives' (*Commissioned by P&G*, 2012) <http://www.sirc.org/publik/motherhood_cross-cultural_perspectives.pdf> accessed 3 January 2019

603 Jonas Edlund and Ida Öun, 'Who should work and who should care? Attitudes towards the desirable division of labour between mothers and fathers in five European countries' (2016) 59 Acta Sociologica 151

604 Jonas Edlund and Ida Öun, 'Who should work and who should care? Attitudes towards the desirable division of labour between mothers and fathers in five European countries' (2016) 59 Acta Sociologica 151, 156

605 c. 15% of respondents in Sweden compared with just over 30% of respondents in the Netherlands and just over 40% in the UK.

606 Susanne Fahlén, 'Does gender matter? Policies, norms and the gender gap in work-to-home and home-to-work conflict across Europe' (2014) 17(4) Community, Work and Family, 371

> The system of public day care for preschool children is thus an important part of Swedish social life. The system is well established and the country now well covered, enabling both parents in families with small children to be active on the labour market to a large extent (with better coverage in urban areas which have a high frequency of people of both genders in professions).[607]

It is not, therefore, the case that care is not valued in Sweden. Indeed, it has been suggested that the 'strong feeling of communal responsibility for universal child care' in Sweden,[608] is connected to achieving social equality. The 2001 National Childcare goals, for example, state that '[t]he importance of activities in contributing towards compensation for difference in the growing-up conditions for children from different parts of the population and in creating places of interaction for children from different ethnical, cultural and social backgrounds has been emphasised.'[609] However, Strandbrink and Pestoff observe that achievement of this vision is more complex in contemporary Sweden:

> The universality at the systems level is not necessarily reflected at the level of practical provision in such a way that identical practical arrangements or policy solutions are produced in each individual facility or every corner of the country… Needs and demands are approached in a different way [in some areas], due to the relatively large proportion of refugees and newly arrived Swedes in the ward; i.e. groups who generally have higher levels of unemployment and make more extensive use of social insurance systems.
>
> In this setting, the childcare system becomes an important tool to assess and strengthen the bonds of social solidarity. It provides the local polity with a direct means to reach (out to) families with little or no footing at all

[607] Peter Strandbrink and Victor Pestoff, *Small-scale Welfare on a Large Scale: Social cohesion and the politics of Swedish childcare* (Södertörns högskola 2006), 53-4

[608] Jet Bussemaker, 'Recent Changes in European Welfare State Services: A Comparison of Child Care Politics in the United Kingdom, Sweden, Germany and the Netherlands' 1997 Program for the Study of Germany and Europe 7.6 <http://aei.pitt.edu/63647/> accessed 29 November 2016, 9

[609] National Childcare Goals (Ds 2001:57; *Barnafödandet i fokus. Från befolkningspolitik till barnvänligt samhälle*, 57) quoted (and translated) in Peter Strandbrink and Victor Pestoff, *Small-scale Welfare on a Large Scale: Social cohesion and the politics of Swedish childcare* (Södertörns högskola 2006), 42

> in Swedish society. The emphasis on language development is a prominent aspect of this.[610]

Despite the difficulties in achieving a system of childcare provision that promotes social equality, the value of caretaking to society more generally seems to be recognised. However, the priority for parents is engaging in paid work. This is potentially problematic. As discussed in relation to the Universal Breadwinner model in Chapter 2, there are aspects of caretaking that cannot be outsourced to the state, such as where children are unwell. This raises questions about who is performing these aspects of caretaking in a society that aims for gender equality. Questions are also raised about whether these aspects of caretaking are visible and considered to be valuable in Sweden.

5(i).3 What does the Swedish vision of gender equality mean for the visibility of and value attributed to care?

5(i).3.1 A choice to care?

Ideas of choice are important in considering both the visibility of caretaking and its value. If caretaking is seen as a free choice, then it is perhaps easier to see it as the easier option and to feel that the caretaker should suffer the financial consequences of that choice. Further, the factors that shape that choice, such as gendered expectations of mothers and fathers, can be rendered invisible. Those gendered expectations also play a role in understandings of what caretaking involves. As will be discussed further below, the expectations of mothers and fathers in Sweden are different. However, the rhetoric of equality can serve to disguise these differences and render elements of caretaking invisible.

Swedish ideas of choice around caretaking are complex. As discussed in Chapter 4(i), autonomy in Sweden appears to prioritise financial self-sufficiency over choice. When it comes to care, there seems to be a similar reluctance to facilitate choices that would conflict with the goal of financial self-sufficiency, as seen, for example, in the debates around cash for care schemes (explained by Giuliani and Duvander as 'a subsidy for parents whose children are between the ages of

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[610] Peter Strandbrink and Victor Pestoff, *Small-scale Welfare on a Large Scale: Social cohesion and the politics of Swedish childcare* (Södertörns högskola 2006), 185

one and three and who are not using publicly subsidised childcare').[611] Cash for care was first introduced in 1994[612] but abolished in 1995.[613] A second scheme was introduced in 2008 and abolished in 2016. The 2008 scheme was justified in the following terms:

> The main rationale was to >> increase families' freedom of choice […] by reducing national political interferences << (Prop. 2007/08:91, p 17). The benefit is supposed to enable parents to spend more time with their children and to support flexibility in their combination of employment and care. [614]

The idea of choice was explicitly contrasted with the goal of gender equality in contemporary discussions of the measure;[615] while such schemes are gender neutral, their use is gendered in practice.[616] Those defending the scheme suggested it served to value 'the unpaid work women do at home and contributing to making women who do not work outside the home equal to their working husbands and to working women'.[617] However, in Sweden it was widely viewed as a trap for women[618] and there was some evidence that the scheme served to exacerbate existing inequalities. According to Ellingsaeter:

> …17 per cent of applicants had only primary education (9 years or less), compared to 11 per cent in the total population… It is estimated that almost 50 per cent of the women who receive the benefit are economically

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[611] Giuliana Giuliani and Ann Zofie Duvander, 'Cash-for-care policy in Sweden: An appraisal of its consequences on female employment' (2017) 26 International Journal of Social Welfare 49, 49

[612] Anne Lise Ellingsaeter, 'Cash for Childcare: Experiences from Finland, Norway and Sweden' (*Friedrich Ebert Stiftung*, April 2012) <http://library.fes.de/pdf-files/id/09079.pdf> accessed 9 July 2018

[613] Giuliana Giuliani and Ann Zofie Duvander, 'Cash-for-care policy in Sweden: An appraisal of its consequences on female employment' (2017) 26 International Journal of Social Welfare 49, 50

[614] Ann-Zofie Duvander and Anne Lise Ellingsaeter, 'Cash for childcare schemes in the Nordic welfare states: diverse paths, diverse outcomes' (2016) 18 European Societies 70, 76

[615] See, for example, NIKK 'Increased Parental Choice Can Lead to Reduced Gender Equality (*Nordic Information on Gender*, first published in NIKK magasin 2 2007, page last updated 19 October 2017) <http://www.nikk.no/en/about-nikk/background/family-policy-2009-2011/4531-2/> accessed 9 July 2018 and Anne Lise Ellingsaeter, 'Cash for Childcare: Experiences from Finland, Norway and Sweden' (*Friedrich Ebert Stiftung*, April 2012) <http://library.fes.de/pdf-files/id/09079.pdf> accessed 9 July 2018

[616] Anne Lise Ellingsaeter, 'Cash for Childcare: Experiences from Finland, Norway and Sweden' (*Friedrich Ebert Stiftung*, April 2012) <http://library.fes.de/pdf-files/id/09079.pdf> accessed 9 July 2018, 7

[617] NIKK 'Increased Parental Choice Can Lead to Reduced Gender Equality (*Nordic Information on Gender*, first published in NIKK magasin 2 2007, page last updated 19 October 2017) <http://www.nikk.no/en/about-nikk/background/family-policy-2009-2011/4531-2/> accessed 9 July 2018

[618] Heikki Hilamo and Olli Kangas, 'Trap for Women or Freedom to Choose? The Struggle over Cash for Child Care Schemes in Finland and Sweden' (2009) 38 Journal of Social Policy 457

dependent on their partners… The likelihood of taking the benefit declined with increasing income and education…[619]

Interestingly, despite the resistance to ideas of choice in the context of cash for care schemes, choice seems influential in the perception of decisions about childcare. Kugelberg's research at a food production company in Sweden found that '[g]ender segregation was not seen as a matter of inequality but as a problem for individuals presenting themselves at work, being able to work full time and being able to take on heavy jobs. Combining motherhood with a job was seen as the mother's private business.'[620] Relatedly, in the participant interviews which formed part of this research, Eric talked about the availability of pre-nups as a way of allowing people to choose how to structure their lives:

> … I mean people can choose their lives, how to live their lives anyhow, regardless of these rules. I mean, if you want to live your life as a housewife or a houseman, you can choose that… So the system is not really the issue, uh, because it allows people to, to, uh, live their lives as they want to. But you have to know what you're doing…
> (**Eric, Lawyer, Sweden**)

As discussed further below and in Chapter 4(i), there are limited legal protections for caretakers when relationships break down. The effect of pre-nups is to exclude assets from the community regime. Thus, the relative effects of such agreements on the parties is shaped by the circumstances. In cases where the caretaker has brought more assets in, preserving those assets may help to offset any disparity in earning capacity on separation. However, if the agreement serves to protect the pre-acquired or inherited assets of the breadwinner, or seeks to keep all property separate, then this is likely to increase the financial disparity between the parties on separation. In the latter cases, choosing not to live according to societal norms is likely to leave the caretaker in a very vulnerable position. Given that parties may not anticipate the financial effects of caretaking

[619] Anne Lise Ellingsaeter, 'Cash for Childcare: Experiences from Finland, Norway and Sweden' (*Friedrich Ebert Stiftung*, April 2012) <http://library.fes.de/pdf-files/id/09079.pdf> accessed 9 July 2018, 6

[620] Clarissa Kugelberg, 'Constructing the Deviant Other: Mothering and Fathering at the Workplace' (2006) 13 Gender, Work and Organization 152, 157

at the time when they enter into such agreements, the idea that this is a free choice is problematic.

A view of caretaking as a free choice also ignores the extent to which cultural constraints, such as the meaning of motherhood (discussed further below), influence the decisions that parents make. In research into how workplace cultures might influence fathers' uptake of parental leave, Haas and Hwang noted the effect of remarks by managers that such leaves were a choice, rather than an expectation: '[d]iscussion of choice reinforces the gendered division of domestic labor, since mothers do not get to decide how active a parent they want to be'.[621] The emphasis on mothers engaging in paid work, does not, therefore, necessarily mean that the work they engage in is the same as that of fathers. The most popular models for dividing care in Sweden are the one and a half earner model, involving a part-time working mother and full-time working father, (41%)[622] and a model based on both parents sharing breadwinning and caring (43%).[623] There is limited support for a model in which both parents work full-time (12%).[624] In practice the full-time working father and part-time working mother model prevails and, as discussed in the next section, caretaking tasks are not shared equally between parents.

5(i).3.2 Gender (in)equality in the performance of caretaking tasks

> The Swedish model, built around the participation of men and women in unpaid care and in paid work, in practice, is a one-and-three quarters model. Men work full time and invest in their careers and women work part time (though it is a long part time, 20 to 30 hours) in the public sector, in workplaces where it is easier to combine employment with having a family, in so-called women-friendly jobs. Mothers choose women-friendly workplaces with low pay. This trade-off has consequences for mothers

[621] Linda Haas and Philip Hwang, 'Policy is not enough – the influence of the gendered workplace on fathers' use of parental leave in Sweden' (2019) 22 Community, Work & Family 58, 67

[622] Jonas Edlund and Ida Öun, 'Who should work and who should care? Attitudes towards the desirable division of labour between mothers and fathers in five European countries' (2016) 59 Acta Sociologica 151, 159

[623] Jonas Edlund and Ida Öun, 'Who should work and who should care? Attitudes towards the desirable division of labour between mothers and fathers in five European countries' (2016) 59 Acta Sociologica 151, 159

[624] Jonas Edlund and Ida Öun, 'Who should work and who should care? Attitudes towards the desirable division of labour between mothers and fathers in five European countries' (2016) 59 Acta Sociologica 151, 159

after divorce. Women not attached to male earners are poorer in terms of time and money.[625]

Despite the Swedish emphasis on gender equality, the roles of men and women in society remain different. Not only do women still perform the greater share of caretaking, but it seems that the nature of the care performed by mothers and fathers is different. Women still take the majority of parental leave. For example, in 2017, women took 72% of parental allowance days[626] (previously maternity insurance)[627] and 62% of temporary parental allowance days[628] (a benefit paid in respect of time taken to look after sick children).[629] Thus, Lewis and Åström's 1992 observation that '[d]espite a public commitment to achieving greater equality in the work of women and men, the Swedish system of promoting equal opportunities has only changed the position of women, leaving that of men relatively untouched' seems apt.[630] This is seen as a cause for concern within Sweden and prompted a government review recommending that the amount of parental leave reserved to each parent be increased to 5 months.[631]

As in the other jurisdictions, on average, women spend more time in unpaid work and men more time in paid work.[632] Whereas men spend around 37 hours per week in paid work and women 30 hours, women spend 26 hours engaged in unpaid work compared with men's 21 hours.[633] In 2016 29% of women worked

[625] Barbara Hobson, 'The Evolution of the Women-friendly State: Opportunities and Constraints in the Swedish Welfare State' in Shahara Razavi and Shireen Hassim (eds) *Gender and Social Policy in a Global Context* (Palgrave Macmillan 2006), 166

[626] Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2018' (*SCB,* 2018) <https://www.scb.se/contentassets/4550eaae793b46309da2aad796972cca/le0201_2017b18_br_x10br1801eng.pdf> accessed 17 October 2019, 46

[627] Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2016' (*SCB*, 2016) <http://www.scb.se/contentassets/7516e7d2f0834a7b94bfd87593405c7b/le0201_2015b16_br_x10br1601eng.pdf> accessed 6 December 2017, 41

[628] Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2018' (*SCB,* 2018) <https://www.scb.se/contentassets/4550eaae793b46309da2aad796972cca/le0201_2017b18_br_x10br1801eng.pdf> accessed 17 October 2019, 46

[629] Försäkringskassan, 'Temporary Parental Benefits' <https://www.forsakringskassan.se/myndigheter/kommuner/foraldraforsakring/tillfallig_foraldrapenning/!ut/p/z0/04_Sj9CPykssy0xPLMnMz0vMAfIjo8ziLYwMfJ2cDB0NLIINLAw8LT0sXd0sjdx9PIz0g1Pz9AuyHRUB44kboQ!!/> accessed 13 April 2018

[630] Jane Lewis and Gertrude Åström, 'Equality, Difference and State Welfare: Labor Market and Family Policies in Sweden' (1992) 18 Feminist Studies 59, 61

[631] Slutbetänkande av Utredningen om en modern föräldraförsäkring, 'Jämställt föräldraskap och goda uppväxtvillkor för barn – en ny modell för föräldraförsäkringen' (SOU 2017:101) <https://www.regeringen.se/4afa97/contentassets/01a6fba2043a4e58aeac32cf52bd3449/sou-2017_101_jamstallt-foraldraskap-och-goda-uppvaxtvillkor-for-barn.pdf> accessed 5 December 2019 (Final Report of the Inquiry into Modern Parental Insurance, 'Equal parenting and food childhood conditions for children – a new model for parental insurance)

[632] Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2016' (*SCB*, 2016) <http://www.scb.se/contentassets/7516e7d2f0834a7b94bfd87593405c7b/le0201_2015b16_br_x10br1601eng.pdf> accessed 6 December 2017, 35

[633] Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2016' (*SCB*, 2016) <http://www.scb.se/contentassets/7516e7d2f0834a7b94bfd87593405c7b/le0201_2015b16_br_x10br1601eng.pdf> accessed 6 December 2017, 35

part-time compared to 11% of men.[634] Further, women's part-time work was far more likely to be the result of caring for children, whereas for men other factors such as studying or illness / reduced work capacity were more common motivators.[635] Research further indicates that 'it is primarily the male-dominated types of flexibility that are controlled by the employees, and not the female dominated types of flexibility'.[636] It is also notable that these statistics on working hours are based on women and men aged 20-64.[637] It may be that the differences are more pronounced amongst the parents of young children.

Even where parental leave is shared, it is unclear how far the practicalities of caretaking are divided during those periods and on a longer-term basis.[638] It has been found, for example, that 'fathers who have used parental leave work fewer hours per week than fathers who did not'[639] and that there is a 'negative correlation between length of leave and subsequent working hours'.[640] Further, separated fathers who used more than two weeks of parental leave were significantly more likely to have frequent contact with children after separation than those who did not take leave[641] (although the fathers who took the longest leaves were less likely to have frequent contact than those who took 2 weeks to 2 months of leave[642]). However, what is less clear is whether this greater time involvement translates into undertaking a greater share of caretaking.

As discussed in Chapter 4(iii), there is a difference between caring about / taking care of children and caretaking. There is some data to suggest that greater time involvement does not necessarily result in a greater share of caretaking in

[634] Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2016' (*SCB*, 2016) <http://www.scb.se/contentassets/7516e7d2f0834a7b94bfd87593405c7b/le0201_2015b16_br_x10br1601eng.pdf> accessed 6 December 2017, 51

[635] Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2016' (*SCB*, 2016) <http://www.scb.se/contentassets/7516e7d2f0834a7b94bfd87593405c7b/le0201_2015b16_br_x10br1601eng.pdf> accessed 6 December 2017, 53

[636] Thomas P Boje, 'Working time and caring strategies: parenthood in different welfare states' in Anne Lisa Ellingsaeter and Arnlaug Leira (eds) *Politicising parenthood in Scandinavia* (Policy Press 2006), 202 citing A Grönlund, *Flexibilitetens Gränser*, (Borea Förlag 2004)

[637] Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2016' (*SCB*, 2016) <http://www.scb.se/contentassets/7516e7d2f0834a7b94bfd87593405c7b/le0201_2015b16_br_x10br1601eng.pdf> accessed 6 December 2017, 35

[638] John Ekberg, Rickard Eriksson and Guido Freibel, 'Parental Leave - A Policy Evaluation of the Swedish "Daddy-Month" Reform' (2013) 97 Journal of Public Economics 131

[639] Ann-Zofie Duvander and Ann-Christin Jans, 'Consequences of Fathers' Parental Leave Use: Evidence from Sweden' [2009] Finnish Yearbook of Population Research 49, 55

[640] Ann-Zofie Duvander and Ann-Christin Jans, 'Consequences of Fathers' Parental Leave Use: Evidence from Sweden' [2009] Finnish Yearbook of Population Research 49, 55

[641] Ann-Zofie Duvander and Ann-Christin Jans, 'Consequences of Fathers' Parental Leave Use: Evidence from Sweden' [2009] Finnish Yearbook of Population Research 49, 58

[642] Ann-Zofie Duvander and Ann-Christin Jans, 'Consequences of Fathers' Parental Leave Use: Evidence from Sweden' [2009] Finnish Yearbook of Population Research 49, 59

Sweden. For example, Ekberg et al found that there was no evidence that men who had children after introduction of the 'daddy month' increased the proportion of the leave they took to care for sick children.[643] Further, it has been suggested that 'fathers tend to take more time in the summer season and around Christmas, and they tend to take more time with children in the second year of their life.'[644] It is, therefore, possible that parental leave may be used to supplement leave entitlements, rather than being motivated by caretaking responsibilities as such. It is caretaking that tends to have greater implications for ongoing earning capacity. For example, taking time out of the workplace to look after sick children, whilst compensated, may still shape perceptions that an individual is less committed to their job. Further, if parental leave is used in holiday periods then it may be perceived as less disruptive in the workplace and may not, therefore, have the same implications for one's career progression. There is some suggestion that fathers take leaves during these periods because it is more convenient for their employers.[645]

5(i).3.3 Understandings of motherhood and fatherhood

A national survey of Swedish mothers (discussed earlier in this chapter) concluded that:

> … there is an underlying tension between what women are being encouraged to do by state family policy and a somewhat conflicting and continuing public consensus regarding the large amount of time and commitment that motherhood inherently entails.[646]

The Swedish state has played a significant role in trying to reshape ideals of parenthood, but it has not succeeded in overturning them entirely and, as highlighted above, practices still lag behind. Elvin-Nowak and Thomsson suggest that '[m]others who live in Sweden have to construct their motherhood within the context of a gender-equality discourse, but in an everyday reality that is not

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[643] John Ekberg, Rickard Eriksson and Guido Freibel, 'Parental Leave - A Policy Evaluation of the Swedish "Daddy-Month" Reform' (2013) 97 Journal of Public Economics 131

[644] John Ekberg, Rickard Eriksson and Guido Freibel, 'Parental Leave - A Policy Evaluation of the Swedish "Daddy-Month" Reform' (2013) 97 Journal of Public Economics 131, 137

[645] Linda Haas and Philip Hwang, 'Policy is not enough – the influence of the gendered workplace on fathers' use of parental leave in Sweden' (2019) 22 Community, Work & Family 58, 67

[646] Social Issues Research Centre, 'The changing face of motherhood in Western Europe: Sweden' (*Commissioned by P&G*, 2012) <http://www.sirc.org/publik/motherhood_in_Sweden.pdf> accessed 16 October 2018, 7

gender equal.'[647] The rhetoric of similarity between men and women conflicts with everyday practice in which 'gender is socially constructed through difference.'[648] They outline three discursive positions in relation to the meaning and practice of motherhood, all of which bear similarity to constructions of motherhood in the Netherlands and England and Wales, which will be discussed in Chapters 5(ii) and 5(iii) respectively.[649] The first, stressing the mother's accessibility and closeness to the child, is time intensive. 'By spending as much time with their children as possible, especially when the children are young, the mothers see themselves as immunizing their children against future problems.'[650] Generous parental leave enables this to some extent. However, there is a clear incompatibility between this norm and the reality of the full-time working mother.

The second discursive position, described as 'happy mothers make happy children',[651] requires a balancing of work and home life:

> In Swedish society, where almost every mother is in the labour market, this kind of discussion has a guilt-triggering effect. The individual task is not only to try and achieve an everyday life where work outside the home can be combined with caring for home and children but also to do this in a way that makes the mother happy and content and, most important, results in the well-being of her child.[652]

There is some suggestion that mothers in Sweden experience a greater conflict between paid work and home life than mothers in England and Wales or the Netherlands. The industry-funded national survey discussed above suggested that the guilt scores of Swedish mothers were the second highest in a sample of thirteen countries.[653] This reflects findings by Cousins and Tang that higher

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[647] Ylva Elvin-Nowak and Heléne Thomsson, 'Motherhood as Idea and Practice: A Discursive Understanding of Employed Mothers in Sweden' (2001) 15 Gender and Society 407, 410
[648] Ylva Elvin-Nowak and Heléne Thomsson, 'Motherhood as Idea and Practice: A Discursive Understanding of Employed Mothers in Sweden' (2001) 15 Gender and Society 407, 410
[649] Ylva Elvin-Nowak and Heléne Thomsson, 'Motherhood as Idea and Practice: A Discursive Understanding of Employed Mothers in Sweden' (2001) 15 Gender and Society 407
[650] Ylva Elvin-Nowak and Heléne Thomsson, 'Motherhood as Idea and Practice: A Discursive Understanding of Employed Mothers in Sweden' (2001) 15 Gender and Society 407, 414
[651] Ylva Elvin-Nowak and Heléne Thomsson, 'Motherhood as Idea and Practice: A Discursive Understanding of Employed Mothers in Sweden' (2001) 15 Gender and Society 407, 417
[652] Ylva Elvin-Nowak and Heléne Thomsson, 'Motherhood as Idea and Practice: A Discursive Understanding of Employed Mothers in Sweden' (2001) 15 Gender and Society 407, 417
[653] Social Issues Research Centre, 'The changing face of motherhood in Western Europe: Sweden' (*Commissioned by P&G*, 2012) <http://www.sirc.org/publik/motherhood_in_Sweden.pdf> accessed 16 October 2018, 15

proportions of mothers and fathers in Sweden than in the Netherlands or the UK reported conflicting pressures between work and family life.[654] Other research has suggested that women in Sweden face greater conflict between work and household demands than those in the UK and the Netherlands because they are more likely to work longer hours.[655]

Thus, changes in expectations around work have not transformed expectations of motherhood. As Björnberg explains, '[b]asically, at a level of everyday life, the expectations and cultural norms for motherhood and fatherhood are traditional and seemingly quite resistant to change.'[656] There is also a suggestion in Kugelberg's research that the emphasis on greater equality between parents has not translated into workplace norms:

> Fatherhood was not assumed to affect the working life and jobs of individual men and was thus not a relevant issue to them. Parenthood was interpreted as motherhood and motherhood was seen as problematic, as the time-use norms were difficult for women with restricted timetables.[657]

These findings, based on a single food production corporation, need to be treated with caution; they cannot be generalised to all workplaces. In particular, the workplace was highly gender segregated (there were more men at higher levels and women at lower levels and different departments were male or female dominated).[658] Nevertheless, the overall situation of this workplace was similar to the Swedish labour market as a whole.[659] Further, Haas and Hwang found that similar norms constrained fathers' opportunities to reduce their working hours where their children were young.[660] They point to three interrelated causes. First,

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[654] Christine Cousins and Ning Tang, 'Working time and work and family conflict in the Netherlands, Sweden and the UK' (2004) 18 Work, Employment and Society 531

[655] See, for example, Mattias Strandh and Mikael Nordenmark, 'The interference of paid work with household demands in different social policy contexts: perceived work – household conflict in Sweden, the UK, the Netherlands, Hungary and the Czech Republic' (2006) 57 The British Journal of Sociology 597 and Duncan Gallie and Helen Russell, 'Work-family conflict and working conditions in Western Europe' (2009) 93 Social Indicators Research 445

[656] Ulla Björnberg, 'Ideology and choice between work and care: Swedish family policy for working parents' (2002) 22 Critical Social Policy 33, 47

[657] Clarissa Kugelberg, 'Constructing the Deviant Other: Mothering and Fathering at the Workplace' (2006) 13 Gender, Work and Organization 152, 159

[658] Clarissa Kugelberg, 'Constructing the Deviant Other: Mothering and Fathering at the Workplace' (2006) 13 Gender, Work and Organization 152

[659] Clarissa Kugelberg, 'Constructing the Deviant Other: Mothering and Fathering at the Workplace' (2006) 13 Gender, Work and Organization 152, 156

[660] Linda Haas and Philip Hwang, '"It's About Time!": Company Support for Fathers' Entitlement to Reduced Work Hours in Sweden' (2016) 23 Social Politics 142

policymakers and unions have failed to challenge 'assumptions about full-time work and men's responsibility for childcare' and have a greater interest 'in promoting mothers' full-time employment than father's reduced hours, reinforcing the male model of work.'[661] A second obstacle is 'a cultural context where men's lack of equal responsibility for childcare is taken for granted.[662] Finally, 'company support for men as active fathers appeared only lukewarm'.[663]

Elvin-Nowak and Thomsson's final discursive position in relation to the meaning and practice of motherhood, referred to as '"maintaining separate spheres" focuses on the mother as a working woman rather than mother. The femininity produced within the structure for this concept is more independent from the motherhood position. Still, it is always at risk of being perceived negatively in those cases in which the working woman appears to the detriment of the mother.'[664] Elvin-Nowak and Thomsson, for example, noted that the 'most prominent feature'[665] in all of their participants' everyday mothering 'was a never-ending struggle to arrange their own lives as working mothers to the greatest advantage of the children'.[666] This contrasts with research by Haas, Allard and Hwang on the position of fathers:

> On average, fathers indicated that within their work group, it was relatively easy for fathers to take time off to care for children… Fathers reported that it was relatively easy for fathers in their group to take the 10 daddy days at childbirth, take leave or take children to the doctor or school, stay at home to care for sick children, take parental leave full-time for a month, and say no to overtime. But they also reported that it was relatively difficult to adjust work times according to children's schedules at school or daycare, reduce work hours by 25% to care for children and take parental

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661 Linda Haas and Philip Hwang, '"It's About Time!": Company Support for Fathers' Entitlement to Reduced Work Hours in Sweden' (2016) 23 Social Politics 142, 162
662 Linda Haas and Philip Hwang, '"It's About Time!": Company Support for Fathers' Entitlement to Reduced Work Hours in Sweden' (2016) 23 Social Politics 142, 162
663 Linda Haas and Philip Hwang, '"It's About Time!": Company Support for Fathers' Entitlement to Reduced Work Hours in Sweden' (2016) 23 Social Politics 142, 162
664 Ylva Elvin-Nowak and Heléne Thomsson, 'Motherhood as Idea and Practice: A Discursive Understanding of Employed Mothers in Sweden' (2001) 15 Gender and Society 407, 424
665 Ylva Elvin-Nowak and Heléne Thomsson, 'Motherhood as Idea and Practice: A Discursive Understanding of Employed Mothers in Sweden' (2001) 15 Gender and Society 407, 418
666 Ylva Elvin-Nowak and Heléne Thomsson, 'Motherhood as Idea and Practice: A Discursive Understanding of Employed Mothers in Sweden' (2001) 15 Gender and Society 407, 418

> leave full-time for 6 months (the latter being reported as the most difficult to do).[667]

It therefore appears that work for mothers must fit around parenthood, whereas for fathers the reverse is true. This mirrors perceptions in England and Wales about the way that parents should divide paid work and caring responsibilities when children are young.[668] It also contrasts with the rhetoric of sameness in discussions around gender equality and means that the full extent of the caretaking performed by mothers may be hidden.

Gender is, therefore, central to the way in which caretaking responsibilities are divided. However, socioeconomic background has an impact on the way in which the tension between the norms of being a good mother and a good citizen worker are experienced. For example, Elvin-Nowak and Thomsson found that:

> The personal striving for gender equality was most pronounced among the academically educated, middle-class Swedish-born women in our study. These women expect their partners to share equally because they construct their understandings of men and women on ideas of similarity. This understanding of gender implies that women and men possess the same qualifications for caring for children as for breadwinning. When these women describe their everyday life as working mothers, they often mention that although their husbands theoretically agree with them when they are discussing their children’s everyday life circumstances, in practice, it is the woman’s responsibility to adapt her life to the child’s well-being. Because the fathers’ work schedules are understood as more rigid and unchangeable, and the children’s well-being is most important for the women, the negotiations come to rest between the woman and her conscience rather than between the mother and the father.[669]

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[667] Linda Haas, Karin Allard and Philip Hwang, 'The impact of organizational culture on men's use of parental leave in Sweden' (2002) 5 Community Work and Family 319, 336

[668] John Curtice, Elizabeth Clery, Jane Perry, Miranda Phillips and Nilufer Rahim (eds) *British Social Attitudes 36* (The National Centre for Social Research, 2019) <https://www.bsa.natcen.ac.uk/media/39363/bsa_36.pdf> accessed 27 September 2019

[669] Ylva Elvin-Nowak and Heléne Thomsson, 'Motherhood as Idea and Practice: A Discursive Understanding of Employed Mothers in Sweden' (2001) 15 Gender and Society 407, 423-4

For these women, there is more opportunity to care for children than for those from working class backgrounds, but the societal norms that shape those decisions mean that the language of choice is misleading. In contrast, for mothers from lower socioeconomic backgrounds financial constraints can prevent even this sort of choice from being a possibility:

> Regardless of socioeconomic background, the mothers who participated in the study associated good mothering with meeting the children's needs, spending much time with them, and not letting them spend too long days in preschool. Reconciling paid work and caring responsibilities was not easy, however. The culturally shaped ethical ideas of good mothering particularly constrained the low-income mothers' possibilities to reconcile paid work with caring commitments. While all mothers wanted to give appropriate care to their children, the opportunities to do so varied greatly.[670]

5(i).4 How does the law think about care?

5(i).4.1 Financial provision

The emphasis on achieving gender equality through paid work, and the vision of autonomy discussed in Chapter 4(i), contributes to the invisibility of caretaking in the law. It is accommodated to some extent through the community of property system; as was discussed in Chapters 4(i) and 4(ii) the community of property regime functions as a safety net for the caretaker spouse because it gives him or her a claim to 50% of the marital property. However, as Bertil, one of the participants in this research, noted, 'the Swedish courts look very little to… the financial situation' of the parties when the assets are divided. Thus, a half share of the assets for the caretaker may leave him or her in a precarious position. This is compounded by the very restrictive approach to spousal maintenance in Sweden, which largely ignores the presence of caretaking responsibilities because of the determination that women should be financially independent (see further Chapter 4(i)). Eric's description of spousal maintenance as a 'trap' for women (see further Chapter 4(i)) echoes the discussion in relation to the cash for care schemes considered above.

[670] Christine Roman, 'Lone mothers with low income face obstacles to practice their mothering' (2017) 54 Sociologisk Forskning 303, 304

There was some support in participant interviews for a more compensatory approach to recognising care in the law. For example, Filippa suggested that unjust enrichment might provide the basis of a claim for spousal maintenance or a lump sum in Swedish law to compensate the caretaker where the other parent had been able to build up savings as a result of the caretaker being at home with the children. However, she was concerned to keep such compensation within limits:

> … even though Sweden is much more… um… equal… when it comes to daycare, the children and so on, still we can see that there is, a, um… difference between women and men. So, I think in one way, uh, [spousal maintenance] should be a bit more generous. But… I also think that… not too generous… I think everyone has to take their own responsibility as well for their own economics and not rely on the other spouse.
> (**Filippa, Lawyer, Sweden**)

Financial arrangements on separation in Sweden therefore seem to be influenced by a vision of gender equality that aims to allow both men and women to be autonomous, in the Swedish sense that prioritises economic self-sufficiency. This goal appears to be the most important aspiration for the state, and the idea of choice offered by cash for care policies was considered a less important goal. There are, of course, legitimate concerns about the extent to which cash for care policies offer a genuine choice. However, it is interesting that choice only appears to be viewed as problematic in this context. Parental decisions that result in mothers taking a greater share of the caretaking are construed as a choice and are seen as unproblematic, even though they carry similar penalties. Perhaps the difference is that there is now no financial incentive from the state that might encourage people to make the 'wrong' (gender unequal) choice. Thus, any choices may be construed as freely made.

5(i).4.2 Child arrangements on separation

The way in which childcare arrangements are reached on separation provides another way in which to assess the extent to which the law views and values

caretaking. To what extent are the realities of caretaking taken into account in these decisions? And what weight do past caretaking roles carry in them?

5(i).4.2.1 Joint custody and 'situational power'

In Sweden joint custody, which relates to legal decision making, does not necessarily entail shared time with children. Joint custody is common, although no longer the default:

> And, um, until one or two years ago there was a rule saying that, generally, there should be joint custody. Now the courts found that sometimes they forced people who couldn't even talk to each other to joint custody… today it's easier to get sole custody, if you can't co-operate with the children. (**Bertil, Lawyer, Sweden**)

There is scope to depart from joint custody in cases where the parents cannot agree about key aspects of the children's upbringing; Anna suggested that the four key issues for this purpose were the child's healthcare, passport, the address where the child was registered and the child's schooling. There is, therefore, still some scope for the exercise of situational power[671] if the parents cannot agree on these issues. Anna and Filippa suggested that this did happen in some cases, and Clara suggested that 'irreconcilable differences' would be another reason for sole custody, the result of which may also be to favour the position of the parent who had previously undertaken the greater share of caretaking.

Despite the possibility of departing from joint custody, most participants seemed to regard it as the default. Gunilde, for example, described it as 'very common' and in her experience the parents' failure to cooperate was not a reason to avoid joint custody: 'the courts say that, uh, if they can't, uh, cooperate now, perhaps they can cooperate later'. Other participants considered the use of joint custody as a norm to guide negotiation:

> … And I think the courts almost always aim to, uh… it, it's possible to, that the parents have joint custody and, like, the courts in Sweden, always

[671] Carol Smart & Bren Neale, *Family Fragments* (Polity Press 1999), 146

almost, want the parties to agree. So they try really hard to get the parties to agree before the case goes to a final hearing.

(**Anna, Lawyer, Sweden**)

You try to get them to agree. Uh, normally the base in Sweden is that joint custody what's best for the child always, uh, um, if one of the parents say no, you can still say that, yeah, the court can still say yes joint custody. But if both parties say no, then they have to choose one of the parents. And we try to tell them that, well, joint custody is almost always the best thing.

(**Clara, Lawyer, Sweden**)

This reflects the strong emphasis on private ordering discussed in Chapter 4(i). Some participants were critical of the changes to the rules on joint custody, perceiving them to have increased the scope for conflict:

...when it comes to, uh, think about children…uh… it sometimes feels like we don't really know what we're supposed, what's the best. I mean it's been like changing from, uh… for example… cooperation problems between parents and how much that is supposed to affect the process. Uh, first it was not supposed to affect the process, and then it was supposed to affect the process and now we see maybe its not so good that it affect the, uh, result. So now because it makes people fight instead…

(**Filippa, Lawyer, Sweden**)

However, Gunilde pointed out that children were often lost in this emphasis on private ordering:

… in Sweden we are making laws politically. Because now we have decided that every parent shall share the custody. So we make a law about it. Uh, and, uh, then everybody do so. And it's not quite sure that it's the best for the children. So I am, uh, I must say, I'm, I'm a bit disappointed about, uh, how, uh, now when they talk again about joint custody, that's

the best for the children… I don't think they know what they are talking about.

(**Gunilde, Lawyer, Sweden**)

Research indicates that parental conflict affects child wellbeing[672] it also impacts on the quality of ongoing contact between parents and children.[673] Thus, as Singer observes, '[t]o solve conflicts between the parents, thus protecting the interests of the child, can be said to be one of the main purposes of the law concerning matters of custody and residence. A possibility to decide on joint custody and alternating residence against the will of one parent clearly contravenes such an ambition.'[674] This, therefore, seems another example of the law prioritising other values over care. Shared custody and shared time arrangements, which are discussed further in the next section, are based on assumptions about what is best for children, without an evidence base relating to children's experiences.[675] Such arrangements seem logical where formal equality between men and women is aspired to and assumed to have been achieved. The simplicity of shared custody and shared time also has an obvious appeal where there is a strong emphasis on private ordering. However, given the way in which society functions in practice, such norms serve to disguise both the experiences of caretakers and care receivers (children). Caretaking is, therefore, given limited value in these decisions.

5(i).4.2.2 Separation as a catalyst for change?

Shared residence is prevalent following parental separation. In 2014, Statistics Sweden found that '35 per cent of the children with parents who have separated share residence about equally with their mothers as with their fathers. Among children whose parents have separated recently, the share is roughly 50 per cent.'[676] Given that lawyers are most likely to be involved in cases at the point of

[672] See, for example, Jennifer McIntosh, 'Enduring Conflict in Parental Separation: Pathways of Impact on Child Development (2003) 9 Journal of Family Studies 63

[673] Jane Fortin, Joan Hunt and Lesley Scanlan, 'Taking a longer view of contact: The perspectives of young adults who experienced parental separation in their youth' (2012) <http://sro.sussex.ac.uk/44691/1/Nuffield_Foundation_Research_Summary-FINALupdate2.pdf> accessed 16 October 2018

[674] Anna Singer, 'Active Parenting or Solomon's Justice - Alternating Residence in Sweden for Children with Separated Parents' (2008) 4 Utrecht Law Review 35, 45

[675] Anna Singer, 'Active Parenting or Solomon's Justice - Alternating Residence in Sweden for Children with Separated Parents' (2008) 4 Utrecht Law Review 35, 47

[676] Statistics Sweden, 'Shared residence for one in three children' (21 February 2014) <https://www.scb.se/en_/Finding-statistics/Statistics-by-subject-area/Population/Population-projections/Demographic-Analysis-DEMOG/Aktuell-Pong/55356/Behallare-for-Press/370439/> accessed 9 July 2018

separation, it is perhaps unsurprising that participants perceived such arrangements as the most common:

> Yeah. It's pretty hard to say… because, uh, I have to know so much more about the, the parties of course. But, like, I think, if there are like no problems with the parents, they are like fully competent to be parents, uh, and there isn't any other like, um, difficulties, uh, I think it's pretty common that you have 50:50. Ja.
> (**Anna, Lawyer, Sweden**)

> But it would also depend on the case. But 50:50 living is still seen as the magic answer to everything.
> (**Clara, Lawyer, Sweden**)

> **Interviewer:**…Is it fair to say that shared care is almost the default rule. So the starting point?
> **Filippa:** Ja. Ja.
> (**Filippa, Lawyer, Sweden**)

> **Gunilde**: And I think the, the most common is that, uh, the children live one week with their mother, one week their father. And, uh, some people think that that's the rule. But it isn't. You have to look at the children. But, um, ja. That's also about the rights, you know. The parent's rights. Rights of the parent.
> **Interviewer**: So, do you think that people, um, if, if they think that, that is the law, do you think it informs the, that misunderstanding, is that shaping the decisions that they reach.
> **Gunilde**: Ja.
> **Interviewer**: Ok.
> **Gunilde**: I think so.
> (**Gunilde, Lawyer, Sweden**)

In the population as a whole (where 35% of children of separated parents live with both parents equally), just over 50% of children of separated parents live

only or mostly with the mother, with around 10 percent living only or mostly with the father.[677] These data raise several issues. First, given the gendered patterns of work and care described above, the level of shared residence immediately following separation suggests that separation may be regarded as a catalyst for change. There is some support for this interpretation in the data from parents in England and Wales, which will be discussed in Chapter 5(iii). Gunilde suggested that this was also the case in Sweden:

> **Interviewer**: [Asking about scenario question] Um, and with the children here, what if Jonathan [the breadwinner] says, I want the children now to live with, half and half with both of us?
> **Gunilde**: I should say no… If I was the lawyer there.
> … And so typical. And he has had no interest before.
> (**Gunilde, Lawyer, Sweden**)

This has implications for the extent to which caretaking is valued. In Sweden, as in the other jurisdictions considered here, mothers remain primarily responsible for caretaking. Therefore, for both parents to be seen as equally capable of caretaking after divorce indicates something about the way in which caretaking is perceived. In particular, competence is assumed, rather than something that needs to be demonstrated by input of time:

> …we have a lot of custody fights, but normally one does agree because it is, by this time, so… well endowed in the society that both parents are equally good at, at giving care. We're, we're not… as it were, say fifty years ago, that dad was actually less competent as a parent. A-and now, the basic perception is that both parents are adept at being parents.
> (**Clara, Lawyer, Sweden**)

One possibility is that it is the gender gap in caretaking itself that is invisible, and the prevalence of professional care may serve to exacerbate this. If the expectation is that children are cared for by professionals then the caretaking that

[677] Statistics Sweden, 'Shared residence for one in three children' (21 February 2014) <https://www.scb.se/en_/Finding-statistics/Statistics-by-subject-area/Population/Population-projections/Demographic-Analysis-DEMOG/Aktuell-Pong/55356/Behallare-for-Press/370439/> accessed 9 July 2018

is carried out by parents, for example, in taking children to and from nursery and school or when they are unwell is even less visible than in the other jurisdictions where there is not the same assumption that all adults will be fully engaged in the labour market. The data from England and Wales (discussed in Chapter 5(iii)) suggest a difference in perception, at least on the part of some fathers, between the 'daily grind' of paid work and the relatively easier job of looking after children. If caretaking is somehow seen as the easier or more enjoyable option, then it may be less important to have spent time doing it to qualify for the role post-separation. Anna's suggestion in the Swedish context that the requirement for 50:50 shared care is 'competence' may be indicative of this.

If an equal shared residence arrangement is agreed in a case where the parents have previously adopted more traditional roles, then there can be financial consequences for the caretaker. As Singer explains:

> Many parents have a – sometimes justified – impression that alternating residence for the child will improve the parent's economy. The parent with the higher income is provided an incentive to ask for alternating residence in order to avoid paying maintenance and the parent with the lower income has reasons to refuse alternating residence in order not to lose different kinds of social benefits or special maintenance payments.[678]

As in England and Wales, the default position if there is a shared care arrangement in place is that no child maintenance is payable,[679] albeit that there is the possibility of child support if there is a big discrepancy in the parties' respective financial positions.[680] The potential unfairness of this situation was

[678] Anna Singer, 'Active Parenting or Solomon's Justice - Alternating Residence in Sweden for Children with Separated Parents' (2008) 4 Utrecht Law Review 35, 46

[679] Försäkringskassan, 'Child support upon alternating living arrangements' <https://www.forsakringskassan.se/privatpers/foralder/for_foraldrar_som_inte_lever_ihop/barnet_bor_vaxelvis_hos_bada_faraldrarna/!ut/p/z1/vVPRToMwFP0WH_a4tIXC2CNuZHPL1A03t740F-igBlosiH6-nXEvGjHGaJ_a5Jxzz709FzG0R0xBJ3NopVZQ2veB-ZzOpxMym-Bl4N0RHK6CUbghl2S5puj-DYC_OCFGrJ-_QwyxOpUZOrhHIMTL0mHmjb0hHVMxTFIYDQEndAQOHgfYOaFT1dZtgQ6pVq1QbSO4EU2tVSM7McC1kR20tTDNAB-1gTIT5nwzYHijKy4tkZeiE4bLQtcDnIBRouWJNryDF1F2suGFbngCGfAjvHMVoFgotOjrKd6Q09Dkw-MjC63Xk8eXFu3_xuzJYybzAX5SlllAWTaJtMycK8v-DLTfxXrdx7QfQK_xR8CNF09x6F-tyS6OnOjS-aQwcz0crm-JS2-cxSI-K_SE5mBTNfoyNr6H7jspntFWaVPZlMY_DNH8mwrRzv9lhf4GVs4v5RffrdX_RbB_X-pqWwUuZYm_iTbB892xyCu-ilyvzC9eAQmBSds!/?1dmy&urile=wcm%3apath%3a%2Fcontentse_responsive%2Fprivatpers%2Fforalder%2Fforaldrar_som_inte_lever_ihop%2Fbarnet_bor_vaxelvis_hos_bada_faraldrarna%2Funderhallsbidrag> accessed 16 October 2018

[680] Försäkringskassan, 'Child support upon alternating living arrangements' <https://www.forsakringskassan.se/privatpers/foralder/for_foraldrar_som_inte_lever_ihop/barnet_bor_vaxelvis_hos_bada_faraldrarna/!ut/p/z1/vVPRToMwFP0WH_a4tIXC2CNuZHPL1A03t740F-igBlosiH6-nXEvGjHGaJ_a5Jxzz709FzG0R0xBJ3NopVZQ2veB-ZzOpxMym-Bl4N0RHK6CUbghl2S5puj-DYC_OCFGrJ-_QwyxOpUZOrhHIMTL0mHmjb0hHVMxTFIYDQEndAQOHgfYOaFT1dZtgQ6pVq1QbSO4EU2tVSM7McC1kR20tTDNAB-1gTIT5nwzYHijKy4tkZeiE4bLQtcDnIBRouWJNryDF1F2suGFbngCGfAjvHMVoFgotOjrKd6Q09Dkw-

illustrated by the second scenario question participants were asked to discuss in the interviews for this project. This involved a married couple in which the father worked full time earning a salary of SEK 1 million (c £100,000) plus bonuses of up to SEK 1,500,000 (c £150,000) and a mother who had been at home with the children full-time for the last ten years. The children in this case were 12 and 10 years old which meant their views would carry significant weight, and in the case of the elder would likely be determinative. The limited availability of spousal maintenance in Sweden meant that some participants, such as Anna, thought it would be 'pretty unlikely' that the mother would receive any here. Further, even those who felt that some spousal maintenance might be payable here envisaged it for a very short period. Ebbe, for example, thought that maintenance might be paid up to the point at which divorce was granted but that it was unlikely afterwards in this scenario:

> … because she has no disabilities that, uh, help her getting into the working market as I can see it. As I know of. So it's um, if she gets a disease she might – Maybe [if her husband] wants out and, you know, pushing this divorce and she's ending up in a depression or something, she needs more time.
> (**Ebbe, Lawyer, Sweden**)

Bertil explained that the mother in this case would have 'to have a good argument and, um, be very concrete and, uh, so on.' Whilst payments might be made for a year to enable re-training, he felt it was unlikely that payments would be made for a three year university course: 'he won't have to pay for that. Maybe the court might end up with one year and then she has to take loans or whatever. That's the brutal world that hits back, normally, on women.' Thus, if the parties were to agree to a shared care arrangement, or the children were to live with their father following separation, the mother's only entitlement would be to a half share of the marital property (in this case c. £200,000). Whilst a financially superior position to that of many couples on separation, it is a result that leaves the mother solely responsible for the economic costs of caretaking.

MjC63Xk8eXFu3_xuzJYybzAX5SlllAWTaJtMycK8v-DLTfxXrdx7QfQK_xR8CNF09x6F-tyS6OnOjS-aQwcz0crm-JS2-cxSI-K_SE5mBTNfoyNr6H7jspntFWaVPZlMY_DNH8mwrRzv9lhf4GVs4v5RffrdX_RbB_X-pqWwUuZYm_iTbB892xyCu-ilyvzC9eAQmBSds!/?1dmy&urile=wcm%3apath%3a%2Fcontentse_responsive%2Fprivatpers%2Fforalder%2Fforaldrar_som_inte_lever_ihop%2Fbarnet_bor_vaxelvis_hos_bada_faraldrarna%2Funderhallsbidrag> accessed 16 October 2018

A second issue raised by the data is the durability of shared residence arrangements. The lower overall prevalence of shared residence in Swedish society than in those recently separated may suggest that over time, shared residence arrangements break down and are replaced primarily by arrangements under which mothers again perform most of the caretaking. Bertil remarked on this experience in practice:

> **Interviewer:** … And so is [one week with each parent] the *most* common arrangement for children? Or does it vary?
>
> **Bertil:** I would say [pause] [laughs]. I would say, yes. Uh, no. Um, I would say, yes. When they divorce and the children are small this is quite a normal arrangement. Now after some years, the father, well you know, I have to work in Germany for two months here and I have to do, and now the chief has asked me to take a little more responsibility, can you take a little more of the children? So it changes of all the time, this is, life doesn't stand still.
>
> (**Bertil, Lawyer, Sweden**)

Given the limited availability of spousal maintenance claims in Sweden (see Chapter 4(i)) this change perhaps makes less difference to the overall position of caretakers than it might elsewhere; for example, in England and Wales a court might be more inclined to make a clean break award in a case involving shared residence than in a case where one party was performing the bulk of the caretaking, which would prevent a later claim for maintenance if the position changed. However, this drift may again serve to disguise gendered caretaking patterns in society. Lawyers, for example, advise on norms at the point of separation, rather than those afterwards. Thus, perceptions of the extent to which care is shared may differ from reality.

A third, related, issue raised by the discussion of shared residence is the extent to which it denotes an equal care time arrangement. As in England and Wales shared residence is capable of a whole host of meanings. Anna remarked that the 'limit' of shared care was not necessarily clear in Sweden. These sorts of

labels may, therefore, serve to perpetuate the invisibility of caretaking after separation. Shared care or shared residence gives the impression of an equal division of time and care. However, the labels need not denote either. Further, even where time is shared equally, as the data from England and Wales suggest (see further Chapter 5(iii)), this does not necessarily result in caretaking being shared equally.

5(ii) The Netherlands: Towards a Universal Caregiver model?

5(ii).1 Introduction

This chapter explores the Dutch approach to caretaking and considers what this means for the visibility of caretaking in society and the value attached to it (RQ 1.b). As described in Chapter 4(ii), in the Netherlands the idea of solidarity, in the sense of a joint enterprise between partners, influences understandings of autonomy. This is different to the sort of social solidarity which was discussed in the Swedish context in Chapter 5(i). As will be discussed below, the position is, however, more complex when it comes to childcare policy.

This chapter begins by considering approaches to childcare in the Netherlands. It then considers background norms around care, paying particular attention to the idea of choice which was a key theme in the interviews with legal practitioners conducted for this research. As was discussed in Chapter 5(i), ideas of choice are important when thinking about the visibility of care and its value. If caretaking is seen as a free and individual choice, it is easier to allow the caretaker to bear the costs of that choice. The rhetoric of choice can also render invisible the factors such as gender norms, which influence both decisions about who should care, and what is expected of them. Ignoring these factors can serve to render the work of caretaking invisible to those who are not expected to care at all, or for whom expectations of care are less onerous. Against this backdrop, this chapter considers the way in which the law on separation deals with caretaking responsibilities: are caretaking responsibilities recognised in the legal framework, and are they valued?

5(ii).2 Childcare policy in the Netherlands

In 1995 a Government Commission recommended a 'Combination Model' for combining paid and unpaid work in the Netherlands. Plantenga describes this model as follows:[681]

> The point of departure of the combination model is a balanced combination of paid and unpaid care work, where unpaid care work is equally shared between men and women. The core concept here is that both paid and

[681] Janneke Plantenga, 'Combining Work and Care in the Polder Model: An Assessment of the Dutch Part-time Strategy' (2002) 22 Critical Social Policy 53, 54

> unpaid work are equally valued. Depending on the lifecycle phase, both men and women should be able to choose a personal mix of paid labour in long part-time (or short full-time) jobs, part-time household production of care and part-time outsourcing of care.[682]

The Combination Model was connected with ideas of gender equality. As Kremer explains, '[r]aising the labour participation rate and, related to this, making it easier to combine paid work with care tasks, has been the central plank of Dutch emancipation policy for many years'.[683] However, it sought to balance this aspiration with Dutch norms around parents caring for their children:

> The combination model… tries to find a balance between the Dutch culture of 'self care'[684] and improving women's position in the labour market, and clearly aims at gender equality outside and inside the home. Thus on the one hand, the Commission sided with the strong anti-Scandinavian sentiments that stressed that parents should do the bulk of the parenting themselves… But on the other hand, it was stressed that men should work less and women should work more…[685]

The emphasis on parents caring for children may help to explain the approach to childcare provision in the Netherlands, which is provided through the market, with the state, employers and parents all making financial contributions.[686] This contrasts with the position in Sweden where it is seen as primarily a public matter, but is similar to the position in England, although the degree of privatisation in the Netherlands is greater.[687] The greater use of childcare by mid- and high-income families in the Netherlands[688] may be partly explained by the market approach,

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[682] Janneke Plantenga, 'Combining Work and Care in the Polder Model: An Assessment of the Dutch Part-time Strategy' (2002) 22 Critical Social Policy 53, 54

[683] Monique Kremer, *How Welfare States Care* (Amsterdam University Press 2007), 200

[684] 'Self care' seems to mean the expectation that children should be looked after by their parents, and specifically their mothers, rather than the state (see further Monique Kremer, *How Welfare States Care* (Amsterdam University Press 2007), 203). See also, Trudie Knijn, 'Fish without Bikes: Revision of the Dutch Welfare State and Its Consequences for the (In)dependence of Single Mothers' (1994) Social Politics: International Studies in Gender, State & Society 1 and Janneke Plantenga, 'For Women Only? The Rise of Part-time Work in the Netherlands' (1996) Social Politics: International Studies in Gender, State & Society, 57

[685] Monique Kremer, *How Welfare States Care* (Amsterdam University Press 2007), 200

[686] Trudie Knijn and Jane Lewis, 'ECEC: childcare markets in the Netherlands and England' in Brigitte Unger, Daan van der Linde and Michael Getzner (eds), *Public or Private Goods? Redefining Res Publica* (Edward Elgar 2017)

[687] Trudie Knijn and Jane Lewis, 'ECEC: childcare markets in the Netherlands and England' in Brigitte Unger, Daan van der Linde and Michael Getzner (eds), *Public or Private Goods? Redefining Res Publica* (Edward Elgar 2017)

[688] Trudie Knijn and Jane Lewis, 'ECEC: childcare markets in the Netherlands and England' in Brigitte Unger, Daan van der Linde and Michael Getzner (eds), *Public or Private Goods? Redefining Res Publica* (Edward Elgar 2017)

which has resulted in a shift towards for-profit child care providers in wealthy urban areas,[689] but may also suggest that norms around self-care are more pervasive for those in lower income groups.[690]

The Combination Model has implications for the visibility of care and value placed upon it. If all parents are expected to engage in caretaking, then the work involved in that caretaking is likely to be more visible in society than if it is primarily performed by women. However, the effects of the Combination Model on valuing caretaking have been shaped by the way that society is organised around it. The Universal Caregiver model discussed in Chapter 2 envisages a situation in which employment is arranged around caretaking responsibilities. This attaches a value to caretaking by making it a central concern in how society is organised. The Combination Model has had some success here; the Netherlands has the highest rate of part-time employment in the EU,[691] half of men and women 'express a preference for an egalitarian division of work and care tasks between men and women',[692] and in 2013, half of fathers of young children looked after their child at some point during the week while the mother worked.[693] Nevertheless, there has not been to sort of fundamental change in the nature of employment envisaged by the Universal Caregiver model. When combined with the limited state assistance in providing childcare described above, it is perhaps understandable that Kremer suggests:

> In practice, the ideal of parental sharing turns out as the junior model (he works full-time, she works part-time): the woman, ironically, is doing the "sharing" on her own.[694]

[689] Joëlle Noailly and Sabine Visser, 'The Impact of Market Forces on Child Care Provision: Insights from the 2005 Child Care Act in the Netherlands' (2009) 38(3) Journal of Social Policy 477
[690] Frits van Wel and Trudie Knijn, 'Transitional Phase or a New Balance? Working and Caring by Mothers with Young Children in the Netherlands' (2006) 27(5) Journal of Family Issues 633
[691] Eurostat, 'Part-time employment rate' (last updated 10 October 2018) <http://ec.europa.eu/eurostat/web/products-datasets/product?code=tesem100> accessed 16 October 2018
[692] Wil Portegijs (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2016' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS)*, 13 December 2016) <https://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2016/Emancipation_Monitor_2016>accessed 11 September 2018
[693] Wil Portegijs (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2016' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS)*, 13 December 2016) <https://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2016/Emancipation_Monitor_2016> accessed 11 September 2018
[694] Monique Kremer, *How Welfare States Care* (Amsterdam University Press 2007), 220

Dutch women spend more time looking after the household and children and less time in paid work than men.'[695] Further, employed mothers are twice as likely to take parental leave as employed fathers,[696] and whereas only 6% of mothers are never at home while their partner is at work, three-quarters of women spend more than one day a week at home while their partner is working.[697]

5(ii).3 The 'choice' to care

> I think, uh mothers like being at home with their children a lot… I think it's your, it's your own choice… it tends to be that, ja fathers will stay at home more and more for one day a week, for example, but, uh, ja, women like, ja, like to work part-time in the Netherlands… and… it is possible financially to do it.
>
> (**Bente, Lawyer, Netherlands**)

Several perspectives about the nature of care can be seen in participant interviews in the Netherlands. The first, the idea of care as a choice, was most evident in Bente's interview. This interpretation is consistent with Verweij and Reimann's secondary analysis of interviews with mothers in the Netherlands in which those mothers 'framed their decision to work part-time as a preference',[698] although see further the discussion below about factors such as gendered norms which impact on such a choice. Bente's understanding of care as a choice had implications for how she viewed the legal response on separation. Bente felt that men were often disadvantaged at the point of separation. First, as discussed further below, the partner who had undertaken caretaking responsibilities during the relationship had a far greater ability to shape the nature of the arrangements for the children following divorce, an example of situational power.[699] Second,

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[695] Wil Portegijs (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2016' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS)*, 13 December 2016) <https://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2016/Emancipation_Monitor_2016>accessed 11 September 2018

[696] Wil Portegijs (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2016' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS)*, 13 December 2016) <https://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2016/Emancipation_Monitor_2016>accessed 11 September 2018

[697] Wil Portegijs (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2016' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS)*, 13 December 2016) <https://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2016/Emancipation_Monitor_2016> accessed 11 September 2018

[698] Miriam Verweij and Maria Reimann, 'The part-time story: Dutch couples at the life-course transition to parenthood' in Daniela Grunow and Marie Evertsson (eds) *Couples' Transitions to Parenthood: Analysing Gender and Work in Europe* (Edward Elgar 2016), 129

[699] Carol Smart and Bren Neale, *Family Fragments* (Polity Press 1999), 146

Bente considered that the rules on spousal alimony were ‘very, very, very much in favour of, uh, women.’ She considered that it was ‘good’ to have spousal maintenance ‘because after…divorce you don’t want, um, the children, for example, to have a very luxury vacation with their father and they cannot go with their mother because she has nothing.’ However, the unfairness arose because ‘you already have a right for spousal alimony when your income is, ja, not so different from one another.’

Bente felt that the combination of this approach to determining child arrangements and the generous rules on spousal maintenance meant that many fathers were trapped following separation:

> … in the Netherlands we also have this equal care and upbringing, uh, for the children which is laid down in… law. But, um, fathers… say, ok, during our marriage I have worked a lot and I want to work less, but I can’t work less because I have to pay all these spousal alimony, child alimony etcetera. But I want to take care more of my children, um, now that we, uh, have separated… that’s not easy… because he has this obligation but he wants to take care more of his children… So that’s, basically, a big problem.
> (**Bente, Lawyer, Netherlands**)

Carlijn took a different view of the issue, premised on a slightly different understanding of choice:

> Um, when you live together for a couple of years and when you allow that your, your wife or husband didn’t work because the other person took care of the children, well, then of course you have to be supportive, supportive after the marriage.
> (**Carlijn, Lawyer, Netherlands**)

These two accounts demonstrate two very different interpretations of the same decision, which suggest different attitudes to caretaking responsibilities. For Bente, the unfairness arises because of the caretaker’s choice not to work. She

considered that in many cases ‘the man wants his wife to work again and that was also a problem during the marriage.’ This suggests that caretaking is perceived as less valuable to the family than paid work, and was perceived in this way by the breadwinner during the marriage. This may be because the work involved in caretaking is not properly recognised, or it may be because of a perception, justified or not, that the need for that work no longer exists, for example because children are older and increasingly self-sufficient.

For Carlijn, who stressed the importance of both parties striving for financial independence, the obligation to pay spousal maintenance arises from the fact that the party who has undertaking the caretaking role has been financially disadvantaged. This recognition of caretaking as an economic burden was also evident in Elise’s interview:

> … I think in the majority, in the vast majority of cases, the women take a step back in their careers to look after the kids, so they all start working part-time. And in the majority of cases, I would think that the kids, after divorce, stay with the mother. So, um, you know, not only during the marriage they’ve - women have been limited in building up a career but also after marriage they still quite often the one, the main carer for the kids. Not all the time but, I would think still a majority of women.
> (**Elise, Lawyer, Netherlands**)

In these accounts, the costs of caretaking are more visible and the choice in question appears to be a joint one for which both parties must bear the cost.

Without further information about Bente’s cases, it is hard to explore the idea of choice in greater detail. Ruitenberg’s research suggests three categories of mothers who do not work or work part-time: Drifters, Privilegeds and Balancers.[700] For the former group of stay-at-home mothers, the ‘decision to give up work was generally a gradual, sliding process and not a conscious individual decision to be a full-time homemaker’.[701] A variety of factors contributed to this

[700] Justine Ruitenberg, 'A Typology of Dutch Mothers' Employment Narratives: Drifters, Privilegeds, Balancers, Ambitious' (2014) 31 Gender Issues 58
[701] Justine Ruitenberg, 'A Typology of Dutch Mothers' Employment Narratives: Drifters, Privilegeds, Balancers, Ambitious' (2014) 31 Gender Issues 58, 67

state of affairs: ‘a hard-working spouse (despite earlier promises to work less), the availability, high costs and poor quality of childcare provisions, job dissatisfaction, illnesses (such as being burnt-out, redundancy, sick relatives in need of care, or their lack of sufficient knowledge of the Dutch language or the right diplomas’).[702] Most of these women ‘missed having work, a life outside their home and subsequently felt restless’.[703] In contrast, for the Privilegeds, who worked between 12 and 24 hours, ‘the narrative of choice towards motherhood is particularly strong’.[704] Unlike the Drifters, who often ‘lacked a clear professional preference’[705] when they were younger, Privilegeds ‘often had clear ideas about what they liked to do as a profession when they were younger, and also succeeded in doing it’.[706] Nevertheless, these women often ‘anticipated early on the fact of becoming a mother, and often chose the easier professional options because of that’.[707] Finally, the Balancers, who had ‘large’[708] part-time jobs of 25-35 hours ‘try to balance their desires to be both good mothers and good workers. They tend to really enjoy their work and motherhood: *Work is essential, caring is important.*’[709] ‘However, their “choice” of work hours (generally 32 h), which corresponds with their preferred number of work hours, is also characterised by the social expectations to work part-time and not full-time.’[710] As was discussed in Chapter 4(ii), it seems to be the case that Bente’s clients were generally wealthier than average. It is, therefore, possible that they disproportionately fell within the Privileged category in having more freedom than less well-off mothers to choose to prioritise care. Nevertheless, Ruitenberg questions the appropriateness of the language of choice to describe mothers’ working patterns:

> Dutch mothers’ heterogeneous labour market behaviour cannot be understood as simple and varied expressions of free choice, but rather as

[702] Justine Ruitenberg, 'A Typology of Dutch Mothers' Employment Narratives: Drifters, Privilegeds, Balancers, Ambitious' (2014) 31 Gender Issues 58, 66-7
[703] Justine Ruitenberg, 'A Typology of Dutch Mothers' Employment Narratives: Drifters, Privilegeds, Balancers, Ambitious' (2014) 31 Gender Issues 58, 67
[704] Justine Ruitenberg, 'A Typology of Dutch Mothers' Employment Narratives: Drifters, Privilegeds, Balancers, Ambitious' (2014) 31 Gender Issues 58, 69
[705] Justine Ruitenberg, 'A Typology of Dutch Mothers' Employment Narratives: Drifters, Privilegeds, Balancers, Ambitious' (2014) 31 Gender Issues 58, 67
[706] Justine Ruitenberg, 'A Typology of Dutch Mothers' Employment Narratives: Drifters, Privilegeds, Balancers, Ambitious' (2014) 31 Gender Issues 58, 69
[707] Justine Ruitenberg, 'A Typology of Dutch Mothers' Employment Narratives: Drifters, Privilegeds, Balancers, Ambitious' (2014) 31 Gender Issues 58, 69
[708] Justine Ruitenberg, 'A Typology of Dutch Mothers' Employment Narratives: Drifters, Privilegeds, Balancers, Ambitious' (2014) 31 Gender Issues 58, 71
[709] Justine Ruitenberg, 'A Typology of Dutch Mothers' Employment Narratives: Drifters, Privilegeds, Balancers, Ambitious' (2014) 31 Gender Issues 58, 71
[710] Justine Ruitenberg, 'A Typology of Dutch Mothers' Employment Narratives: Drifters, Privilegeds, Balancers, Ambitious' (2014) 31 Gender Issues 58, 71

> intentional and unintentional outcomes of mothers' diverse – though always engendered – perceptions of possibilities and constraints.[711]

5(ii).3.1 Choice and gender norms

> Individualism may be a dominant ideology of our time, with regard to women as well as men. However, whether individualization is realised also depends on the values which run against it. With respect to motherhood, norms about childcare and male and female gender identities proved to be strong counter-values. They occasion the current dilemmas of motherhood in the Netherlands. Nowadays women are presumed to strive for autonomy, financially and socially, but this contradicts the social practices of parenthood as well as the supposed needs of children and the female gender-identity. No good alternatives to motherhood are available and daily life-experiences and the socialization of women accentuates their caring identity.[712]

As explained at the outset, the Combination Model is premised on mothers and fathers sharing paid and unpaid work equally. However, where the expectations of mothers and fathers are different, the realisation of this goal is complex. There is some suggestion that when combined with structural features of Dutch society, such as the cost and availability of childcare, these gender norms may help to explain the failure of the Combination Model to redistribute paid and unpaid work more equally. Thus, Verweij and Reimann, note, for example, that '[i]f we keep in mind that over three-quarters of Dutch women work part-time, we see that this "preference" might be guided by what is a common and expected thing to do.'[713]

Kirk and Suvarierol suggest that 'Dutch cultural norms prioritise the mother's caring responsibilities'.[714] In contrast, Dutch understandings of fatherhood show similarities to those in England and Wales (see further Chapter 5(iii)). Verweij and Reimann note of expectant parents, for example, that:

[711] Justine Ruitenberg, 'A Typology of Dutch Mothers' Employment Narratives: Drifters, Privilegeds, Balancers, Ambitious' (2014) 31 Gender Issues 58, 77

[712] Trudie Knijn, 'Social Dilemmas in Images of Motherhood in the Netherlands' (1994) 1 The European Journal of Women's Studies 183, 203

[713] Miriam Verweij and Maria Reimann, 'The part-time story: Dutch couples at the life-course transition to parenthood' in Daniela Grunow and Marie Evertsson (eds) *Couples' Transitions to Parenthood: Analysing Gender and Work in Europe* (Edward Elgar 2016), 130

[714] Katherine Kirk and Semin Suvarierol, 'Emancipating Migrant Women? Gendered Civic Integration in the Netherlands' (2014) 21 Social Politics 241, 245

> … there are major differences in what the mothers and the fathers expect from their time with the child. It appears that the father's caring time is expected to be more about bonding, being active, involved and present, whereas the mother's caring time is expected to be more about managing the basic care of the child.[715]

This is consistent with Dermott's research in the UK,[716] in which fathers focused on 'the aspects of parenting that were least "work-like" and downplayed the requirement to perform regular child maintenance activities'[717] (see further Chapter 5(iii)).

Cultural understandings of the roles of mothers and fathers are compounded by societal structures. For example, Verweij and Reimann consider that the model of parental sharing supported by the state '[i]mplicitly promotes a traditional division of labour as couples lose the least income from choosing to have the partner with the lower earnings, generally the woman, taking the majority of the leave.'[718] Thus, there is some suggestion that despite the influence of the Combination Model, parents-to-be do not intend to share care equally:

> Most of the interviewed parents-to-be agreed that shared parenting together with professional childcare was the best possible way to reconcile work and family. "Shared parenting", however, did not necessarily mean "sharing equally". Most of the couples in this study, regardless of any egalitarian ideals or non-traditional employment combinations, did not plan to share paid work, housework and childcare equally.[719]

Thus, it seems that at least insofar as parents to be are concerned, the Combination Model does influence perceptions around combining work and

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[715] Miriam Verweij and Maria Reimann, 'The part-time story: Dutch couples at the life-course transition to parenthood' in Daniela Grunow and Marie Evertsson (eds) *Couples' Transitions to Parenthood: Analysing Gender and Work in Europe* (Edward Elgar 2016), 133
[716] Esther Dermott, *Intimate Fatherhood A Sociological Analysis* (Routledge 2008)
[717] Esther Dermott, *Intimate Fatherhood A Sociological Analysis* (Routledge 2008), 62
[718] Miriam Verweij and Maria Reimann, 'The part-time story: Dutch couples at the life-course transition to parenthood' in Daniela Grunow and Marie Evertsson (eds) *Couples' Transitions to Parenthood: Analysing Gender and Work in Europe* (Edward Elgar 2016), 135
[719] Miriam Verweij and Maria Reimann, 'The part-time story: Dutch couples at the life-course transition to parenthood' in Daniela Grunow and Marie Evertsson (eds) *Couples' Transitions to Parenthood: Analysing Gender and Work in Europe* (Edward Elgar 2016), 137

caretaking. However, this norm does not yet seem to have become dominant in guiding behaviour:

> On the one hand, these new egalitarian ideals were a point of reference in our interviewees' accounts, and the couples that planned to live according to the "more traditional" model seemingly felt that they needed to justify their choice. On the other hand, regardless of the strength of the egalitarian ideal, most Dutch couples still practised the one-and-a-half earner model in which the man worked full-time or almost full-time while the woman worked part-time and was the primary carer.[720]

5(ii).3.2 Choice and the optimism bias

A second challenge to the idea of choice arises from the suggestion, made by several participants, that caretaking was not necessarily a rational or even considered choice:

> It's like Brexit. When I look at that whole discussion about Brexit it's really… not informed and they don't realise what it means when they make the caring decision and everything. They really have the feeling like, ok, I've got such a reasonable partner, after divorce it will be fine.
> (**Anne, Legal Adviser, Netherlands**)

> I think as a person that everybody, whether you are a wife or a man, that you have to be, um, um self-supporting in life… And that you, during your marriage, you have to check your, your financial balance and, but, on the other hand, I understand that, that doesn't happen, or I understand that it's difficult to have that um, uh, business-like, uh, relation in a marriage.
> (**Carlijn, Lawyer, Netherlands**)

Such choices, therefore, also appear to have much in common with the way in which pre-nups tend to be ignored in practice by those who had signed up to them (see further Chapter 4(ii)). For Anne, the way in which people think, or rather don't

[720] Miriam Verweij and Maria Reimann, 'The part-time story: Dutch couples at the life-course transition to parenthood' in Daniela Grunow and Marie Evertsson (eds) *Couples' Transitions to Parenthood: Analysing Gender and Work in Europe* (Edward Elgar 2016), 139

really think, about caretaking, was explained by the idea that people are generally optimistic about their own relationships:

> … most people say they will not be in the category… that's the problem. Because you even have insurance for divorce, but I hear from the insurance companies that hardly anyone, it's a really bad product, nobody wants it. So, everybody is like, when they marry, or have the registered partnership, especially when they have children, that they're like we will be fine, we will not be people who will divorce, and then they move the caring arrangements and everything, and then it goes wrong… and then it's just big misery. Financially. Ja.
> (**Anne, Legal Adviser, Netherlands**)

This is consistent with research findings that one reason cohabitants in the UK tend not to take legal action with respect to their relationship is 'an optimistic assumption that they (unlike others) would not need such legal steps'.[721] This is potentially problematic in light of recent research in the Netherlands about attitudes to financial dependence:

> Most women and men believe it is important that women should have their own income. For most of them, however, that income need not necessarily be enough to enable them to live independently; they believe that in a good relationship, financial dependence is not an issue.[722]

If people overestimate the likelihood of their relationships succeeding, this raises further questions about ideas of choice and who should bear the responsibility for choices made within a relationship. Someone who believes that their relationship is a 'good' one which will last may be more prepared to make a decision in the interests of the family as a whole, but which is damaging for them individually. If they were wrong in this assessment of their relationship, is it right to view the

[721] Anne Barlow and Janet Smithson, 'Legal assumptions, cohabitants' talk and the rocky road to reform' (2010) 22 CFLQ 328, 331
[722] Wil Portegijs (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2016' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS),* 13 December 2016) <https://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2016/Emancipation_Monitor_2016> accessed 11 October 2018, 8

decision as a free or rational choice? What implications does this have for who should bear the financial consequences of that choice?

5(ii).4 How does the law think about care?

> … there is a lot of attention also from the Government… that both partners should work… But the situation is that both don't work. People divide. So there's a normative idea… and the legal system is not correcting that. So the legal system sort of starts with a sort of ideation while in practice it's very different. Um… and the only way you can change that of course when you are really going to fully value, um, caring tasks the same as work tasks. And if you don't do it, you should have really good information for the one who takes the caring tasks.
> (**Anne, Legal Adviser, Netherlands**)

There appears to be a conflict between the societal idea of parental sharing and the way in which caretaking is practised in the Netherlands. This section considers the different ways in which care is treated by the law and what this means in terms of its visibility and the value attributed to it.

5(ii).4.1 Financial provision

Chapter 2 considered three approaches to the treatment of caretaking in the law: compensation, reward and recognition.[723] For cohabitants in the Netherlands, as in England and Wales, the law largely ignores the presence of caretaking responsibilities. For married couples and those in registered partnerships, the community of property regime is protective:

> [Universal community of property] was a very good system, because, uh, it starts with solidarity between partners. So what you then sort of can prevent is that one partner does the earnings and the other one takes care of the kids and then they split up. And then, uh, the one who has taken care of the kids doesn't get anything, while the other a career and earns a lot, and um, lot of money. So for that situation it was really good because

[723] Gillian Douglas, *Obligation and Commitment in Family Law* (Hart 2018)

> it was a protection for the one that was financially more vulnerable and especially if there is some sort of caring provision.
> (**Anne, Legal Adviser, Netherlands**)

On this understanding of community, caretaking is not valued as such. Instead, consistently with the compensatory rationale discussed in Chapter 2, this approach recognises that caretaking causes losses. However, the regime does not seek to compensate these losses directly. Rather the equal division of capital is a safety net for the caretaker in cases where there are assets. This approach is akin to the approach to spousal maintenance in the Netherlands. Maintenance payments do not have a compensatory function[724] in the sense envisaged by *Miller; McFarlane*.[725] Instead, spousal maintenance is calculated based upon the recipient's lack of means and the payer's ability to pay;[726] it is not relevant whether the lack of means has been caused by the marriage.[727] Thus, whilst a need generated by caretaking responsibilities may be met by spousal maintenance, the limited term for which such maintenance is payable means that the compensatory rationale is imperfect. It is notable that whereas women in the Netherlands lose almost a quarter of their purchasing power on divorce, men lose only 0.2% of theirs.[728] Further, women in receipt of maintenance payments lose 38% of their purchasing power.[729]

The community of property regime may also be seen to fit with Douglas' idea of reward, which considers 'caring as a means whereby the carer *works* to build the family and thereby *earns* her share of the family wealth',[730] albeit that such regimes were not originally created for this purpose. As Cooke et al explain:

[724] Katharina Boele-Woelki, Olga Cherendychenko and Lieke Coenraad, 'Grounds for divorce and maintenance between former spouses: the Netherlands' (*CEFL*, September 2002) <http://ceflonline.net/wp-content/uploads/Netherlands-Divorce.pdf> accessed 17 October 2018, 24
[725] *Miller v Miller : McFarlane v McFarlane* [2006] UKHL 24
[726] Katharina Boele-Woelki, Olga Cherendychenko and Lieke Coenraad, 'Grounds for divorce and maintenance between former spouses: the Netherlands' (*CEFL*, September 2002) <http://ceflonline.net/wp-content/uploads/Netherlands-Divorce.pdf> accessed 17 October 2018, 23
[727] Katharina Boele-Woelki, Olga Cherendychenko and Lieke Coenraad, 'Grounds for divorce and maintenance between former spouses: the Netherlands' (*CEFL*, September 2002) <http://ceflonline.net/wp-content/uploads/Netherlands-Divorce.pdf> accessed 17 October 2018, 27
[728] Wil Portegijs (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2016' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS)*, 13 December 2016) <https://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2016/Emancipation_Monitor_2016> accessed 11 September 2018
[729] Wil Portegijs (SCP) and Marion van den Brakel (CBS), 'Emancipation Monitor 2016' (*The Netherlands Institute for Social Research (SCP) and Statistics Netherlands (CBS)*, 13 December 2016) <https://www.scp.nl/english/Publications/Summaries_by_year/Summaries_2016/Emancipation_Monitor_2016> accessed 11 September 2018
[730] Gillian Douglas, *Obligation and Commitment in Family Law* (Hart 2018), 198

> In its most basic form, community of property originates in the ideology of the community of persons created through the marriage union... On a more pragmatic level, considerations such as the joint enterprise that marriage represents, the sharing of breadwinner and homemaker roles and the care of children all suggest that marriage is a partnership not only of persons, but also of their contributions to the partnership, be they material or practical. Consequently, where the law deems it necessary to regulate the property rights of the parties by virtue of their formal relationship, community presents itself as a logical default position. The law provides an empty pot into which the parties will contribute for the benefit of both the union and their own individual interests. Yet the joint enterprise approach is a creature of modern-day thinking... The origins of community lie rather in the legal incapacity of the wife, the desire to keep property within the family (at a time when land was a major source of wealth) and on the basis that marriage was for life. All three elements are far removed from the reality of marriage (and other intimate relationships) at the beginning of the 21st century.[731]

The joint enterprise idea that underpins modern day thinking about such regimes reflects the non-discriminatory approach advocated in *White v White*[732] in England and Wales. Eekelaar explains this as follows:

> The principle that the nature of each spouses' contributions to the marriage should be treated as being of equal worth whether made in the world of business or at home was at the heart of the decision in *White.* This element of the resultant award (and it was not necessarily the only element) will therefore be of a quasi-proprietorial nature, an entitlement earned through the contributions.[733]

Given that community begins from the date of the marriage, there is not necessarily a durational element to a domestic contribution as such. However,

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[731] Elizabeth Cooke, Anne Barlow and Thérèse Callus, 'Community of Property A Regime for England and Wales?' (The Nuffield Foundation 2006), 3-4

[732] *White v White* [2000] UKHL 54

[733] John Eekelaar, 'Asset distribution on divorce - the durational element' (2001) 117 LQR 552, 553

participants to this research explained that it was possible to make adjustments in a short marriage for greater financial contributions. This focus on financial contributions can also be seen in the Swedish system through the ability to reduce shares for marriages of less than 5 years. Likewise, in England and Wales, one of the reasons for departing from equality in the share of assets is that one of the parties has made a 'special contribution'[734] (which, to date, has only applied to financial contributions). Thus, in all three jurisdictions, it appears that caretaking is recognised only indirectly. It will be equated with the contribution of the breadwinner unless there is good reason not to do so. However, the breadwinner's non-financial contribution (or lack thereof) will be ignored.[735]

5(ii).4.2 Child arrangements on separation

As discussed in Chapter 5(i), a different perspective on the way in which law views and values caretaking is to consider the way in which future caretaking arrangements are decided upon at the point of separation. For example, do such decisions focus on the parents' respective abilities to provide care, on reaching a decision that is fair as between the parents or on something else?

In the Netherlands, children primarily live with their mothers following divorce. The 2018 population statistics suggest that 18.7% of single parents were fathers and 81.3% mothers.[736] Data from 2008, which showed a comparable division (85% of children usually stayed with their mother), suggest that single fathers are more likely to be looking after one child than single mothers.[737] It has been estimated that 74% of children of divorced parents live with their mother, 6% with their father and 20% in co-parenting arrangements.[738] The influence of gender norms can be seen in both the overall breakdown of parenting arrangements and in shared care arrangements themselves:

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[734] See, for example, *Cowan v Cowan* [2001] EWCA Civ 679, *Cooper-Hohn v Hohn* [2014] EWHC 4122 (Fam)
[735] Gillian Douglas, *Obligation and Commitment in Family Law* (Hart 2018), 198
[736] Statline, 'Households: size, composition, position in the household, 1 January (*CBS,* Changed on 6 April 2018) <https://opendata.cbs.nl/statline/#/CBS/en/dataset/82905ENG/table?ts=1530599976004> accessed 17 October 2018
[737] Arie de Graaf, 'Nearly half a million single parents in the Netherlands' (*CBS*, 5 September 2008) <https://www.cbs.nl/en-gb/news/2008/36/nearly-half-a-million-single-parents-in-the-netherlands> accessed 16 October 2018
[738] Nederlands Jeugdinstituut, 'Cijfers over Stiefgezinnen' <https://www.nji.nl/pdf/Databank/Cijfers-over-Jeugd-en-Opvoeding/Cijfers-per-onderwerp/Stiefgezinnen?hid=pdf;lmg=60;tmg=60;rmg=60;bmg=50;pnr=1> accessed 17 October 2018 (page translated using Google translate)

> … men who have a new partner are less likely to be in a shared residence arrangement than are their single counterparts. Women, however, are more likely to be in a shared residence arrangement when they have a new partner than are single women. For women, being in a shared residence arrangement instead of in the most common arrangement with a resident mother is associated with less time spent with the children, which makes spending time with a new partner easier. For men, being in a shared residence arrangement increases the time spent with the children compared with being a non-resident father, which make spending time with a new partner more difficult.[739]

The underlying expectations around the default roles for post-separation mothers and fathers may reflect expectations of mothers and fathers in intact families, in which mothers still undertake the majority of caretaking. The extent to which parenting tasks are shared in intact families is dependent on parents' working patterns. As the Central Bureau for Statistics notes, '[f]athers are only more involved in all or most parenting tasks when the mother is employed (part time or full time) and the father is not.'[740] Further, it appears that while tasks such as playing with children and taking them to bed tend to be shared relatively equally (in 85% and 71% of cases respectively),[741]

> …when asked which one of the working parents is usually involved in certain tasks "always or most of the time", the parents' answer for all tasks is: the mother. This is especially true for dressing children, done by the mother in 44 percent of the cases and less than 3 percent by the father. The most time-consuming task, namely nursing a sick child, is nearly 3.5 times more likely to be done by the mother all or most of the time. In 31 percent of the families where both parents are working equally long hours

[739] Wilma Bakker and Cara Mulder, 'Characteristics of post-separation families in the Netherlands: shared residence versus resident mother arrangements' (2013) 78 GeoJournal 851, 862

[740] Centraal Bureau voor de Statistiek, 'Child-rearing mostly done by mothers, including working mothers' (8 October 2015) <https://www.cbs.nl/en-gb/news/2015/41/child-rearing-mostly-done-by-mothers-including-working-mothers> accessed 17 October 2018

[741] Centraal Bureau voor de Statistiek, 'Child-rearing mostly done by mothers, including working mothers' (8 October 2015) <https://www.cbs.nl/en-gb/news/2015/41/child-rearing-mostly-done-by-mothers-including-working-mothers> accessed 17 October 2018

in paid jobs, mothers stay at home to look after a sick child, while fathers do so in only 9 percent.[742]

This gendered division of caretaking within intact families appears to be recognised in the child arrangements reached post-separation. While there were some suggestions that separation prompted a change in parental views about how involved they wanted to be in their children's lives, unlike the position in Sweden, shared care arrangements are not considered the norm. This suggests greater visibility of historic caretaking in the Netherlands and perhaps greater value placed upon it.

5(ii).4.2.1 Separation as a catalyst for change

> So what I find sometimes unfair is the idea that, ok, after the marriage, before I didn't take care of the kids, but now after the marriage, *I* want half, um, of the time. But it's my money and you get, actually it's I, I will pay you a little bit of alimony but, uh, hardly anything… I find that discussion not really equal. I'm, I'm always surprised that people can say really say honestly, like, I want a half a child, child time, I want the children, and then, but why can't you work on your own. Like, well, at the same time, the other was for years taking care of, of them, the children.
> (**Anne, Lawyer, Netherlands**)

The comparator tables in Chapter 4 outline the legal provisions in relation to child arrangements on separation. Participants suggested that the approach of the courts was changing, in that children generally spent greater time with their fathers than they had in the past:

> … If you go to court it's not likely that you get a co-parenting situation but, um, uh, let's say ten to fifteen years ago, heh um the situation was ok, the children will be living with one parent and would see the other parent once every two weeks a weekend. That was normal. And nowadays its, uh, its normal to have a weekend every two weeks but also have regular visits

[742] Centraal Bureau voor de Statistiek, 'Child-rearing mostly done by mothers, including working mothers' (8 October 2015) <https://www.cbs.nl/en-gb/news/2015/41/child-rearing-mostly-done-by-mothers-including-working-mothers> accessed 17 October 2018

during the week for example. So it's, it's changing a bit but not, uh, not, not in a co-parenting situation.
(**Bente, Lawyer, Netherlands**)

… As you see that men are more, um… um… attracted, attracted to, to taking care of the children. And you see that, um, in the earlier days it was also always very simple. Children stayed with their mother and once, two weeks they saw their father in the, during the weekends, and that has all changed...
(**Carlijn, Lawyer, Netherlands**)

However, shared care was still far from the norm and was only favoured in cases where the parents could cooperate:

…with co-parenting in the Netherlands, uh, they say, ok, if you want to have - If, if, it needs to be, um, you, you need to work it out in practice and if you cannot communicate with each other, if you cannot work out an arrangement for yourselves, um, heh its, its not in the interests of the children that you uh will fight and have this co-parenting situation because it doesn't really work in practice, so.
(**Bente, Lawyer, Netherlands**)

The approach of the courts is explicitly couched in terms of child welfare. Nevertheless, the indirect effect of this approach is that the primary caretaker has so-called situation power[743] in respect of the arrangements that were reached:

… if you cannot work out an arrangement for yourselves and you, you go to court, then basically then the court is looking at the current situation and they will… look at how… did you do it before and, and if a father says, ok, but I want, I'm going to work, uh, uh, two days less and I want to take care of my children, I don't see that happen very often so I, I think uh if you have a, if you have a current situation, uh, then the person who is at home with

[743] Carol Smart & Bren Neale, *Family Fragments* (Polity Press 1999)

> the children, or more at home with the children, uh, he or she is in, in the advantage then of taking care of the children after divorce.
> (**Bente, Lawyer, Netherlands**)

Once again, this suggests that past caretaking is more visible in the Netherlands than in the other jurisdictions and that greater value may be placed upon it than elsewhere. This does, however, have the effect of increasing the situational power of the parent who has performed caretaking historically; if the parents cannot cooperate then the caretaker is likely to continue as primary caretaker following divorce. The flip side of the position Bente describes is considered further in Chapter 5(iii). Whereas the breadwinner's desire to become more involved in caretaking after separation is generally recognised in England and Wales, the caretaker cannot exercise a similar choice to become more involved in the labour market if the breadwinner is not prepared to undertake a greater share of the childcare.

5(iii) England and Wales: The invisibility of care in parental perceptions

5(iii).1 Introduction

Chapter 2 outlined different approaches taken in the law of England and Wales to caretaking responsibilities. There is far greater flexibility in the legal system in England and Wales than in Sweden or the Netherlands to meet both financial needs generated by caretaking and to compensate for financial disadvantage caused by caretaking responsibilities. However, as was discussed in Chapter 2, parents are increasingly being left to reach agreements themselves, with limited possibilities for legal advice. Thus, the approach of the law to caretaking is only one part of the story.

This chapter considers the ways in which the parents interviewed for this project regarded caretaking and, in particular, the extent to which it was considered a relevant factor in the financial settlements that they reached on separation (RQ 1.b). Caretaking responsibilities are an important factor that limits the ability to become financially independent. However, for various reasons, they are often invisible in the negotiation of financial settlements. In particular, as in the Netherlands, the narrative of choice seemed to be influential in discussions around the division of caretaking responsibilities for these parents. Further, whereas gender equality is much less central to policy in England and Wales than in Sweden, the influence of assumptions about gender equality was evident in participant discussions. The invisibility of caretaking responsibilities appeared to be connected to perceptions of their value; those not performing them were less likely to see their value.

5(iii).2 Caring and the role of gender

> … it is clear that in Western cultures there are significant differences in both the responsibilities associated with mothering and fathering, and with the meaning(s) associated with being a mother and being a father. Moreover, while motherhood may have imparted a fairly stable identity, the meaning of fatherhood has become highly contested and uncertain in Britain in the 1990s.[744]

[744] Carol Smart & Bren Neale, *Family Fragments* (Polity Press 1999)

Participant interviews support the idea that conceptions of parenthood remain gendered. This section begins with a discussion of the different expectations of mothers and fathers seen in participant interviews. It also looks at how parents talked about the division of caretaking responsibilities both during their relationship and after separation. It is important to look at both the pre and post separation position when assessing the financial impact of caretaking. The division of care during a relationship may have consequences for the nature of shared care arrangements after separation and, in particular, the extent to which caretaking is divided between parents. As discussed further below, shared time post-separation does not necessarily mean that all of the responsibilities of care are shared. Caretaking has financial implications that are not shared by those caring about / taking care of children. Not only do caretaking responsibilities have an impact on the ability to engage in the workforce, but children cost money. If there is the illusion of shared responsibility without the reality, then there is the potential for one partner to be far worse off financially. It is also important to consider the extent to which the nature of a person's career and their level of seniority affects the ability to accommodate caring responsibilities without jeopardising that career. Flexible working, for example, may be easier for someone who is more senior in their career, and that seniority may be the product of decisions made during a relationship about the division of caretaking responsibilities.

Gender was an important theme in participant interviews, albeit a complex one. Whilst gender equality or equivalence was widely endorsed by participants, the interviews themselves present a far more nuanced picture. Participants were asked about two scenario questions, one involving a female carer and one involving a male carer. There were two different versions of these scenarios, with half of the participants receiving one and half receiving another, in which the genders were reversed. After they had commented on the scenarios, participants were asked whether it would have made a difference to their answer if the genders were reversed. All participants said that gender shouldn't make a difference in these scenarios, albeit that three[745] suggested that assumptions about gender were pervasive and that in reality it was hard to be sure about

[745] Erin, David and Elizabeth

whether inherent biases would have made a difference to their answers. Nevertheless, gender difference was evident both implicitly and explicitly in many of the interviews.

The idea of inherent differences between men and women was seen in a number of the interviews. This was most obvious in the interviews with some of the married parents whose own division of caretaking responsibilities, either during their relationships or afterwards, had been or were most 'traditional':

> … as a rule women are a bit more emotionally involved with the children. Um, and the men are more the fun disciplinarian.
> (**Antonia, Mother, England & Wales**)

> … I think children ought, this is my personal belief, I personally believe that children ought to be with the mother. Because, you know, if the mother is compos mentis and is financially able, then the children ought to be with their mother because the mother gives them birth.
> (**Laura, Mother, England & Wales**)

> Maybe the younger generation maybe a bit different but the, obviously, the generation I'm in, um, I don't think [clears throat] many, a lot of men that I know anyway would want to do that. Even though they might, the thought of it might sound quite good being home and everything else. But yeah, I think it's the breadwinning, sort of caveman sort of attitude [laughs].
> (**Ruth, Mother, England & Wales**)

> Men, men do want to be out at work. Um, they know. Men aren't stu… well most men are stupid. But I know men who aren't stupid who know that it's harder work at home.
> (**David, Father, England & Wales**)

Antonia, Laura and Ruth had all been primary caretakers during their relationships. For Antonia and Ruth, the gendered division of labour continued after separation, and both expressed a desire for greater involvement by their ex-

husbands. Following separation, both Laura and David's roles were atypical of their gender. David became the primary caretaker of his children and Laura lost contact with hers. It seems that in all cases, their statements about the differences between men and women are related to their own experiences. For Antonia and Ruth, their ideas of traditional gender roles reflect their own experience. Likewise, David was 'the only boy' in his club of single parents, reinforcing his experience as unusual. Laura's statement must be understood in the context of her grief at not seeing her children. Elsewhere in her interview, she expressed support for shared care:

> … it's 50:50. Mum and dad are equal as far as I'm concerned. I know mum gives the child life. Yes, I know all that. But, actually, in modern times children need mum and dad. So, no. It's gotta be 50:50.
> (**Laura, Mother, England & Wales**)

It is possible that this statement reflects the idea that a shared care arrangement is better than not seeing one's children at all. For Andrew, who had been the primary caretaker for his children during his marriage, shared care was agreed because of advice he had received from his solicitor about the sort of childcare arrangement the court would favour:

> I was eager that it would, as far as childcare was concerned, that it would reflect the history. Um, but my solicitor advised me, um, against sort of taking it into a courtroom that it, you know it was quite clear that if I did, if, if we got that far, I would lose.
> (**Andrew, Father, England & Wales**)

Andrew expressed support for shared care in his interview. He felt that this was the best outcome for children ('it's important for the, for children to have *meaningful* contact with both their parents'), although his own preference would have been to have the children with him as much as possible. In his case, after a number of years of shared care, the children came to live with him full-time. Like Laura, his views about shared care might have been shaped by the realisation

that shared care is a good compromise, at least insofar as the parents are concerned. Andrew commented:

> And, and it is still the case I think where, um, it's more than likely the Dad is gonna be the one who misses out.
> (**Andrew, Father, England & Wales**)

Thus, shared care is better than no contact at all, even if it is not ideal. Andrew's statement also suggests that it is gender, rather than the prevailing division of caretaking responsibilities within intact families, that shapes post-separation arrangements. The law does not contain any presumption in favour of mothers; child arrangements should be based on the best interests of the children involved. However, Andrew's statement reflects the legal advice he received: that the court would not support an application for him to be the primary caretaker. David, who became the primary caretaker of his children following a separation in the early nineties, faced similar attitudes from the Child Support Agency:

> Um, and they'd say, "Right, I'll get your papers," so you'd hear dur-dur-dur, and they'd go, "Right, so um I see you haven't been making your payments," or, "When's the next payment due?" Um… by default, I was the absent parent and I'd have to tell them. And, and every single time they'd go, "Oh, uh, hang on, we have to reset everything." I said, "Surely you don't. You, you have an absent parent and a parent with care. One is the payee and one is the payer." It's, it's black and… isn't it? Yeah, but you're Mr [Surname]." "Yes, I am. And I I'm, I'm the payee, I'm the parent with care." "Give me a minute, I need to uh, I need to tap away…" You don't. You don't, honestly, just take gender out of the equation. There are two parties, yeah, and they couldn't get it. It was so bizarre.
> (**David, Father, England & Wales**)

In addition to these explicit statements about gender difference, there were more subtle suggestions about the different standards expected of mothers and fathers in order to be considered a good parent. Fathers, for example, were often described as being 'hands on' or 'involved':

> …so he often would do, you know, school drop offs and pick ups and um take them out or, um, yes spend time with them. He played games with them, like board games and things. So yeah, he, he was a pretty hands-on dad.
> (**Antonia, Mother, England & Wales**)

> Um, I think one of the big things for me was that because he was, um, pretty hands on anyway I never worried, about them when they were with him.
> (**Emily, Mother, England & Wales**)

> … at the weekends I was a very hands on dad, and as I said, I'd done the night feeds and I'd, you know, I'd done all of the night feeds for number two and I'd done one of the two or three night feeds for number one.
> (**Kenneth, Father, England & Wales**)

This illustrates some of the differences in what is expected of mothers and fathers. The level of caretaking required to be considered an involved or 'hands on' father was relatively low. Antonia, for example, talks about playing games with children as being the foundation for this characteristic and Kenneth talked about being involved at the weekends. Emily, for example, said this of her ex-husband's role during their relationship:

> I was very much the person who made the decisions and he'd go along with them. So even when they were tiny, you know, when you're trying to get them into routines and things like that, it was very much, follow my lead. Um, yeah, although he was quite hands on. So he would, you know, he would do, uh, I mean, I, I said, so, but he would do express feeds and, um, they, we had little routines, so he would do all the washing of all the bottles and all of that sort of stuff. And he was never a dad who didn't change nappies or, you know, spend time with them.
> (**Emily, Mother, England & Wales**)

This is consistent with Dermott's[746] research, which suggests that it is not the time spent on fatherhood which is key to whether someone is seen as a good father[747]:

> The aspects of parenting the fathers viewed as most significant indicated that "caring about" was more important than "caring for"; fathers concentrated on the aspects of parenting that were least "work-like" and downplayed the requirement to perform regular child maintenance activities.[748]

Dermott notes that the '[t]he elements of parenthood most valued by these fathers were viewed as desirable because they develop and facilitate a strong parent-child relationship'.[749] It is understandable where breadwinning responsibilities limit the time available with children that this would be the priority. The point is not to criticise this desire; rather to point out the differences in the expectations of mothers and fathers and, relatedly, the different impacts that caretaking responsibilities have on earning capacity, which is discussed further in the next section.

In contrast, it seems difficult to imagine someone describing a mother as being 'hands on'. This can perhaps be understood against the backdrop of very different expectations of mothers. As Collier argues, '[i]t is not 'adults' but primarily mothers, for example, who tend to be depicted as "sacrificing everything" for their children. It is women who are judged, held responsible and seen to have failed, or succeeded, in the acting out of this duty of care in a way that most men arguably do not.'[750] Arguably, if a mother behaved in the same way as the 'hands on' fathers described above she would be seen as a bad mother. This does not mean that fathers are not also constrained by societal expectations, simply that those expectations are different. David, who became the primary caretaker for his children after separation, explains the concerns he had about how a new partner would perceive him based on his caretaking role:

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[746] Esther Dermott, *Intimate Fatherhood A Sociological Analysis* (Routledge 2008)
[747] Esther Dermott, *Intimate Fatherhood A Sociological Analysis* (Routledge 2008), 62
[748] Esther Dermott, *Intimate Fatherhood A Sociological Analysis* (Routledge 2008), 62
[749] Esther Dermott, *Intimate Fatherhood A Sociological Analysis* (Routledge 2008), 62
[750] Richard Collier, 'Fathers 4 Justice, law and the new politics of fatherhood' (2005) 17 CFLQ 511, 518

> I was never worried about other people I didn't know. But … when I met my wife it was very important to me that I worked. And I wanted her to know that I had, um… crikey. Yeah, I did, I wanted her to know that I had a reasonably good job and I was well paid. I, more so than the parenting. I was more afraid that parenting would cause her to, I don't know, not view me, as a… yeah, as, as the right sort of man for her, I think.
> (**David, Father, England & Wales**)

5(iii).2.1 Balancing work and caretaking

In Smart & Neale's study of separating parents, many of the mothers 'had made their parenthood a central part of their lives.'[751] In contrast '[t]he father's identity is less likely to be derived from such an intense focus on parenthood.'[752] Smart & Neale did, however, find that following divorce fathers were more likely to feel that being a caring parent was a core part of their identity.[753] These patterns were also evident in the stories of these participants, albeit that they were slightly less pronounced, perhaps reflecting the continuing emphasis in society on the importance of the role of fathers in the period since Smart and Neale's research.

One indicator of the centrality of parenthood to a participant's life was the extent to which caretaking took priority over paid work. For those who had been the primary caretaker during their relationships, all of the mothers and one of the fathers, caretaking responsibilities tended to be prioritised. For Sophie and Andrew, this meant giving up work altogether. For, the remainder, it meant reducing their hours.

The primary caretakers were not alone in adjusting their working commitments during their relationships. Several of the other fathers also actively adjusted their working commitments or made use of flexible working to spend more time with their children. For example, Matthew was the first father in his company to make use of shared parental leave and spent three months at home with his daughter. Neil explained that 'when the kids were teeny tiny, I worked part-time as well'. Jason and Michael also explained how they put their children ahead of their

[751] Carol Smart & Bren Neale, *Family Fragments* (Polity Press 1999), 51
[752] Carol Smart & Bren Neale, *Family Fragments* (Polity Press 1999), 52
[753] Carol Smart & Bren Neale, *Family Fragments* (Polity Press 1999), 53

careers, albeit that they continued to be the main breadwinner for their families and it does not appear that they reduced their working hours:

> … despite not being the par- the stay-at-home parent I was spending so much time in child care and housework that my real-term earnings decreased.
> (**Michael, Father, England & Wales**)

> So I'd always been very there with my daughter, you know, not bothered about money, not bothered about a career, it was just being there for her.
> (**Jason, Father, England & Wales**)

For these fathers, being a caring parent was a fundamental part of their identity. Further, for Michael (and perhaps Jason), his caretaking responsibilities carried economic costs. However, Michael and Jason were the primary breadwinners for the family and their partners were both at home with their children. Thus, it seems likely that their partners also felt the economic impact of having children.

More common for fathers than reducing their working hours was to make use of flexible working to enable them to carry out their existing workloads around the children. Matthew, for example, often collected his daughter from nursery during his marriage because of the demands of Elizabeth's job, albeit that both of them considered Elizabeth to be her primary caretaker. Kenneth, talking in a post-separation context, also stressed the value of flexibility:

> I've got the sort of job where you're never really not working. Um, so I will either work very late, sometimes I will work from home, sometimes, whatever... What that means is the flip side of that is I have some flexibility... You know, this morning I was in at half past six, because I'm going to need to leave the office at half past four to go and pick up the... Um, but equally I could then work from home, you know, after they've gone to bed, etc. Or if I'm [going to see the children], you know, we've got the technology such that actually I can sit in a [coffee shop] and, you know,

> work on a document and finish it, and send it out, without being in the office.
> (**Kenneth, Father, England & Wales**)

This sort of flexibility was often the result of seniority and it was recognised as being unusual:

> Um, so, it's, it's, yeah, you know, my, my employer are, you know, very understanding in that if I need to, um, if I need to leave at short notice it's, it's not a problem, um, I think it's easier in my position, being a manager, in that, you know, I'm responsible for my own diary, my own time, um, I, I'm not doing the kind of work that needs me to be, be sat at a desk you know, for 35 hours a week and, there's, there's a bit more flexibility, um, so, ultimately, as long as I'm kind of delivering what I need to do it's not too much of a problem.
> (**Matthew, Father, England & Wales**)

> I can probably, I could probably think of a dozen men that I know who are in a similar situation to me, but who don't enjoy the flexibility of employer, employer so have just – it's just kind of… they've just defaulted very, very quickly into being the sorts of fathers that, um, see their children once every fortnight... Um, and my point is that it, it is, it is the employer flexibility thing is, is absolutely crucial in this. I could, I couldn't possibly do what I do if I was working for an employer that wasn't prepared to do that.
> (**Neil, Father, England & Wales**)

Unlike the position of the primary caretakers, this flexibility was a bonus and enabled a greater degree of involvement than would otherwise be the case, rather than being an integral feature of the job that had been sought out specifically to accommodate caretaking responsibilities, as was the case for the primary caretakers:

> … when I got to my late twenties and I [was in a professional career] and I thought I can't carry on – I'd like a family at some point and I can't carry

on doing this type of work with a family, it doesn't work. So I actually picked the part [of my job that I enjoyed most] and I retrained in that because I knew it was something I could do around the children.
(**Antonia, Mother, England & Wales**)

… when I was pregnant I took a year, year off work. Um, and two lots of nursery fees, uh, at the same time, being, having twins, was, um, very expensive. And so I asked to go back to work part-time. Which they allowed me to do. So I went back, instead of being, you know, full-time, I went back three – three days. Um… and I did have to, due to organisational change, I did have to, uh, my current role was, had moved somewhere which logistically I couldn't get to with dropping, doing nursery pick ups and drop offs. So I, I dropped a whole banding, um, a whole pay grade. Um… for a sort of slightly less stressful job and, um, meant I could do the part-time hours.
(**Esther, Mother, England & Wales**)

… after we separated and when it became apparent that we weren't going to be able to keep paying the nursery fees for [daughter] to be in full time, I uh, I fixed my Fridays. And I do, I mean, I occasionally work Fridays and I have to try and, and she either goes into nursery or her granddad has her. Um, but, yeah I did have to change my working hours. Matthew didn't change his. [Laughs] That wasn't on the table.
(**Elizabeth, Mother, England & Wales**)

Post-separation, some of the fathers who had not previously been primary caretakers made similar career choices. Gareth, for example, decided to work as a contractor, rather than an employee, so that he had control over his hours and was able to see his children regularly, something that wouldn't have been possible with his previous rota. This did, however, have consequences:

So now I work fixed Monday to Thursday so I always have my Friday and weekends free for the kids. Which is great, but they're trying their best to stop people contracting… uh, so I've kind of - And I don't get sick pay, I

don't get a pension and I'm constantly stressed I'm not gonna be able to find any work. So I don't have any real job security and, um. I mean the benefit is that I earn more but I mean, that's, that's great, but I mean I could do with some security to be perfectly honest.
(**Gareth, Father, England & Wales**)

Jason also decided to reduce his working hours after agreeing a shared care arrangement with his former partner:

I guess most sane adults would say, right, ok, put my daughter into childcare, then I could do more hours to pay for the childcare. But what I realised was… I'm going to – I don't get this time back with her, you know, and there's no refunds on parenting. So, I was, I wanted to put as much as I can into the time with her. Because also that could give her mum justification – well, you're not with her anyway, you're putting her into childcare, she might as well be with me. So I wasn't willing to compromise my time with her. So that means –meant I couldn't work as many hours.
(**Jason, Father, England & Wales**)

However, an increase in the time spent with children for did not necessarily translate into exactly the same care being performed as by their former partners. For example, in Esther's case the children stayed with their dad overnight during the week but she remained responsible for most of the caretaking on that evening:

I pick them up from school. Um, feed them. Um… take them to – they go to, you know, clubs, beavers, you know, that type of thing. Yeah, I do all the running around and then he collects them after work. And literally just time, just sort of like half an hour before bed, huh, clearly.
(**Esther, Mother, England & Wales**)

This is a particularly extreme example, but there were other examples in which shared time arrangements for children on separation did not necessarily translate into an equal division of caretaking responsibility. For Andrew, for example,

separation did result in more dual responsibility insofar as his ex-wife would take the children to the doctors or dentist if an appointment fell in the week that they were with her. However, he remained primarily responsible for making those appointments in the first place. This experience was shared by other parents who had adopted a shared care arrangement:

> … the um, the doctors and dentists and things I tend, I tend to deal with that. Um, I dealt with it when we were together. I have no doubt if we were still together that I would be the one dealing with it. Um, that said, and I mean I obviously keep her dad in the loop so her dad knows if she's got a doctor's appointment or anything like that and if I can't take her her dad takes her.
> (**Elizabeth, Mother, England & Wales**)

> **Interviewer:** Um I was, I was just, uh, sort of wondering about, sort of, um, practicalities and things. So, uh, things like doctors, dentists, all the kind of mundane, everyday stuff. How does that all work?
> **Emily:** They happen here [laugh]. Yeah, so I do all of that. With them. Unless of course there was an emergency when they with were with their Dad. In which case he would do it. Yeah. Yeah.
> (**Emily, Mother, England & Wales**)

These examples are important from a financial perspective because they demonstrate the extent to which the financial consequences of caretaking can be shared unequally even where time is shared equally. In Esther's case, albeit not involving a shared care arrangement, her ex-partner's overnight contact during the week relied upon her being in a job which allowed her to finish early to collect the children. In contrast, her partner did not need to make any adjustments to his own working patterns. Thus, his salary and future career prospects remained unaffected. Notwithstanding this, his overnight contact would serve to reduce his child support liability. Esther's ex-partner continued in fact to make child maintenance payments at a level that enabled her to continue making mortgage payments. However, as discussed in Chapter 4(iii), this had consequences in

terms of the power dynamics within the relationship, with her feeling 'beholdened' to him.

From the perspective of financial settlements on separation, it is very important to look carefully at the nature of part-time or flexible work being undertaken. There is a very real difference in the future promotion and salary prospects of a managerial job that allows for flexibility in how work is undertaken and a part-time job that is chosen for its flexibility. Whereas the former is often the result of seniority, which may have been achieved because of the division of labour within a relationship, the latter may preclude such seniority being reached in the future. These sorts of differences are not necessarily easy to quantify, but a focus on caretaking, as opposed to caring about / taking care of, can at least draw attention to these sorts of issues, which may otherwise be rendered invisible.

5(iii).2.2 Caretaking as the easier option

> 'Caring for'[754] is often 'invisible to all but those who do it (and sometimes even to them).[755]

The idea of caretaking as the easier option was most apparent amongst fathers who had reached arrangements on separation whereby their children spent a relatively large percentage of time with them, but not necessarily during the working week:

> … you could easily argue the case that she's had a wonderful, a wonderful twelve years looking after the, looking after the children and not having to go to the daily grind.
> (**Michael, Father, England & Wales**)

> … it was like equally plausible that she could have worked her arse off and I could have looked after the kids but I didn't have the same opportunities.
> (**Gareth, Father, England & Wales**)

[754] 'Caring for' here corresponds to caretaking in Tronto's definition
[755] Carol Smart, 'The Legal and Moral Ordering of Child Custody' (1991) 18 Journal of Law and Society 485, 489

This contrast between looking after children and ‘the daily grind’ or working your ‘arse off’ envisages caretaking as a wholly enjoyable experience. This is in stark contrast to the descriptions of some of those who had been primarily responsible for caretaking. Antonia, for example, said that ‘[b]eing a mother is really boring… It’s a really tedious, boring job.’ Sophie commented a number of times on how difficult it was to be a single parent and balance work with caring responsibilities; ‘[I]t’s incredibly hard to be honest.’ Emily also explained how much she valued the time the children spent with their father to begin with: ‘when you’re a single parent on your own with two really young children, those weekends off, hard as though they might be to begin with, they became really precious time to me.’

Both Gareth and Michael had arrangements in place for their children whereby the children spent a large proportion of time with them, but the majority of the time tended to take place during periods when the children were not at school. For example, Gareth’s children spent time with him every other weekend and during the school holidays. Similarly, Michael’s children spent every other weekend with him, one night in the week and half of school holidays. This was not their choice; both would have preferred to spend more time with their children during the week. Nevertheless, it is likely that the nature of the care involved on weekends and school holidays, when routines and so on are less important, is different. This difference may be partly responsible for the invisibility of some of the burdens of caretaking. Michael in particular was dismissive of his ex-wife’s role during the relationship:

> Um… before the break up, she was a stay at home, stay at home parent. Um but the moment I walked in the door then it was entirely, entirely down to me. Um… just as a… just as a, uh, statistic for that, um, we used, we used reusable nappies and, um, I changed more nappies than she did. Just because – just through having contr-, hav-, looking after the children from, from 5pm through til, through til 8am, and all the weekends. The entirety of the weekends.
> (**Michael, Father, England & Wales**)

The childcare involved in looking after children through the working day, when they are awake and active, is perhaps more onerous than is recognised here. Changing nappies and getting up in the night are important aspects of caretaking and should not be overlooked. Nevertheless, there is perhaps more respite overnight when children spend at least some time asleep. This is not to undermine Michael's contribution; his breadwinning responsibilities prevented him from being able to do the caretaking during weekdays and he was the primary caretaker at weekends. Rather, the aim is to underline the extent to which the work involved in that caretaking can be rendered invisible to those not performing it.

When it comes to making financial arrangements, the invisibility of caretaking may be problematic. For some participants it was not seen as something that impinged on the ability to engage in the labour market, but rather as something that a parent had been privileged to enjoy and for which they should, therefore, bear any associated costs willingly:

> I don't feel she's [the primary caretaker in the scenario being discussed] earn- she's entitled to a greater claim, based on… uh, based on her lack of earnings. Indeed, you could easily argue the case that she's had a wonderful, a wonderful twelve years looking after the, looking after the children and not having to go to the daily grind. What's, what's that worth? Shouldn't she be, shouldn't she be compensating him for having to, to allow her to do that? What would, what would I have given, to be allowed to do that? I would have loved that. I… Uh so, so I, I don't think there's any argument for that. Unless you're saying, it's a burden looking after children and not going to work. And I would really, really disagree. I would love to do that.
> (**Michael, Father, England & Wales**)

Relatedly, Alison talked about her decision to end her relationship as being seen by her partner as a choice for which she should bear the costs, leaving her primarily responsible for four children:

> And I'm kind of really tied to the house and my job and everything. Whereas he can just, bugger off wherever he likes, you know. He's a completely free agent now. It's like, oh. But - and I can't talk to him about any of the grievances that I've got because he goes, "you brought it on yourself. You didn't want to be with me any more. It's your own fault." So, I just have to – I'm just trying to get on with it the best I can really.
> (**Alison, Mother, England & Wales**)

Whilst it is perhaps a simplification to describe caretaking as a burden, it does carry burdens, particularly when it comes to re-entering the job market after separation. The clearest example of this was Alison's position:

> And he won't have the children. So, uh, I've just gone recently for a job interview and everything – don't know if I've got it but I got, had an interview – three days a week, all year round. And he's already said, I'm not having the kids. I can't have them all summer. So, I felt so demoralised. I thought, what! What is the bloody point, you know. I'm trying, to, I want to get back to more work and reliable –
> (**Alison, Mother, England & Wales**)

David, who became the primary caretaker of his children following separation, also faced difficulties in reconciling work and care. Ultimately he gave up his career in nursing because the costs of paying someone to look after his children during a nightshift were half of what he earned:

> … and I stopped nursing, which broke my heart really because I wanted to be a nurse. I still do. Um, and I went back into computing and I could earn as much in a day as I was earning in a week.
> (**David, Father, England & Wales**)

Financially, David was in a less precarious position than many of those who had been the primary caretakers of children during their relationship. He had retrained as a nurse following separation, but was able to fall back on a career in IT. Whilst not explicit in his interview, it appears that his prior working experience allowed

him to do this. Having to work in a career he 'loathe[d]' of course had costs of its own. This demonstrates some of the wider difficulties, and costs, of reconciling paid work and caretaking responsibilities. These are the costs which are more often borne by the parent who takes the primary breadwinning role in a relationship.

5(iii).3 Caretaking responsibilities and the idea of choice

Where caretaking was less valued by breadwinners, it was often accompanied by the narrative of choice. Underlying Gareth and Michael's views, for example seems to be the idea that caretaking was a choice. However, both of them referred to constraints on their ability to make such a choice. Gareth explained that he 'didn't have the same opportunities' to look after the children and Michael said that he 'would love to do that' and had not been able to. This suggests the presence of cultural and / or structural constraints on the choice to care. This is also apparent in the comments of those parents who were the primary caretakers. For example, Antonia commented on the incompatibility of a professional career and family responsibilities: 'when I got to my late twenties… I thought I can't carry on – I'd like a family at some point and I can't carry on this type of work with a family.' For Esther and Andrew, the decision about who would care was economic one: neither of them earned as much as their partners so they were the ones to take on this role. 'Choices' were, therefore, constrained.

Interestingly, Gareth and Michael used the idea of choice slightly differently when talking about their ex-partners than when talking about themselves. Gareth, for example, contrasted the situation of his second wife '[i]t's not like she can't do more hours but she genuinely does work two days a week' with his own situation:

> Also, I can't afford to, uh, work part-time and pay for all the children. Um, I don't know, but I mean I could probably work it if I [still lived in the same area as my ex-wives], probably just about.
> (**Gareth, Father, England & Wales**)

It could equally be argued that Gareth had made a choice to move to a new town. Gareth didn't talk about the reasons for this move in his interview, but it is unlikely

that such a choice was made in a vacuum. Rather, like the choices of the primary caretakers, it is likely to have been influenced, at least in part, by structural constraints such as the availability of well-paying work.

The idea that the division of childcare responsibilities is a choice is also undermined by the way in which these decisions were reached. Sometimes no active decision was made. As Emily explained, ‘it was just something that kind of just evolved. As we went along.’ Where more active choices were made, these need to be seen against the background of the assumptions about the roles of mothers and fathers described above:

> Um, yeah. It was definitely discussed. So it was largely discussed in terms of, uh … girls, girls get pregnant, they have babies then you have a year off maternity leave and it’s all lovely and you look after the baby and you go and have coffee with friends and you, um, make the home nice. And that’s what my friends have done and other people have done and that’s what we’ll do. So it’s kind of like, I don’t know, a tradition and it’s something that the, the women have wanted to do. And it’s seen as that’s something, like, I dunno, it’s almost like you get married, you get a big white dress, you have your big day, and that’s, that’s the accepted, and that’s what I’m looking forward to. Um, so it’s kind of more, uh, a picture of what is gonna happen is painted, rather than actually all the details are looked at and scrutinised and poured over.
> (**Gareth, Father, England & Wales**)

> So [ex partner’s] approach was very much… oh, you’re a mum now. You should stay home, give up your job, don’t need to work. And I kind of believed that as well myself. I believed that, initially, the best person to care for the baby is one of the parents.
> (**Alison, Mother, England & Wales**)

The deciding factor in discussions was often economic:

> … after we'd been going out for a little while it kind of looked like this thing was going somewhere and we were talking about children... And we were both quite, kind of, keen that, that one of us would stay at home. Um, and economically it made more sense for me to do that because of her earning potential.
> (**Andrew, Father, England & Wales**)

> I think, its just taken for granted that the lower paid, if you're working… um…. You know… my ex used to say to me, well you go out and earn the money I earn. And I'd go, well I can't, you know, I can't – I'm not clever enough or, you know, sort of – and it's like well, therefore, you know, yeah you need to do all the, if they're sick the doctors appointments, the dentists, the opticians, the… um shoe fittings and, you know.
> (**Esther, Mother, England & Wales**)

> She is a teacher. Uh, she got into an argument with the head-teacher at the school she was working. Uh, resigned in a huff and he then blackballed her so she was unable to get another job. So, she was unable to work, and we had children come along and it was a natural, natural thing to do [for her to stay at home].
> (**Michael, Father, England & Wales**)

Given the relative positions of men and women in society, and particularly the existence of the gender pay gap, decisions made on an economic basis are not gender neutral. Such economic decisions make sense for the family unit as a whole but they have different impacts on the individual members, and their ability to make autonomous decisions, post-separation. When it comes to separation, the financial impact of decisions around caretaking seem to be rendered invisible in some cases, and the value of caretaking not apparent, particularly to those not performing it. This is potentially problematic if these norms become increasingly influential in the decision-making of those without access to legal advice.

5(iv) Conclusion

This section draws together the findings from the three different jurisdictions on the question of care. It considers what these findings mean for the questions of the visibility and value of caretaking (RQ 1.b) and the extent to which each of the jurisdictions takes account of caretaking responsibilities on parental separation (RQ 1)? It also draws together the findings of this chapter and Chapter 4 to consider the lessons that can be learned from Sweden and the Netherlands when thinking about England and Wales (RQ 2).

On the question of the visibility and value of caretaking (RQ 1.b), in all three jurisdictions, the themes of choice and gender equality seem to be central to the way in which caretaking is understood. Visions of gender equality in society, which have not been achieved in reality, tend to disguise the inequalities in the caretaking expected of mothers and fathers. This is compounded by perceptions of caretaking as a choice, which devalues it as an activity, and means that the penalties are not fully addressed by the legal framework on separation.

In Sweden, the combination of the societal goal of gender equality and the idea of communal responsibility for childcare underpins a situation in which the financial value attributed to caretaking responsibilities on separation is limited. The caretaking performed by parents is not entirely invisible; the system of parental leave recognises its necessity. However, the presence of parental leave alone does not ensure that the caretaking performed by parents is seen as valuable. First, whilst generous, parental leave is still time limited. When combined with the emphasis on state childcare, this may help to create an impression that caretaking responsibilities are restricted to parents of young children and that they can be outsourced thereafter. This picture is compounded by the gendered way in which leave is taken. As discussed in Chapter 5(i), leave is still primarily taken by mothers. Thus, from the outset, the work involved in caretaking is not necessarily visible to those not performing it. However, because leave is not inherently gendered (it is parental leave, rather than maternity leave) this perhaps contributes to the picture of caretaking as a choice, making it easier to leave the costs with the parent who incurs them.

The Combination Model in the Netherlands appears, at least in theory, to offer a real vision of caretaking as a valuable undertaking. A model in which caretaking is central and the responsibility of both parents, as in the Universal Caretaker model, not only places a value upon caretaking but means that the work involved in caretaking is apparent to all. However, whether because of the continued influence of traditional gender roles, or because of the limited state support to facilitate parental sharing, caretaking in practice remains gendered, which, as in Sweden, can serve to disguise the work involved. Despite the reality, there appears to be a growing perception of gender equality in the Netherlands, accompanied by a reduction in the ability of the legal regime to address the financial costs of caretaking because of a more limited system of community and more restrictive approach to spousal maintenance.

In England and Wales, there appears to be a disconnect between the value attributed to caretaking by the law and by the caretakers interviewed for this research, and the way in which caretaking was viewed by non-caretaker participants. As was discussed in Chapter 2, care is recognised by the law differently in different cases: in some cases it is rewarded, in others compensated or recognised.[756] However, the work involved in caretaking can be disguised by the fact that law broadly equates time spent with children with care; as Chapter 5(iii) illustrates, this is not necessarily the case. Non-caretaker participants appeared to be less able to see the financial penalties suffered by caretakers, perhaps because of the perception of caretaking as a free choice, and sometimes as the easier option. Thus, caretaking appeared to be less valuable to non-caretaker participants than in the legal framework.

On the question of the extent to which each of the jurisdictions takes account of caretaking responsibilities on parental separation (RQ 1), for parents who are cohabitants, the answer in all three jurisdictions is that is limited. As outlined at the start of Chapter 4, there are no claims for maintenance from a partner or for pensions, and the available capital claims are very limited. In England and Wales, the law of trusts, discussed in Chapter 2, is concerned with party autonomy and does not place any value on caretaking responsibilities. In the Netherlands there

[756] Gillian Douglas, *Obligation and Commitment in Family Law* (Hart 2018)

are no such claims available. Sweden is the most generous of the three jurisdictions when it comes to taking into account the costs of the caretaking responsibilities of cohabitants. Although the community that exists for cohabitants is more limited than for spouses, it is underpinned by a more holistic approach which emphasises both parents engaging in paid work, with state support to manage childcare responsibilities.

In Sweden, the family law framework, for both spouses and cohabitants, is not really designed to deal with the financial repercussions of caretaking responsibilities. There is, for example, no compensatory rational for spousal maintenance. As discussed in Chapter 5(i), the community of property system does offer some protection for a caretaker spouse, perhaps reflecting a reward rationale. The equal division of marital property attributes a formally equal value to contributions to the relationship, whatever their nature, a protection that is even more limited for cohabiting caretakers for whom community is more limited. However, such an approach does not necessarily fully recognise the costs of caretaking of young children, and certainly does not allow for the ongoing constraints that caretaking provides on paid work. Thus, in Sweden, caretaking responsibilities are taken into account in a very limited way on parental separation because state policy aims to achieve a version of autonomy in which neither parent's ability to support him- or herself financial is impeded by caretaking responsibilities. This vision is imperfectly realised.

For spouses in the Netherlands, the way in which caretaking responsibilities are taken into account appears to be in a state of transition. On the one hand, there is evidence of a more relational view of autonomy. There is still the possibility of spousal maintenance for caretakers and, as in Sweden, the community of property system shows evidence of a reward rationale and aspects of a compensation rationale to valuing care. Additionally, child arrangements seem to be influenced by past childcare patterns to a greater extent than in Sweden. However, as was discussed in Chapter 4(ii), a more individualistic understanding of autonomy appears to be gaining influence, under which caretaking responsibilities are less visible. This can be seen in the move away from the universal community system and the reduction in the amounts of spousal

maintenance paid. Further, the emphasis on avoiding conflict, rather than on the fairness or otherwise of the decision reached, limits the ability of a factor such as caretaking responsibilities to challenge the result reached.

In England and Wales, the extent to which caretaking responsibilities are taken into account appears to be different in the law from in participant accounts. As discussed in Chapter 2, for divorcing couples, but not cohabiting couples, both the reward and compensatory rationales can be seen in the law. Attempts have been made to make caretaking more visible in policy initiatives such as shared parental leave. However, as outlined in the summary table at the start of Chapter 5, uptake has been low. Further, as discussed in Chapter 2, ideas of individual autonomy are becoming increasingly influential. These trends are also visible in the accounts of participants in Chapter 5(iii); there appears to be a perception that gender equality and freedom of choice underpin caretaking decisions and the financial consequences of those decisions are overlooked at times. Thus, as in both Sweden and the Netherlands, the image of gender equality, without the reality, serves to render the work involved in caretaking invisible and to devalue it as an activity. There is, therefore, a danger that as more and more people resolve disputes themselves, the recognition by the law of the costs of caretaking will be absent from the agreements parents reach.

Before going on to answer the questions of whether it is possible to reconceptualise the ideas of autonomy underpinning family law (RQ 2.a) and of the extent to which caretaking should be considered a societal, as well as a familial, responsibility (RQ 2.b) in Chapter 6, it is worth reflecting on the lessons that can be learned about care from Sweden and the Netherlands (RQ 2). The approaches taken to care in Sweden and the Netherlands suggest that both gender norms and the role of the state are crucial when thinking about caretaking. In Sweden, the push towards state childcare so that both parents can work has resulted in high rates of women working. However, the norms of motherhood are persistent, and conflict with this ideal. Gender norms also, perhaps, explain why the seemingly neutral parental leave provisions are not used in a gender neutral way; in practice, the three months reserved to each parent are understood as conferring three months of leave for fathers. Likewise, in the Netherlands, the

Combination Model has not achieved the promise of the Universal Caregiver model outlined in Chapter 2. Where there is little state support for parents to balance paid work and caretaking, it may be easier for parents to share these roles unequally, as is typical in England and Wales. Where gender norms have historically strongly favoured mothers raising their children, and there is a continuing gender pay gap, it is logical for mothers to be the ones who work part-time and perform the greater share of caretaking. Recognising both the role of the state and the persistence of gender norms is important when thinking about how England and Wales might approach these issues differently.

6. Rethinking Autonomy and Care for family law and policy

6.1 Introduction

The preceding chapters suggest the influence of a neoliberal vision of autonomy in England and Wales, Sweden and the Netherlands and that, to varying extents, caretaking responsibilities are becoming less visible in family law and policy. This ideal of autonomy 'views individuals as atomistic, independent agents, who have the ability, and the duty, to make "responsible" decisions in their own best interests.'[757] In a world where individuals are assumed to behave in this way, 'negative consequences are deemed to flow from "personal choice," without further interrogation of that "choice" or its gender implications.'[758] This vision underpins the increasing emphasis in all three jurisdictions upon the financial independence of partners on separation. However, as described in Chapters 1 and 2, a neoliberal vision of autonomy is particularly problematic in family law because it does not adequately reflect either the fact that family members make decisions for the good of the family unit, which are not necessarily in their own best interests, or the structural context, in particular the incompatibility between caretaking and paid employment, in which such decisions are made. As Diduck explains, 'the interdependencies and connections that are simultaneously encouraged and rendered invisible in pre-separation families are too often forgotten or become irrelevant in the rush to promote parties' autonomy post separation.'[759]

The financial effects of neoliberal understandings of autonomy are well demonstrated by the cases of some of the caretaker participants interviewed for this research in England and Wales. Amongst the former cohabitants, who had very limited legal claims against former partners, state benefits seemed particularly important post separation. Sophie, for example, had been a stay at home mother and was left dependent on state benefits when her relationship broke down. Her former partner refused to pay child maintenance and she had to pursue a deduction of earnings order to enforce the payments. Alison had four children, including one who was disabled. She described her financial position as

[757] Lucy-Ann Buckley, 'Relational Theory and Choice Rhetoric in the Supreme Court of Canada' (2015) 29 Canadian Journal of Family Law 251, 252

[758] Lucy-Ann Buckley, 'Relational Theory and Choice Rhetoric in the Supreme Court of Canada' (2015) 29 Canadian Journal of Family Law 251, 252-3

[759] Alison Diduck, 'Autonomy and Vulnerability in Family Law: the missing link' in Wallbank J and Herring J (eds) *Vulnerability, Care and Family Law* (Routledge 2013), 204

‘a juggling act’ and explained how, in the month prior to the interview, she had to cancel direct debits ‘cause they were coming out at the wrong time of the month.’ She also described as ‘scary’ the fact that she would shortly be losing the single occupancy discount on her council tax when her eldest child turned 18. She was desperate to increase her own working hours but was constrained by her former partner’s refusal to have the children for longer periods of time. For Louise, whose youngest child was 10 weeks old when she and her former partner separated, state benefits were her key source of income.

This sort of financial precarity was not limited to cohabitants. Ruth, for example, had four children and was heavily reliant on tax credits. There had been very limited equity in her former matrimonial home; it appears that Ruth received enough to put down a deposit on a rental property but little more, and she made no claim for spousal maintenance, or against her former partner’s pension. Her former partner paid her ‘a pittance’ for the children and she only went to the Child Maintenance Service when he stopped paying this. The difference between Ruth’s position and that of the cohabitant caretakers is that she at least had the possibility of legal claims to address the financial effects of caretaking, even though it appears that power imbalances may have played a role in her decision not to pursue them. Nevertheless, her precarious financial situation following separation was a result of the fact that she was responsible for almost all of the care of her children, encompassing caretaking and most of the financial responsibilities of care following separation.

This chapter combines the empirical findings of this research with the theoretical discussion in Chapter 2 to address the overall research question of how family law and policy should deal with the economic fallout on relationship breakdown where caretaking responsibilities have been unevenly shared between parents during their relationship. Building on the lessons learned from Sweden and the Netherlands (RQ 2), discussed in Chapters 4(iv) and 5(iv), this chapter considers the respective roles of the family and the state in caretaking (RQ 2.b). Having rejected neoliberal conceptions of autonomy as a guiding principle in family law, this chapter considers whether it is possible to reconceptualise the principle of autonomy for the law of financial provision (RQ 2.a) It is ultimately concluded that

a principle of care should guide the approach of family law on separation, and that this principle also has a role to play in informing the approach of family policy.

6.2 Who is responsible? State, partner or self?

Miles[760] suggests that there are three levels of responsibility: local responsibility for yourself, the horizontal responsibility of individuals who are (or were) in a relationship, and the vertical responsibility of the state. As Hale explains, these different levels of responsibility are connected:

> The State's interest in a lifelong union must stem from the function of marriage as its own little social security system, a private space, separate from the public world, within which the parties are obliged to look after one another and their children. The more the private family can look after its own, the less the State will have to do.[761]

Diduck[762] considers that the role of family law is to determine the value to be placed on the compromises people make for the sake of their family, and on the care work they perform, and to decide who is responsible for paying for them. If the state plays a greater role in supporting or undertaking caretaking, this may reshape the sorts of sacrifices people make for the sake of their family and for which family law must attribute a value. In all three jurisdictions, the increasing role of individual autonomy has meant a greater emphasis on local responsibility for the financial consequences of separation. However, the question of whether this local responsibility is supplemented by horizontal or vertical financial responsibility is answered differently, as is the question of where responsibility for caretaking lies.

In Sweden, local financial responsibility is underpinned by the vertical responsibility of the state. Sweden was considered by Esping-Anderson to have a social democratic welfare state regime, which is underpinned by ideas of 'universalism',[763] the aim of such regimes being 'to promote an equality of the

[760] Joanna Miles, 'Responsibility in Family Finance and Property Law' in J Bridgeman J, H Keating and C Lind (eds) *Regulating Family Responsibilities* (Ashgate 2011)
[761] Brenda Hale, 'Equality and autonomy in family law' (2011) Journal of Social Welfare and Family Law 3, 4
[762] Alison Diduck, 'What is Family Law For?' (2011) 64 Current Legal Problems 287, 314
[763] Gøsta Esping-Anderson, *Three Worlds of Welfare Capitalism* (Polity Press 1990), 50

highest standards'.[764] Sweden's family law regime, however, takes a very restrictive approach to the responsibility of a former partner. The allocation of financial responsibility is consistent with the allocation of caretaking responsibility: as discussed in Chapter 5(i), of the three jurisdictions, the state plays the greatest role in caretaking in Sweden. Nevertheless, in practice, the division of caretaking responsibilities remains gendered.

In England and Wales, insofar as spouses are concerned, the family law regime anticipates horizontal financial support. The discretionary system is designed to offer the flexibility to adapt to individual circumstances and to ensure that the result is fair as between the parties. The greater liability of spouses is, however, accompanied by a liberal welfare state regime,[765] in which '[e]ntitlement rules are… strict and often associated with stigma; benefits are typically modest.'[766] For cohabitants, however, the liberal welfare state regime is all that underpins local responsibility: horizontal responsibility is virtually non-existent. In both cases, the role of the state continues to recede because of austerity measures. Further, for spouses, horizontal responsibilities cannot necessarily be enforced because of the erosion of legal aid. It should, nevertheless, be noted that the state has increased its role in caretaking, for example in providing free nursery care to children over three, albeit that nursery care remains overall more expensive and less widely used than in Sweden.

The Netherlands, like England and Wales, continues to envisage the horizontal financial responsibility of a spouse, but not a cohabitant. This horizontal responsibility is being gradually eroded through constraints on spousal maintenance and the changes to the universal community of property regime introduced in January 2018 (see further Chapter 4(ii)). Whilst there has been some recognition of the impact of separation on caretakers at the policy level,[767] this does not seem to have been reflected in either a greater role for the state in assuming caretaking responsibility (for example through increased nursery care), or in offering financial support to caretakers (for example through state benefits).

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[764] Gøsta Esping-Anderson, *Three Worlds of Welfare Capitalism* (Polity Press 1990), 27
[765] Gøsta Esping-Anderson, *Three Worlds of Welfare Capitalism* (Polity Press 1990), 49
[766] Gøsta Esping-Anderson, *Three Worlds of Welfare Capitalism* (Polity Press 1990), 49
[767] Rijksoverheid, 'Dutch gender and LGBT-equality policy 2013-2016' (*Ministry of Education, Culture and Science*) <https://www.government.nl/documents/reports/2013/11/01/dutch-gender-and-lgbt-equality-policy-2013-2016> accessed 17 October 2018

In response to RQ 2.b, it is suggested that caretaking should be viewed as both a familial and a societal responsibility in England and Wales. As discussed above, the extent to which individual family members need to make sacrifices to accommodate caretaking responsibilities is shaped by societal conditions. Currently, the three jurisdictions strike a different balance, with the role of the state being less important in England and Wales than in Sweden. However, there is theoretical justification for the state to play a greater role than it currently does in England and Wales because of the importance of caretaking to society. 'Social reproduction', described by Fraser as 'a key set of social capacities: those available for birthing and raising children, caring for friends and family members, maintaining households and broader communities, and sustaining connections more generally'[768] is indispensable to society:

> Nonwaged social-reproductive activity is necessary to the existence of waged work, the accumulation of surplus value and the functioning of capitalism as such. None of those things could exist in the absence of housework, child-rearing, schooling, affective care and a host of other activities which serve to produce new generations of workers and replenish existing ones, as well as to maintain social bonds and shared understandings. Social reproduction is an indispensable background condition for the possibility of economic production in a capitalist society.[769]

Given both the necessity of caretaking, and other social reproductive activity, and the benefit to the state of the caretaking performed by families, there is a legitimate basis for responsibility on the part of the state in supporting this. Concerns about encroachment by the state into the private sphere ignore the extent to which the state is already present in such arrangements. As Fineman explains:

> Through the exercise of legitimate force in bringing societal institutions into legal existence and subsequently regulating them under its mandate of its

[768] Nancy Fraser, 'Contradictions of Capital and Care' (2016) 100 New Left Review 99, 99
[769] Nancy Fraser, 'Contradictions of Capital and Care' (2016) 100 New Left Review 99, 102

> public authority, the state also constitutes itself. For example, although we often experience entities such as the family and the corporation as "natural" or inevitable in form and function, in reality such institutions are constructed and evolving; their identities are legitimated in law, hence by the state. Both intimate and economic entities are creatures of the state, in the sense that they are brought into legal existence by the mechanisms of the state. The state determines how both family and corporation, for example, are created as coherent entities entitled to act as such in society.[770]

Thus, the question is not so much whether the state should be involved in such decisions, but the way in which the state should be involved. This does not have a straightforward answer.

Whilst recognising the legitimacy of a greater role for the state in caretaking, it is also important to recognise the limits of the state. The state can of course provide nursery care that enables parents to work. However, finding nursery care that works for everyone is tricky. For some of the parents interviewed for this research, like Gareth and David who work (or worked) shifts, nursery care would need to be flexible. For their children, this might entail staying at nursery overnight. Is this desirable? Even if childcare for everyone could be achieved, what happens when children are unwell and cannot go to school or nursery? Caretaking cannot be entirely outsourced, and arguably should not be. As discussed further below, it is possible for the state to play a greater role in shaping the division of caretaking responsibilities between parents, for example by encouraging a particular division of parental leave, as is done in Sweden by having periods of leave reserved to each parent. However, such policy initiatives do not necessarily apply equally to all families, and it is important to consider the different implications for different families before seeking reform. As was discussed in Chapter 2, for example, the division of paid work and caretaking is particularly pronounced within certain ethnic groups.

[770] Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law and Feminism 1, 6

For all these reasons, it seems unlikely that caretaking will be equally shared within all families in the foreseeable future. The law should, therefore, retain the flexibility to address the unequal financial consequences that arise from this position on separation. Decisions about working patterns are frequently shaped by the perceived needs of the family, albeit that those needs are understood in the light of structural features such as the availability of childcare and cultural expectations around the roles of mothers and fathers. As Hale argues:

> … it comes back to what we think marriage is and is for. Is it simply a private arrangement from which each can walk away when they want and without regard to the consequences for the other? Or is it a status in which we all have an interest? Do we want to encourage responsible families, in which people are able to compromise their place in the world outside the home for the sake of their partners, their children and their elderly or disabled relatives, and can be properly compensated for this if things go wrong?[771]

As Herring explains, financial orders on divorce are one way of recognising 'the value and importance of care work'.[772] The law should recognise decisions that are made for the good of the family, but which often have unequal financial consequences when those families break down. This means a law that responds to those financial consequences.

6.3 A principled approach to family law and policy

How should the law respond on parental separation to the unequal financial consequences of unequal caretaking within a relationship? Whilst neoliberal autonomy is flawed, the pervasiveness of autonomy in all three jurisdictions makes it important to consider whether there is any possibility of rehabilitating the concept (RQ 2.a). Relational understandings of autonomy, which are popular amongst feminist commentators, provide the most obvious alternative understanding to consider. As discussed in Chapter 2, relational autonomy is 'an umbrella term, designating a range of related perspectives… premised on a shared conviction… that persons are socially embedded and that agents'

[771] Brenda Hale, 'Equality and autonomy in family law' (2011) Journal of Social Welfare and Family Law 3, 12
[772] Jonathan Herring, *Caring and the Law* (Hart 2013), 223

identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class and gender'.[773] Relational autonomy recognises that couples make choices 'for the overall happiness of the family'[774] and is, therefore, a good descriptor of the sorts of choices people make in relation to the division of childcare responsibilities. However, is it possible to use relational autonomy to rehabilitate autonomy as a guiding principle of financial provision in family law?

6.3.1 The problem of relational autonomy

Relational approaches to autonomy are crucial in understanding the type of autonomy exercised by those within families. It is, therefore, a good descriptor of past decisions at the point of separation. However, relational autonomy becomes problematic as a principle guiding the approach of the law on separation. Recognising that autonomy may be relational does not supply an answer to the question of how to address the unequal financial consequences of decisions made through its exercise. It simply recognises that choices were not made in a vacuum and that, given the wider context in which they were made, it may be unjust for the decision-maker to be held solely responsible for all the financial consequences of their individual 'choice'. Practically speaking, relational autonomy might, therefore, provide an argument against a clean break settlement in every case. It does not, however, provide a principled basis for deciding how assets should be divided, whether maintenance should be paid and, if so, for how long. As Thompson explains:

> While in theory relational autonomy both challenges and undermines assumptions made by neo-liberal autonomy, in practice the term is almost impossible to apply without the court falling back on neo-liberal norms, because relational autonomy can be interpreted in a range of different ways. It appears then that the main difference between neo-liberal autonomy and relational autonomy is simply that the latter compels one to ask why the decision was made.[775]

[773] Catriona MacKenzie and Natalie Stoljar, 'Introduction: Autonomy refigured' in Catriona MacKenzie and Natalie Stoljar (eds) *Relational Autonomy* (Oxford University Press 2000), 4

[774] *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42 [188]

[775] Sharon Thompson, 'Feminist Relational Contract Theory: A New Model for Family Property Agreements' (2018) 45 Journal of Law and Society 617, 627

A neoliberal concept of autonomy, whilst flawed for the reasons discussed above, is clear about what autonomy looks like on separation: partners are encouraged to be financially independent and expected to be able to move on with their lives, making decisions free from constraint. In contrast, it is not clear what degree of financial interdependence, if any, relational autonomy requires, or what it means for one's ability to make decisions about one's children, for example, going forward. Thus, whilst relational autonomy is crucial in understanding the decisions that people make, and in challenging neoliberal understandings of individuals as rational beings who make individual decisions in their own best interests, it does not provide a principled basis for the law of financial provision on separation. There is, therefore, a need to find a principle that addresses the effects of decisions made through an exercise of relational autonomy.

6.3.2 The role of a relational approach

Although relational autonomy is problematic as a principle underpinning the division of assets on separation, there is a role for a relational approach to the problem of the financial consequences an unequal division of caretaking responsibilities. Whereas relational autonomy is a way of understanding autonomy that takes account of the fact that individuals are embedded in relationships, a relational approach calls for a recognition that the law structures relationships in particular ways:

> What rights and law actually *do,* right now, is structure relations, which, in turn, promote or undermine core values, such as autonomy.[776]

A relational approach recognises that there are particular values promoted by the law. As discussed above, a neoliberal idea of autonomy is one such principle on relationship breakdown, albeit a problematic one. Is there an alternative principle that can guide the way in which law structures relationships, and address the inequalities that currently flow from the exercise of relational autonomy within intact families?

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[776] Jennifer Nedelsky, *Law's Relations* (OUP 2013), 65-6

6.3.3 Care as a core principle of a relational approach

Care is a central part of what families do; Herring, for example, describes it as being 'at the centre of family life'.[777] It is the uneven division of caretaking responsibilities within families which is a crucial factor in explaining disparities in the financial positions of men and women on separation. However, despite this link between caretaking and economic inequality, it appeared to be relatively invisible to some participants in this research. This reflects both its invisibility within family law and within society more generally.

As described in Chapter 5(iii), Michael contrasted looking after children with the 'daily grind' of work. He described the financial settlement in his case as follows:

> And, uh, at the, at the end of it the, uh, judge gave… uh… allocated, decided, allocated her enough money to enable her to go and buy a three bed house and I was left to fend for myself… with what was left. So the – if you, if you go and had a look at the – how it all worked out, what she got, she ended up, uh with the *entirety* of the marital, the assets accumulated during the marriage. And she ended up with… most of my pre-marital assets as well. Whereas I got landed with a huge debt, I'm gonna be paying off for the rest of my life. Fairness did not come into it at all.
> (**Michael, Father, England & Wales**)

The law of financial provision on divorce allows for a departure from an equal division of assets to meet either party's needs. Michael's wife had stayed at home with the children and it seems likely that her greater financial needs as a result would explain the financial settlement reached in his case. Underpinning Michael's perception of unfairness were various features of the litigation between him and his wife. Not only was he, understandably, angry at his wife's allegations, rejected by the court, that he had sexually abused his children, but he felt that his wife was maximising her financial claim by deliberately not finding work. However, Michael noted that the judge had ascribed his wife an earning capacity in any event. It, therefore, seems likely that the unequal division of assets here was driven by his wife's financial needs, as found by the court, rather than as asserted

[777] Jonathan Herring, *Caring and the Law* (Hart 2013),187

by his wife. The unfairness of this decision from Michael's perspective may, therefore, be illustrative of the invisibility of the caretaking his wife performed within their marriage (see further Chapter 5.iii).

The same invisibility of the obligations and financial consequences of caretaking appeared to underpin attitudes to child maintenance, with several of the recipients of such maintenance noting that their former partners did not seem to understand that child maintenance was being paid for their children and not for them:

> 'cause a lot of his pay is based on bonuses, depending on performance and things like that. Um, and I've had to really fight to get those out of him. So, um, that has caused a bit of tension. I think, I sense of bit of resentment from him that he thinks he's paying me money. I think that's quite common. Um, he doesn't really like paying me money [Laughs]. Um, and I'm not sure he reminds himself it's not really for me.
> (**Emily, Mother, England & Wales**)

> …every time I spoke about money it would end up in a huge argument where he would call me a money grabbing… whatever. Um, you know, I just want, you know, I wanted to get as much money out of him as I could. He, he could never see that, actually, I was doing it for the children.
> (**Louise, Mother, England & Wales)**

In the law, caretaking receives limited consideration in both decisions relating to financial settlements and in decisions relating to children. As regards the latter, caretaking is implicitly drawn to the court's attention through the concept of welfare,[778] and through the need for the court to have regard to the likely effect of any change of circumstances.[779] However, presumptions about what is in a child's best interests, most notably the presumption that the continued involvement of both parents in a child's life will further his or her welfare,[780] shape the way in which these provisions are interpreted. A court making orders about

[778] Children Act 1989, s 1(1)
[779] Children Act 1989, s 1(3)(c)
[780] Children Act 1989, s 1(2A)

where a child lives or spends time[781] is focused on the division of time, and not necessarily the division of caretaking responsibilities.

As regards financial settlements, as explained in Chapter 2, there are limitations to both the reward and compensatory approaches to valuing caretaking. The reward approach, which treats the caretaker as having earned a share in the family wealth, fails properly to account for the costs of caretaking. Caretaking is different from other domestic and financial contributions. First, it is not only a contribution to a relationship, and potentially to the career of the breadwinner, but it has financial costs for the caretaker, most notably its impact on earning capacity, which a breadwinner does not incur. Second, caretaking continues to be performed after a relationship ends. Not only might this have an indirect benefit for the breadwinner in allowing him or her to continue in his or her career, but it means that the financial penalties for the caretaker continue after the end of the relationship. The compensatory approach, focusing as it does on the position of the caretaker only, fails fully to address what caretaking means for the family. In particular, it ignores the fact that a division of labour frees the breadwinner up to engage in paid work.

This invisibility of caretaking to some parents and within family law needs to be understood within its wider structural context. As Tronto explains:

> Care is a central but devalued aspect of human life. To care well involves engagement in an ethical practice of complex moral judgments. Because our society does not notice the importance of care and the moral quality of its practice, we devalue the work and contributions of women and other disempowered groups who care in this society… only if we understand care as a political idea will we be able to change its status and the status of those who do caring work in our culture.[782]

The failure to value caretaking adequately on parental separation reflects a wider societal approach in which it is systematically devalued. For example, whilst unpaid care forms a vital part of social reproduction, which is indispensable to

[781] Children Act 1989, s 8
[782] Joan Tronto, *Moral Boundaries A Political Argument for an Ethic of Care* (Routledge 1993), 157

society, it does not form part of economic measures such as GDP.[783] Further, even ONS attempts to calculate unpaid care relative to GDP[784] base that value on the market value of child minder services[785] which are ‘sex-segregated or sex-stereotyped jobs, which are filled by women and lower paid.’[786] ‘Moral boundaries’[787] also serve to prevent care being ‘a more central aspect of human life’.[788] Such boundaries include, for example, the boundary between public and private life: ‘in stressing the importance of public forms of moral life such as defining justice, this boundary makes less legitimate and less morally worthy the daily caring work disproportionately done by the excluded people in our society.’[789] It is this wider invisibility of caretaking in society that underpins its invisibility within the family and the failure of the law adequately to address the economic implications upon separation.

Tronto argues for a wholesale reform of political and social institutions to reflect the fact that ‘[c]are is a central concern of human life’.[790] She argues that such a large-scale undertaking is the only way to address the systematic undervaluing of caretaking within society. However, this sort of undertaking is beyond the scope of this thesis. Instead it is suggested that the vital role families perform in caring for children should be recognised in family law and policy. Nevertheless, Tronto’s focus on making care more central to political and social institutions provides a valuable framework for thinking about how care can be made more visible in family law and policy, and a core value around which relations should be structured, given its economic repercussions at the point of separation.

6.4 What does it mean to care?

Tronto argues that one of the key reasons for the invisibility of care in society has been the failure to think systematically about what it entails:

[783] ONS, ‘Household satellite account, UK: 2015 and 2016’ (2 October 2018) <https://www.ons.gov.uk/economy/nationalaccounts/satelliteaccounts/articles/householdsatelliteaccounts/2015and2016estimates#focus-on-childcare> accessed 6 December 2018

[784] See, for example, ONS, ‘Household satellite account, UK: 2015 and 2016’ (2 October 2018) <https://www.ons.gov.uk/economy/nationalaccounts/satelliteaccounts/articles/householdsatelliteaccounts/2015and2016estimates#focus-on-childcare> accessed 6 December 2018

[785] ONS, ‘Chapter 10: Methodological annex’ (7 April 2016) <https://www.ons.gov.uk/economy/nationalaccounts/satelliteaccounts/compendium/householdsatelliteaccounts/2005to2014/chapter10methodologicalannex#annex-1-methodology-for-all-the-activities> accessed 6 December 2018

[786] Marilyn Waring, *Counting for Nothing* (2nd edn, University of Toronto Press 2004), 227

[787] Joan Tronto, *Moral Boundaries A Political Argument for an Ethic of Care* (Routledge 1993), 178

[788] Joan Tronto, *Moral Boundaries A Political Argument for an Ethic of Care* (Routledge 1993), 178

[789] Joan Tronto, *Moral Boundaries A Political Argument for an Ethic of Care* (Routledge 1993), 178

[790] Joan Tronto, *Moral Boundaries A Political Argument for an Ethic of Care* (Routledge 1993), 180

> Why is care not a central category of social analysis? Care and its component pieces are discussed and thought about in our society, but they are not considered in a systematic form. Without a systematic way to think about care, the opportunity to gain a critical perspective on our culture is lost.[791]

It is, therefore, crucial that any approach seeking to place care at its centre employs a clear understanding of the concept. Tronto's four phases of care are set out in Chapter 2: caring about, taking care of, care-giving (referred to in this thesis as caretaking) and care-receiving. As discussed in Chapter 2, it is caretaking that has the greatest implications for financial independence upon separation. It is this aspect of care that is time-consuming and which most conflicts with engagement in the labour market. However, as Tronto argues, there is a tendency to equate providing money with caretaking that serves to undervalue care in society:

> …providing money is more a form of taking care of that it is a form of care-giving [caretaking]. The reason to insist upon this distinction is important. Money does not solve human needs, though it provides the resources by which human needs can be satisfied. Yet as feminist economists have long noted, there is a great deal of work that goes into converting a pay check, or any other kind of money, into the satisfying of human needs.[792]

Tronto's idea of care as a practice highlights what care entails. This can be missed in court decisions relating to children, which tend to presume parents are equally capable of providing care unless there is evidence to the contrary. Relatedly, the discussion of participants' experiences demonstrates that the invisibility of care can serve to disguise the extent to which money is required to undertake caretaking. Tronto's analysis of the different phases of care, combined with the more general aim of making care central to citizenship, provides a starting point for an approach to valuing care on parental separation. Seeking to

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[791] Joan Tronto, *Moral Boundaries A Political Argument for an Ethic of Care* (Routledge 1993), 112
[792] Joan Tronto, *Moral Boundaries A Political Argument for an Ethic of Care* (Routledge 1993), 107

place care at the heart of family law on separation means understanding these different phases and ensuring that all are visible.

The next section explores what it means for care to take centre stage as a core principle of family law and policy. What difference might it make if care, rather than autonomy, guided legal and policy reforms?

6.5 Contrasting care and autonomy as core principles

6.5.1 Family law

The difference between care and autonomy as guiding principles on relationship breakdown is perhaps most clearly demonstrated by the different approaches taken by three of the participants in England and Wales: Elizabeth, Matthew and Jason. Whereas the approach of Elizabeth and Matthew (who were married to each other) was underpinned by a principle of care, Jason's case most clearly demonstrates an approach which focuses on party autonomy. Jason described the arrangements for his daughter, and the rationale for those arrangements, as follows:

> **Jason:** … it can get a bit floaty, flaky and fluffy around the edges and I'd like that to be really trimmed really clear.
>
> **Interviewer:** Can you explain what you mean by the sort of, by the floaty around the edges. Sort of what, what happens and what are some of the problems?
>
> **Jason:** So, handover as an example. So, uh, yeah, good example is last summer, so 6 weeks and there was, they were only on time for handover on my Wednesday once. So it was like, that's flaky, that's, you know, that's keep – just leave a bit earlier if you need to get there for 11. You know, I know that if you're half an hour late or an hour late I'm just going to add it on Sunday or Saturday. But why do that, you know and so it's that kind of stuff that – probably trivial but the more I try and keep it focussed. If it had been the other way. If I hadn't really bothered about all this kind of stuff it would be completely messy. So.
>
> **Interviewer:** So in terms of, sort of, seeing your daughter at all or in terms of –

> **Jason:** In terms of me, um, receiving what's my right as a father.
> And without becoming like one of the father doormats that are out there and like, oh no, I don't have a right to see her. I can't see her. I'll only see her every other weekend. That was never going to happen. That can't happen. And I've just tried to put the firm, clear boundaries in place because there can be confusion, there can be misunderstandings and actually if all this stuff is put in place now then we know how it is, you know. You can't say 5 years down the line, well hold on we never discussed this. This has always been very clear. That's what I always wanted. And [daughter] is, is very stable, I believe, because she understands boundaries. She's knows I'm very black and white, um… yeah.
> (**Jason, Father, England & Wales**)

This approach epitomises individual autonomy on separation. The focus is on parental rights, which require clear boundaries to ensure their enforcement. This makes complete sense in a world where autonomy is the goal on parental separation. However, for Jason's daughter this meant two different homes with two very different ways of life:

> I think, she gets now, especially after last week, that actually, you've got your medicine at that house, and I've got mine and they're two different things, two different diets, two different ways of life.
> (**Jason, Father, England & Wales**)

This divide between his daughter's parents even translated itself into school meals. Jason described how his daughter would eat a vegan meal at school on Wednesday, Thursday and Friday because 'the official handover time… [in the shared care arrangement] is 11 on a Wednesday so that means her lunch at school is actually within my time.' Jason felt that this worked well for his daughter. Further, his motivation to play a greater role in his daughter's life was clearly central to the arrangements reached on parental separation. However, it is not clear that such an approach would work for every child. The danger of an approach based on individual autonomy is that the needs of children become

invisible, and rigid arrangements may be imposed on them because they work best for their parents.

At the opposite end of the spectrum, Elizabeth and Matthew perhaps best epitomise an approach with care at its core. Elizabeth, for example, remarked 'you don't get an autonomous decision uh, in, in relation to your children. You wouldn't have expected it when you were together, you don't get it now.' For her and Matthew, their daughter's best interests were central in all decisions they made; both financial and in relation to the arrangements for their daughter:

> … the magnetic factor has to be the child and so stepping out of your own… your own, you know, putting yourself in the child's position and, and basically every single decision what is better for them – doesn't matter what I think about it – what is better for them.
> (**Elizabeth, Mother, England & Wales**)

> … the single most important thing are, you know, is, is the, the needs of the child, and everything else comes secondary to that. You know, it may be that you, you know, you, you can barely bring yourself to speak to your ex-partner for whatever reason but you, you know, if you can't get over that for your child, I think there's something seriously, seriously wrong.
> (**Matthew, Father, England & Wales**)

Against this backdrop, Elizabeth and Matthew reached a financial settlement that would allow Matthew to rehouse, and calculated child maintenance based on what Matthew could afford to pay alongside a mortgage, which was less than Elizabeth would have been entitled to under the statutory formula. They also maintained flexible arrangements for their daughter. This was not without personal cost. Matthew, for example, described the challenges of trying to balance the needs of Elizabeth and his daughter with those of his new partner:

> I'm not just managing my time and [daughter's] time but I'm, I'm working, you know, with Elizabeth and her partner, my partner, you know, and it's

just almost like, you, you can't, y-you can never please anybody any of the time almost is, is how it sometimes feels to me.
(**Matthew, Father, England and Wales**)

This situation is the antithesis of neoliberal autonomy and the sort of autonomy that is encouraged in all three of the jurisdictions discussed in this thesis. Working to reach arrangements that suited everyone meant that neither Elizabeth nor Matthew had control over their own life. Further, they were both prepared to sacrifice their own financial entitlements for the good of the family unit as a whole. Elizabeth, for example, accepted a lower child maintenance payment than she might otherwise have been entitled to, and Matthew decided not to make any financial claim against a flat in Elizabeth's name to which he had contributed financially.

6.5.2 Family policy

When it comes to family policy, the influence of a neoliberal idea of autonomy can be seen in the reforms introducing Universal Credit, a new welfare benefit combining six state benefits[793]. One of the overarching principles of the reform was that it would 'help claimants and their families to become more independent'.[794] However, the reform paid little attention to the implications of these changes for caretakers.

Universal Credit has been widely criticised for a number of reasons, [795] including its impact on the power dynamics within relationships. Whereas under the previous system, child tax credit and working tax credit were paid directly to the primary caretaker, and housing benefit directly to a landlord, Universal Credit is by default a single payment into a single bank account.[796] This is particularly problematic for survivors of domestic abuse, for example, because it limits the

[793] Gov.UK, 'Universal Credit' <https://www.gov.uk/universal-credit> accessed 13 September 2018
[794] Department for Work and Pensions, '2010 to 2015 government policy: welfare reform' (updated 8 May 2015) <https://www.gov.uk/government/publications/2010-to-2015-government-policy-welfare-reform/2010-to-2015-government-policy-welfare-reform#appendix-1-government-policy-on-universal-credit-an-introduction> accessed 13 September 2018
[795] See, for example, Alison Graham, 'Universal Credit discriminates against women by design. Here's how' (*The New Statesman*, 17 August 2018) <https://www.newstatesman.com/politics/feminism/2018/08/universal-credit-discriminates-against-women-design-here-s-how> last accessed 13 September 2018
[796] House of Commons Work and Pensions Committee, 'Universal Credit and domestic abuse' (Seventeenth Report of Session 2017-19) <https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/1166/1166.pdf> accessed 13 September 2019

possibility for them to leave an abusive relationship,[797] but in a wider range of relationships it may create or exacerbate power imbalances between the parties. Power imbalances were evident in the relationships of several of the participants in this research:

Alison: Um… and then it just kind of got worse and worse as my earning power diminished. And then, and then I used to have to, ugh, ask for money all the time. Terrible.
Interviewer: Mm.
What was, um, his approach to that? Was he… so, was it that you disliked asking for money or was he, sort of, resistant to paying money? What, what were the sort of – why did you feel like that?
Alison: Um, I think it was probably… bit of both because, even now, I mean I don't like asking for help um, you know, I like standing on my own two feet and all of the rest of it.
Interviewer: Yeah.
Alison: Um… And… also there was the kind of like… well, you've been to the Co-op three times today, you know, what's that all about? 'Cause obviously he could see it on our joint account 'cause that was my real only money was coming out of the joint account. And, um, I used to, you know, I, um, I used to try and make my money last as much as possible. But [sigh] yeah, no, nightmare. Nightmare.
(**Alison, Mother, England & Wales**)

… I controlled all the, all the money, um, but like I say he went off and spent it… on just nothing basically. Just nothing at all. He'd go out for sort of… something to eat. Like it was like you know lunchtime or whatever… I should have probably said no to him but, it's different isn't it when you, when you're with somebody and obviously they're earning more money. I mean I was earning money but they're earning more money it's sort of sometimes you feel like you can't say no to them. So… not that he had to ask me for money but it was like in the joint account sort of thing so – Yeah,

[797] House of Commons Work and Pensions Committee, 'Universal Credit and domestic abuse' (Seventeenth Report of Session 2017-19) <https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/1166/1166.pdf> accessed 13 September 2019

> we, like I said, we had our own separate accounts but I don't think I ever hardly used it in the end to be honest. So – But I know that I would never get a joint account again, ever. Even if I was with somebody again.
> (**Ruth, Mother, England & Wales**)

> … he would suddenly go out and buy a golf club. One golf club for a hundred pounds. But then the next week, he would look at the shopping list and go mental at me because I'd spent three pounds on a bottle of shampoo and said, you know, what's wrong with Asda's own or… So it was a bit, a bit one-sided financially really.
> (**Louise, Mother, England & Wales**)

These experiences are not unique. Vogler and Pahl's research[798], for example, found that resources were shared equally in only one fifth of households.[799] Universal Credit has the potential to compound these inequalities. Benefits that would previously have been paid to caretakers may now be paid to their partners, rendering caretakers completely dependent upon their partners financially. In some cases, this might prevent those who want to leave relationships from being able to do so. In others, it offers the potential of entrenching existing power imbalances further. Is it in the best interests of caretakers or children that the parent who is not doing that day to day caretaking has control over the financial resources necessary for it to happen?

What difference might it have made if a principle of care, rather than autonomy, had guided this reform? Recognising the central role of care in family life immediately complicates the goal of achieving financial independence for claimants and their family members. Rather than assuming that financial independence, in the sense of financial independence of the family from the state, is desirable, that goal needs to be explicitly justified. A nuanced understanding of care also draws attention to the very different consequences of the different phases of care outlined by Tronto. As discussed previously, both the time and financial costs of caretaking are greater than for the other phases of care. Thus,

[798] Carolyn Vogler and Jan Pahl, 'Money, power and inequality within marriage' (1994) 42 The Sociological Review 264
[799] Carolyn Vogler and Jan Pahl, 'Money, power and inequality within marriage' (1994) 42 The Sociological Review 264, 285

a benefits regime that achieves financial independence for a person who is not caretaking will not necessarily do the same thing for a caretaker.

Recommendations by the Work and Pensions Committee that Universal Credit payments should be paid to the main caretaker by default[800] are an important way of redressing the power imbalances created and exacerbated by the current regime. They recognise the reality of the power imbalances that arise because of caretaking responsibilities, and are a way of helping to structure relations to recognise this.

6.6 Reforming law and policy to recognise care

Having argued that it is care, and not autonomy, that should be at the core of family law and policy, this section discusses three areas of potential reform in family law and policy to address the problem of the unequal financial consequences of an unequal division of caretaking within intact families on parental separation. These reforms are informed both by the principle of care discussed above and by the lessons learned from research in Sweden and the Netherlands (RQ 2). There are many different ways that law and policy could be reformed in these areas. This section is not intended to dictate the form that reform should take. Rather, it is intended to illustrate the factors and considerations that could guide such reform.

6.6.1 Family policy: parental leave

Caretaking remains gendered in all three of the jurisdictions considered in this thesis. Even in Sweden, where gender equality is an explicit goal of family law and policy, gender equality remains unachieved in practice. As discussed in Chapter 5(i), Swedish policies have generally been concerned with enabling mothers to engage in paid work; the sharing of caretaking tasks is seen as necessary to facilitate this. What difference might it make for caretaking to become the central focus of family policy?

[800] House of Commons Work and Pensions Committee, 'Universal Credit and domestic abuse' (Seventeenth Report of Session 2017-19) <https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/1166/1166.pdf> accessed 13 September 2019

Even in Sweden, which provides generous parental leave and the ability to take time off to care for sick children, research indicates that fathers find it difficult to adjust their work times according to children's schedules.[801] Further the participant fathers in England and Wales who talked about the flexibility allowed by their jobs recognised that their positions were exceptional (see further Chapter 5(iii)). An analysis engaging explicitly with caretaking would recognise that children's needs are ongoing. Whilst the realisation that children get sick, and parents need to take time off work, is important, it is also vital to recognise that children need to be picked up from nursery or school every day. Making caretaking central would help to shed light on the factors that facilitate or hinder these different aspects of caretaking, and on the way in which relationships, such as the employment relationship, would need to be restructured to uphold this value. It is only in these circumstances that the Universal Caretaker model, discussed in Chapter 2, is a realistic possibility.

Such an analysis requires radical change to the nature of working patterns and seems unlikely within the current neoliberal framework. Nevertheless, policy may still play a role in increasing the visibility of caretaking, for example by encouraging both mothers and fathers to share parental leave. It would be possible to go even further than Sweden and mandate an equal division of leave between parents to try and encourage a more equal sharing of caretaking. However, whilst superficially attractive, such an approach is potentially problematic for a variety of families. First, for low-income families, without additional financial support, it may be simply unaffordable for leave to be shared rather than for it to be taken by the lower earner. Second, in areas of England and Wales with a more ethnically diverse population, fewer women tend to work because they are caring for family.[802] Thus, such reforms are likely to have a disproportionate effect on families from ethnic minority communities on the way they structure their family lives. A third issue with a policy mandating an equal division of parental leave is that, as discussed in Chapter 5, an equal division of time does not necessarily translate into an equal division of caretaking. In

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[801] Linda Haas, Karin Allard and Philip Hwang, 'The impact of organizational culture on men's use of parental leave in Sweden' (2002) 5 Community Work and Family 319, 336

[802] ONS, 'Women in the labour market: 2013' (25 September 2013) <http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/womeninthelabourmarket/2013-09-25> accessed 12 July 2018

Sweden, for example, there are seasonal peaks in fathers' leave use at Christmas and in the summer, suggesting that it may serve as additional vacation time.[803] This may become less of an issue if leave were divided equally as it might help to create a culture in which both parents are seen as equally responsible. However, cultural change is not a quick or straightforward process and there is a possibility that gendered expectations of caretaking would persist, with mothers simply having less time to perform the tasks expected of them. As discussed in Chapter 5(i), pressure to perform the dual roles of caretaking and breadwinner can be a significant cause of stress. Additionally, it is important to remember that not all families have two parents who can be, or want to be, involved in the day-to-day lives of their children. For Erin, for example, there was no possibility of sharing parental leave with her child's father who lived in a different city, and with whom she was not in a relationship.

6.6.2 Family law: child arrangements

Placing a more nuanced understanding of care at the centre of the law on child arrangements means understanding the different types of care performed by parents, and specifically the difference between caretaking and other forms of care. This does not mean that children should automatically live full time with the parent who was the primary caretaker during the relationship. However, it does mean recognising the difference between caretaking and other forms of care when making child arrangements. This is relevant both in considering what arrangements are best for a child at the point of separation, and in considering what a division of time really means in terms of a division of caretaking. Esther's children, for example, spent two evenings a week with her former partner but she was responsible for much of the caretaking on those evenings:

> I pick them up from school. Um, feed them. Um… take them to – they go to, you know, clubs, beavers, you know, that type of thing. Yeah, I do all the running around and then he collects them after work…. And literally just time, just sort of like half an hour before bed, huh, clearly.
>
> (**Esther, Mother, England & Wales**)

[803] John Ekberg, Rickard Eriksson and Guido Freibel, 'Parental Leave - A Policy Evaluation of the Swedish "Daddy-Month" Reform' (2013) 97 Journal of Public Economics 131, 137

An approach that explicitly focused on caretaking would not necessarily preclude such arrangements. However, it would recognise that this division of time did not necessarily result in a more equal division of caretaking. Such an approach might better ensure that the needs of children are met following separation by ensuring that child support follows the costs of caretaking, rather than relating to the time spent. This is particularly important in cases such as Esther's where her partner's child support liability would be reduced by the amount of his overnight contact, but where she was the one who had to arrange working commitments to pick the children up from school on those evenings. Considering whether an alternative approach to child support, based the division of caretaking, rather than time, would better meet the needs of children is an area for further research.

Making care central in child arrangements on separation also means listening to the experiences of care-receivers (children). As Tronto explains, '[i]t is important to include care-receiving as an element of the caring process because it provides the only way to know that caring needs have actually been met.'[804] Gareth's experience demonstrates how complex this can be to achieve:

> … So each, each of my kids are different. So sometimes I will have, um, I will have just [oldest]. So [oldest] and [second child] have completely different personalities and sometimes [second child] just needs some time with his mum. Sometimes [oldest] just needs some time with his mum. Um, and its not just, right, here's the kids, here's their coats, bring them back on Sunday. It's like we, we do change it around a bit and actually the dynamics between [oldest] and [youngest] and [second] and [youngest] and the three of them are such that you do tend to, um, shift things around, pay attention to what they're saying. Um, and also the, the kids tend to play their parents in completely different ways, um, and, um, so a lot of [oldest's] behavioural issues aren't behavioural issues when he's with me, and a lot of [second's] behavioural issues with me aren't behavioural issues when he's with his mum. So we need to, as much as we have, uh, cross words to say to each other, um, they, we have to keep talking about

[804] Joan Tronto, *Moral Boundaries A Political Argument for an Ethic of Care* (Routledge 1993), 108

all of this stuff 'cause otherwise we can have phantom problems with the children.

Um, yeah. So I mean it – as annoying as it is, you have to keep talking to the other parent and checking out the kids. Um, yeah, especially, you just need to know where they're at, 'cause otherwise you can have a complete lack of cohesion between your parenting and it can be really confusing for them and kids need a lot of stability and they need to rely on, uh, cause and effect of their actions.
(**Gareth, Father, England & Wales**)

Such approaches are not easy to achieve in practice, particularly where parents are not on good terms with one another. However, taking measures to re-structure relationships around care, with a particular focus on the experiences of care-receivers, may help to challenge approaches based on parental rights; the sorts of caring relationships envisaged in Tronto's approach are by definition not singular or individualistic.

The question of how to achieve this approach in the law is more difficult. A changed approach in the law, employing a more nuanced conception of care, would primarily benefit those with legal advice. It would be possible to develop guidance for parents that focused explicitly on the division of caretaking responsibilities, rather than time, and on seeking the views of children about such relationships. However, it is not clear how those without legal advice would even find such guidance. Further, even for those who did find this guidance, there are questions about how effective it would be in shaping behaviours. Research into the effectiveness of the Separated Parents Information Programme,[805] for example, found that whilst parents were positive about the course overall, it had limited impact on parental cooperation and conflict. Thus, even if this sort of guidance could be made a meaningful part of a parenting course, challenges are likely to remain. For example, such a course is most likely to affect those who

[805] Liz Trinder, Caroline Bryson, Lester Coleman, Catherine Houlston, Susan Purdon, Janet Reibstein and Leanne Smith, 'Building bridges? An evaluation of the costs and effectiveness of the Separated Parents Information Programme (PIP)' (*Department for Education*) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/181695/DFE-RR140.pdf> accessed 19 February 2019

take it, even if the materials are made available more widely. Further, trying to design a course that influences behaviour is likely to take time and require refinement.[806]

6.6.3 Family law: financial provision

As discussed in the preceding section, a clear understanding of care, that recognises the particular economic implications of caretaking, provides a useful lens through which to approach financial arrangements. It draws attention to the costs of caretaking and to the fact that these can last beyond the end of a relationship. An approach that places care at the centre of family law also means recognising that where cohabitants perform caretaking roles they may suffer financial disadvantage, as the examples given at the outset of this chapter demonstrate. Valuing care means valuing those who provide care and putting in place legal and policy measures that support them. This applies whether those caretakers are married or not. As discussed above, caretaking is of significant value to society and the state has a role to play in supporting caretakers. However, this does not preclude the responsibility of a partner where the unequal division of caretaking responsibilities arose from decisions made in the context of what works best for the parties to a relationship. The sort of relational autonomy being exercised within a relationship does not justify an approach on separation that prioritises the autonomy of the breadwinner to walk away free from constraint to the significant detriment of caretaker and child. Where cohabitants behave in the same way as married couples and suffer the same financial disadvantages from the way in which they order their lives then they should also receive legal protection.

Couples do not make decisions around caretaking in a rational detached way but in the context of a relationship. As the discussion in Chapter 5 highlights, the absence of legal protection does not encourage rational, legalistic decision-making in reality. Further the examples at the start of this chapter demonstrate that the absence of legal protection can simply result in precarious financial

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[806] Liz Trinder, Caroline Bryson, Lester Coleman, Catherine Houlston, Susan Purdon, Janet Reibstein and Leanne Smith, 'Building bridges? An evaluation of the costs and effectiveness of the Separated Parents Information Programme (PIP)' (*Department for Education*) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/181695/DFE-RR140.pdf> accessed 19 February 2019

situations for caretakers on separation. If care is seen as a central principle of family law, then such results are unacceptable. Placing care at the centre of the law in this area does not mandate the form that law reform should take; it does not, for example, require that cohabitants and married couples should be treated in the same way, although this is one possibility. It does, however, require that the costs of caretaking, and its value to society, should be recognised. The final chapter of this thesis applies the principle of care, and the insights of this chapter and those preceding it, to the question of reforming the law of financial provision for separating couples.

7. Conclusion

7.1 Introduction

As outlined in Chapter 1, the main aim of this thesis is to explore the tension at the heart of family law between ideas of autonomy and the reality of caretaking responsibilities, in order to consider how family law and policy should take account of caretaking responsibilities on parental separation. Chapter 2 engaged in a theoretical and doctrinal analysis of law and policy in England and Wales. This doctrinal analysis was developed in Chapters 4 and 5, where it was combined with empirical and comparative work in England and Wales, Sweden and the Netherlands. Building on the findings of these chapters, Chapter 6 argued that the time has come for family law and policy to reject the influence of neoliberal autonomy, and that instead a principle of care should be placed at their centre. This chapter summarises the key findings of this thesis and suggests how the principle of care outlined in Chapter 6 might be used to reform the law relating to financial provision on parental separation. The chapter considers the principles that might underpin reform of both the law relating to cohabitants and married couples. In light of the reforms proposed by the Divorce (Financial Provision) Bill, it also considers the form that reform of the law of financial remedies on divorce might take, and contrasts these proposals with the reforms suggested by the Divorce (Financial Provision) Bill.

This thesis contributes to the evidence base on the practical operation of the law dealing with financial provision on relationship breakdown. Such evidence is crucial to effective reform of the law.[807] The research complements recent larger scale studies looking at the nature of the financial orders made by the courts on divorce,[808] and the economic effects of divorce on party incomes (for both cohabiting and married parents).[809] It unpicks the reasons why the law fails to recognise the financial implications of caretaking. It also explores the practical effects of the law for parents and children in England and Wales. Additionally, the

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[807] Emma Hitchings and Joanna Miles, 'Financial remedies on divorce: the need for evidence-based reform' (2018) <http://www.nuffieldfoundation.org/sites/default/files/files/briefing%20paper%20Jun%202018%20FINAL.pdf> accessed 18 July 2018 and Jo Edwards, 'The law of financial remedies on divorce: a round-table discussion at the House of Lords' [2018] Family Law 1164

[808] Emma Hitchings and Joanna Miles, 'Financial remedies on divorce: the need for evidence-based reform' (2018) <http://www.nuffieldfoundation.org/sites/default/files/files/briefing%20paper%20Jun%202018%20FINAL.pdf> accessed 18 July 2018

[809] Hayley Fisher and Hamish Low, 'Recovery from divorce: comparing high and low income couples' (2016) 30 International Journal of Law, Policy and the Family 338 and Mike Brewer and Alita Nandi, 'Partnership dissolution: how does it affect income, employment and well-being? (*Institute for Social & Economic Research*, September 2014) <https://www.iser.essex.ac.uk/research/publications/working-papers/iser/2014-30.pdf> accessed 26 September 2018

comparative aspect of the research demonstrates the complexity of reforming the law of financial remedies, and the need to understand the role of the state and societal structures when looking at reforms made in other jurisdictions.

Building on this knowledge, the thesis suggested a general framework for the reform of family law and policy in Chapter 6. There are limits to the social change that can be achieved through law reform. As explained at the outset, care is a social phenomenon and cultural expectations are as important as the legal framework and social structures in influencing how the law works in practice. Law's ability to change these expectations needs to be recognised. Change through law also assumes that people are negotiating by reference to the law. The reality is that in the post-LASPO world it is simply not known whether this is the case. Nevertheless, it is important that law reform is both principled and evidence-based, and this chapter employs the framework set out in Chapter 6 to make practical suggestions for reform of the law of financial remedies giving effect to a principle of care.

7.2 Key findings

Before going on to suggest how a principle of care might be used to reform the law relating to financial provision on parental separation, this section outlines how this thesis has answered the specific research questions, and addressed the three contextual cross-themes (the meaning of gender equality, what it means to care and the respective roles of the family and society in providing care), outlined in Chapter 1.

In response to RQ 1 (to what extent do each of the jurisdictions take account of caretaking responsibilities on parental separation?), it was concluded in Chapter 5(iv) that for cohabitants in all three jurisdictions very little account is taken of caretaking responsibilities on parental separation. The position is better for spouses because of the greater range of financial claims available on divorce. However, in none of the three jurisdictions are the financial costs of care fully recognised by the legal framework. The limited account taken of caretaking responsibilities on parental separation is partly explained by the influence of a neoliberal idea of autonomy in all three jurisdictions, which 'views individuals as atomistic, independent agents, who have the ability, and the duty, to make

“responsible” decisions in their own best interests’.[810] In all three jurisdictions, the influence of neoliberal autonomy can be seen in various ways, including in the encouragement of private ordering, and in an increasingly restrictive approach to spousal maintenance (RQ 1.a). At the same time as financial arrangements on separation fail to take account of the financial costs of care, the discussion in Chapters 5(i), (ii) and (iii) suggests that separation may be seen as a catalyst for change in relation to child arrangements. In all three jurisdictions, there appear to be greater moves towards more equal time arrangements (albeit that each of the jurisdictions are at different points along the spectrum towards equality). The findings of the interviews with parents in England and Wales, however, suggest that more equal time alone does not necessarily result in a more equal sharing of the burdens of caretaking (for example, arranging visits to the doctors, buying school uniform and so on).

Another factor that explains the limited account taken of caretaking responsibilities on parental separation is the relative invisibility of care in society and the limited value attributed to it (RQ 1.b). As was explained in Chapter 5(iv), this is partly because perceptions of gender equality in all three jurisdictions fail to match the reality in which caretaking remains gendered. In all three jurisdictions, there are differences in the ways that the roles of mothers and fathers are understood, with the time involvement expected of mothers being much greater than that of fathers. Thus, even in Sweden where there are strong norms around gender equality, mothers perform a greater share of family caretaking responsibilities. However, in all three jurisdictions there was a suggestion that care is seen as a matter of personal choice (RQ 1.b). Where caretaking is understood in this way, it is much less likely to be seen as involving a sacrifice, or creating a financial need, for which it is legitimate to receive financial support. The failure to recognise the value of caretaking may also explain why equal shared care during a relationship is not necessarily seen as a requirement for shared care arrangements following separation. These findings are important in any attempt to try and achieve gender equality in society more broadly (cross-theme 1).

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[810] Lucy-Ann Buckley, ‘Relational Theory and Choice Rhetoric in the Supreme Court of Canada’ (2015) 29 Canadian Journal of Family Law 251, 252

The findings from all three jurisdictions suggest that it is important to be aware of gender norms and the role of the state when thinking about law and policy reform in England and Wales (RQ 2). In reflecting on the role of the state in caretaking, Chapter 6 suggested that the value of caretaking to society justifies the state playing a role in supporting caretaking (RQ 2.b and cross-theme 3). However, recognising a role for the state does not eliminate the need for law and policy to play a role in dealing with the unequal financial consequences on separation of an unequal division of caretaking within intact relationships. In thinking about how law and policy might do this, Chapter 6 suggested that rather than attempt to reconceptualise the ideas of autonomy underpinning family law, law and policy should be guided by a principle of care (RQ 2.a). Chapter 6 therefore contributes to cross-theme 2 by considering how a theoretical understanding of care can be used in a real-world setting. That undertaking is developed in this chapter, which aims to contribute to the current debates around reform of the law on financial remedies on divorce.

7.3 Rethinking financial provision: marriage vs cohabitation

It was suggested in Chapter 6 that the law should retain the flexibility to deal with the unequal financial consequences of caretaking on parental separation. This is both because caretaking is unlikely to be shared equally within all families in the foreseeable future, and because decisions about working patterns are frequently shaped by the perceived needs of the family, rather than individual self-interest. Placing care at the centre of family law means that, where these sorts of decisions have unequal financial consequences, the law should provide redress. There is, however, a question about the sort of redress that should be provided, and whether it should be the same for married and cohabiting parents.

Ultimately, this is a policy decision. Rather than provide a definitive answer, this chapter outlines several options and explains how they can be rationalised in terms of a framework that places care at the centre of family law and policy. For the avoidance of doubt, the discussion that follows only concerns couples with children. Whereas the reforms suggested to s 25 in the next section would apply to all married couples, irrespective of the presence of children, the question of whether there should be a general regime for financial provision for cohabitants

is beyond the scope of this thesis, although remains an area of concern from the perspective of family law reform more generally.

The first option would be to treat all parents of children in the same way and apply the same legal framework. The discussion later in this chapter suggests changes that could be made to the existing legal framework for married couples to place care at its centre. Option one would be to apply the same framework to all parents. This could be justified on the basis that caretaking is valuable to society, and that it carries financial consequences. This approach places caretaking at the centre of family law, by placing the same value on it, regardless of who it is performed by. However, this justification is less straightforward in situations like Erin's. Erin and her partner were never in a relationship. The idea that claims for financial provision should be available for the benefit of a parent in this situation, rather than for the benefit of the child, is radical, although not necessarily incompatible with placing care at the centre of family law. Such an approach might ultimately appear to be a pragmatic one, attributing financial responsibility to a parent that should more properly be borne by the state.[811]

A second option would be to treat parents the same where their relationship functions in the same way as a marriage; for example, where the parties exhibit similar interdependence and make decisions in the interests of a family that may conflict with their own best interests. This option perhaps fits better with the vision of state responsibility outlined in Chapter 6. As Chapter 6 explains, there is a legitimate basis for the state to support caretakers because of the benefit of caretaking to society. This is separate from the responsibility of a partner. In Chapter 6, it was argued that a former partner should continue to have some financial responsibility for the costs of caretaking. This was partly because of the inability of the state completely to address all of these costs. It was also grounded in the interdependent nature of relationships where there are children. Thus, the basis for the financial responsibility of a partner is the combination of caretaking responsibilities and an interdependent relationship in which those responsibilities are divided unequally.

[811] Anna Heenan, 'Causal and Temporal Connections in Financial Remedy Cases: The Meaning of Marriage' (2018) 30 CFLQ 75

This second option raises the question of how to identify cohabiting relationships that function in this way. One solution would be to develop a list of criteria which, if fulfilled, would lead to the regime applying unless a good reason was shown for it not to. In addition to the presence of children, criteria might include, for example, the length of the relationship and the degree of financial interdependence involved in it. The difficulty with this sort of approach is that such objective features are not necessarily a good indicator of when such a regime should apply. It is not difficult to imagine that in abusive relationships, or even in 'uneven couples'[812] where one partner is more committed than the other, it would be much harder to demonstrate the necessary measures of interdependence. Nevertheless, in such cases it is hard to see why the caretaker alone should bear the financial consequences of having children. It is, therefore, suggested that the simplest way of identifying such relationships would be for a regime to apply by default whenever a couple have a child, but with the possibility of arguing for a departure where it can be established that the parties did not have a relationship of interdependence. How widely or narrowly drawn any opt-out should be is a policy decision. On the one hand, there is an argument that the state is the primary beneficiary of the care provided in these cases, and that it should bear the cost. On the other, there is still a question over why it should be the caretaker who is responsible for the financial consequences of having a child, particularly where these consequences exist because the other parent has not undertaken any caretaking responsibilities at all. Greater state support might, however, ameliorate some of these financial consequences.

A third option would be to distinguish between married and cohabiting couples with children, but to provide some protection for them both. There is a difference between married couples and cohabitants, because the former have been through a ceremony of marriage and have actively chosen to enter into a legally recognised relationship. There are, however, difficulties with this distinction. For example, it is not necessarily the case that all married couples appreciate the financial consequences of their union. Conversely, as was reflected in the experiences of some of the participants in this study, a common law marriage

[812] Anne Barlow and Janet Smithson, 'Legal assumptions, cohabitants' talk and the rocky road to reform' (2010) 22 CFLQ 328

myth[813] exists amongst cohabitants, and many fail to understand their lack of legal protection. Once again, these factors illustrate the challenges of using autonomy as a guiding principle of family law.

That said, there is room for a regime that gives some weight to individual autonomy whilst ensuring that a principle of care is at its core. An opt-out regime, for example, places the needs of a caretaker and the parties' children above the freedom of choice of the other partner by making the possibility of financial claims the default. This is particularly important in couples where there is a heightened power disparity, for example in abusive relationships or uneven couples. Placing care at the centre of family law does not preclude any role for autonomy. Rather, it means that the role of autonomy needs to be justified against a principle of care, instead of being a default assumption about the way in which people behave.

Again, the substantive content of a bespoke opt-out regime for cohabitants is a policy decision and, given the complexity of reforming the law for cohabitants, this thesis does not attempt to suggest the form it should take. However, an approach that places care at its centre means that any regime must recognise the financial effects of caretaking. An approach like the limited deferred community regime in Sweden, in which couples have a fixed entitlement to a share of certain property, is unlikely to achieve this. In contrast, the 2007 Law Commission proposals[814] explicitly consider the economic impacts of cohabitation. This scheme, which considers both retained benefit and disadvantage, reflects a compensatory principle that considers the position of both parties. This contrasts with the way in which the principle of compensation is understood to apply to married couples, where only the position of the claimant is relevant.[815] As described in Chapter 2, a more nuanced understanding of compensation that considers the position of both parties is preferable, because it more fully reflects the impact of caretaking on the family unit. Additionally, the discretionary nature of the Law Commission scheme has the benefit of being able to distinguish between different types of cohabiting couple. This offers a greater possibility of attributing financial

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[813] John Curtice, Elizabeth Clery, Jane Perry, Miranda Phillips and Nilufer Rahim (eds) *British Social Attitudes 36* (The National Centre for Social Research, 2019) <https://www.bsa.natcen.ac.uk/media/39363/bsa_36.pdf> accessed 27 September 2019

[814] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007)

[815] *Waggott v Waggott* [2018] EWCA Civ 727

responsibility to a partner on a principled basis, and one which recognises the nature of the relationship, as well as the presence of caretaking responsibilities, rather than being a proxy for state responsibility.

Although the Law Commission proposals rejected financial needs as the basis of their scheme,[816] another alternative might be to develop a regime based on financial needs that both respected a principle of care and provided a principled basis for financial relief. For married couples, the law currently provides redress for needs that are both causally and temporally connected to a parties' relationship.[817] Whereas causal connections 'are concerned with whether a relationship is in some way responsible for creating a financial claim', temporal connections are concerned with 'the time at which the source of the unmet need for which provision is sought arose', and specifically, whether it arose during the relationship.[818] As has been argued elsewhere, this is justified on the basis of the interdependence inherent in marriage. If a distinction is to be drawn between married and cohabiting couples, then one option would be to limit the claims available to cohabitants to those causally connected to the parties' relationship. Financial needs arising from caretaking responsibilities are the paradigm examples of needs that are causally connected to the relationship. Such a regime would therefore place care at its centre.

7.4 Rethinking financial provision for married couples

Having considered how a principle of care might be used to reform the law relating to cohabitants, this section undertakes the same exercise for married couples. Given the topical nature of reform of the law of financial remedies because of the Divorce (Financial Provision) Bill, after considering the principles that should underpin such reform, the chapter goes on to consider an alternative option for reform of the law.

[816] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007)
[817] Anna Heenan, 'Causal and Temporal Connections in Financial Remedy Cases: The Meaning of Marriage' (2018) 30 CFLQ 75
[818] Anna Heenan, 'Causal and Temporal Connections in Financial Remedy Cases: The Meaning of Marriage' (2018) 30 CFLQ 75, 76

7.4.1 The principles underpinning financial remedy reform

As explained in the introduction, the Divorce (Financial Provision) Bill, proposes changes to the law of financial remedies on divorce, which are underpinned by a neoliberal idea of autonomy. Baroness Deech has explained the basis for the Divorce (Financial Provision) Bill as follows:

> Which comes first – equality at work, affordable childcare and flexible working patterns, or reformed spousal support? I agree… that there is "something fundamentally repulsive about the whole idea of dependent women". And I think that it is only when a reformed financial provision and property law based on equality is promoted that women will push for, and achieve better working conditions and more respect. This is what has come about in other jurisdictions with more equal law. I believe that after one more generation there will be nothing controversial about my Bill.[819]

Women in this description (although it would apply equally to caretakers who are men) are seen as rational economic actors who can be encouraged to make better decisions to promote their own self-interest. The findings of this thesis suggest that simply reforming the law of financial provision as the Bill proposes is unlikely to achieve this. In Sweden, where the law is more like that envisaged by Baroness Deech, family law reforms cannot be separated from the wider context of measures designed to achieve gender equality. For example, as was discussed in Chapter 4(i), Sweden has had a system of individualised income tax since 1971, along with a number of policies, such as paid parental leave and well-funded state childcare, designed to enable parents to reconcile work and care. It is not clear that family law reform in the absence of such measures would achieve greater gender equality, nor is it obvious that such measures would naturally follow a change in the law. The example of Sweden also serves to illustrate the pervasiveness of gender norms, even where sustained efforts are made to change them. For example, as was discussed in Chapter 5(i), despite the efforts to achieve gender equality in Sweden, the positions of men and women remain different.

[819] Ruth Deech, 'Financial Provision Reform' [2018] Family Law 1251

The Swedish experience also calls into question whether neoliberal autonomy is an appropriate guiding principle of law reform even in a more gender equal society. As was discussed in Chapter 2, the ideas of financial independence and choice are key elements of neoliberal ideas of autonomy. However, as Chapter 4(iv) discusses, in practice these themes conflict with one another: allowing parents to make the choice to care impacts on their ability to be financially independent on separation. This conflict is epitomised by the discussions around the desirability of cash for care schemes in Sweden (see further Chapter 5(i)).

For these reasons, the reforms suggested by the Divorce (Financial Provision) Bill are problematic. The remainder of this section, therefore, considers an alternative reform inspired by a principle of care. As was discussed in Chapter 6, care is a central part of what families do, and the invisibility of care in family law and policy is crucial in explaining the different financial positions of men and women following separation. Placing a principle of care at the centre of reform does not dictate the form that reform should take. The discussion below considers one option based on a reimagining of s 25 Matrimonial Causes Act 1973 because this provides a contrast with the alternative approach to reforming this section suggested by the Divorce (Financial Provision) Bill. Thus, as in Chapter 6, the principles of care and neoliberal autonomy are contrasted, but this time in the context of reforming the law of financial remedies on divorce.

7.4.2 Why statutory reform?

> The law relating to financial orders is inherently unclear. It is not possible to discern from the statute what the law requires, although the courts and family lawyers administer the law with confidence.[820]

In 2014, the Law Commission identified two key problems with the law of financial provision on divorce: lack of transparency in the law, which was particularly problematic for those without legal advice, and geographical inconsistencies.[821] The Law Commission ultimately eschewed statutory reform in favour of guidance. This was both because of the complexity of statutory reform and because of fears that an amendment might result in a change to, rather than clarification of, the

[820] Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014), Para 2.56
[821] Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014), Para 3.60

way in which the law was interpreted.[822] Whilst agreeing with the Law Commission's conclusions on the advantages of s 25 and the scope for 'tailor-made solutions'[823] to meet the individual needs of different cases, statutory amendment is suggested here for two reasons:

1. To make substantive changes to the law to enable it better to respond to the consequences of caretaking responsibilities; and
2. To help address the problem of transparency identified by the Law Commission, something which is even more important in the post-LASPO world.

7.4.3 Amending s 25

This section sets one option for amending s 25, which is underpinned by the principle of care discussed in Chapter 6. For ease of comparison, Appendix 2 compares this draft with the current incarnation of s 25. The remainder of this chapter explains the reasons for the changes made, and how these changes attempt to meet the dual objectives of reform set out in the preceding section.

> 25 Matters to which court is to have regard in deciding how to exercise its powers under ss. 23, 24 , 24A, 24B and 24E.
>
> (1) In deciding whether to exercise its powers under section 23, 24, 24A, 24B or 24E above, and if so in what manner -
> (a) It shall be the objective of the court to meet the financial needs of the parties and of any children of the family who have not attained the age of 18. First consideration must be given to the welfare while a minor of any child of the family who has not attained the age of eighteen.
> (b) If the resources available exceed the amount required to meet the financial needs of the parties and children of the family who have not yet attained the age of 18, then the court shall have regard to the principles of compensation and sharing in deciding how to divide the parties' assets.

[822] Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014), Para 3.73
[823] Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014), Para 3.62

(2) As regards the exercise of the powers of the court under section 23(1)(*a*), (*b*) or (*c*), 24, 24A, 24B or 24E above in relation to a party to the marriage, the court shall in particular have regard to the following matters when deciding how best to achieve the objectives set out in s 25(1) and 25(1A) —

(a) all 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;

(fx) the caretaking responsibilities which each of the parties has undertaken during the marriage and the likely impact of such caretaking responsibilities on their future financial needs.

(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.

(2A) For the purposes of this section -

'financial needs' means the sum required to meet the housing and income needs of the parties and any children of the family both at the time of the court's determination and in the future. That sum shall be determined in

light of the parties' standard of living during the marriage and such other of the factors set out in s 25(2) as may be relevant.

'compensation' means that where either of the parties has, or is likely to, suffer an economic disadvantage or receive an economic benefit arising from the way in which the parties have conducted their marriage, any financial award should reflect this.

'sharing' means that unless an unequal division of assets is required by the principles of financial needs or compensation, the parties' matrimonial property shall be divided equally between them. The proportions in which non-matrimonial property should be shared between the parties is to be determined by reference to the factors in s 25(2).

'caretaking' means the direct meeting of needs for care of family members.

7.4.4 How does the amended s 25 meet the objectives of reform?

7.4.4.1 Reflecting caretaking

Chapter 6 argued that for the law adequately to deal with the unequal financial consequences of caretaking on separation, a principle of care should be at the centre of law and policy reform. The example of how s 25 could be redrafted above attempts to reconcile this objective with the need for the law to respond to a wide range of circumstances including, for example, cases in which parties do not have children or have caretaking responsibilities to family members other than children. This consideration informs the way in which caretaking features in the redrafted s 25. Rather than being the objective of the section, 'caretaking' is added to the factors to be considered in s 25(2).

As described below, the overarching objective of s 25 is, as within existing case law, to meet needs, or to share or compensate for relationship-generated disadvantage in cases where resources exceed needs. The inclusion of caretaking in s 25(2) is, however, designed to draw attention explicitly to the fact that caretaking creates financial needs that are not necessarily generated by other types of contribution. It is not suggested that the current incarnation of s 25

cannot take account of the costs of caretaking. For example, caretaking responsibilities are likely to impact on the assessment of a party's needs.[824] However, for s 25 to do so adequately requires a full appreciation of what caretaking responsibilities entail. As discussed in Chapters 2 and 5(iii), this sort of understanding appears absent at times in both case law and in the viewpoints of some parents. Thus, the inclusion of caretaking as a separate factor is designed to ensure that it is visible and properly considered in any analysis.

Adopting Tronto's definition,[825] 'caretaking' is defined as 'the direct meeting of needs for care of family members'. This is designed to make clear the difference between the sort of intensive day to day care which has economic ramifications and other forms of care. Additionally, the inclusion of caretaking as a separate factor from contributions is designed to draw attention to the difference between caretaking and contributions more broadly. As explained in Chapter 6, caretaking is different from other contributions because it often continues beyond the end of the relationship. Thus, not only might past economic disadvantage have future effects, but there may continue to be an impact on the ability to engage in paid work into the future.

Caretaking is not limited to the care of children. It might also cover the care of elderly parents or the children of former relationships. This complicates matters: for example, it is perhaps easier to see the consequences of caring for the children of both parties as causally connected to a marriage than the care of one's own elderly parents.[826] However, the variety of different marriages, the interdependence that often characterises them, the extent to which the family is seen as being responsible for caretaking and the economic impact of caretaking for the party who performs it, makes it important for the law to be flexible enough to deal with these different situations.

This focus on caretaking is not designed to eliminate the objective of financial independence altogether. As discussed in Chapter 1, there are important reasons for parties to be able to move on with their lives after divorce. For that reason, it

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[824] s 25(2)(b)
[825] Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993), 106-8
[826] Anna Heenan, 'Causal and Temporal Connections in Financial Remedy Cases: The Meaning of Marriage' (2018) 30 CFLQ 75

is not suggested that the encouragement in the statute to achieve a clean break should be amended.[827] Rather, the aim of making caretaking an explicit factor in s 25(2) is to make clearer the factors that may interfere with the ability to achieve a clean break. This is particularly important for those without legal advice. However, given the increasing moves towards a clean break in practice,[828] and the gendered financial outcomes of divorce,[829] there may also be reason to remind lawyers of this too.

These suggested reforms are, therefore, at odds with the reforms to periodical payments suggested in the Divorce (Financial Provision) Bill. The Bill limits periodical payments to a period:

> … of not more than five years from the date of the decree of divorce, such period not to be exceeded unless the court is satisfied that there is no other means of making provision for a party to the marriage and that that party would otherwise be likely to suffer serious financial hardship as a result.[830]

The amendments suggested here do not specify a time limit for periodical payments. Research demonstrates that joint lives orders are rare.[831] In many cases this is because they are simply unaffordable.[832] However, there remain cases where such orders are appropriate or necessary. The aim of the reform is not to revert to the pre-1984 version of the Matrimonial Causes Act and the minimal loss principle. Neither is it to achieve a situation in which the marital standard of living becomes the benchmark for life after separation. Rather, it is to challenge the underlying assumptions of neoliberal autonomy, which fail to recognise that the ways in which families structure their lives can have ongoing economic ramifications. Rather than seeing financial independence as an abstract goal to be achieved at all costs, the aim of financial provision on divorce

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[827] Matrimonial Causes Act 1973, s 25A

[828] Emma Hitchings and Joanna Miles, 'Financial remedies on divorce: the need for evidence-based reform' (2018) <http://www.nuffieldfoundation.org/sites/default/files/files/briefing%20paper%20Jun%202018%20FINAL.pdf> accessed 18 July 2018

[829] Hayley Fisher and Hamish Low, 'Recovery from divorce: comparing high and low income couples' (2016) 30 International Journal of Law, Policy and the Family 338

[830] S 5(1)(c)

[831] Emma Hitchings and Joanna Miles, 'Financial remedies on divorce: the need for evidence-based reform' (2018) <http://www.nuffieldfoundation.org/sites/default/files/files/briefing%20paper%20Jun%202018%20FINAL.pdf> accessed 18 July 2018

[832] Gillian Douglas, 'Sharing financial losses as well as gains on divorce' (2018) 32 Australian Journal of Family Law 108, 129

should be to achieve a transition to financial independence in a way that recognises context and, in particular, the fact that the decisions made as part of family life may affect individuals' ability to be financially self-sufficient when relationships break down.

7.4.4.2 Making the law more transparent

Before considering the ways in which the amendments above might help to provide a clearer framework for those using the law (both with and without legal advice), it is important to reflect on the limits of what can be achieved by such a reform alone. In the post-LASPO world, there is a very real difficulty in making the law work for those without legal advice. Terms such as 'matrimonial property' are the product of judicial creation[833] and have been the subject of extensive judicial consideration.[834] It is not only complex to try and distil such terms into a statutory definition, but the nature of a common law system is such that case law is crucial to understanding what that definition means in different situations. Short of fundamental systemic change there is, therefore, a limit to what statutory redrafting can achieve in terms of making the law accessible to non-lawyers.

The amended s 25 above is intended primarily as a framework. For lawyers it is intended to codify many of the existing case law principles. As Williams J recently observed, 'although the statutory provisions are straightforward and the over-arching principles outlined by the House of Lords appear designed to make the determination of financial remedy claims less complex, the reality is far removed.'[835] For many litigants in person, guidance on the interpretation of statutory principles will almost certainly still be required. However, it is possible that the explicit inclusion of the objective of meeting needs, discussed further in the next section, might help to clarify the aims of the section, and that the reference to caretaking may help to combat the invisibility of caretaking that appeared in some of the participant accounts in Chapter 5(iii). It would, however, be necessary to conduct research to find out how litigants in person interpret these changes, and how well they understand statutory guidance, as well as how they identify authoritative guidance in the first place.

[833] White *v White* [2000] UKHL 54
[834] See, for example, *Miller v Miller : McFarlane v McFarlane* [2006] UKHL 24, *Charman v Charman* [2007] EWCA Civ 503, *Sharp v Sharp* [2017] EWCA Civ 408 and *IX v IY* [2018] EWHC 3053 (Fam)
[835] *IX v IY* [2018] EWHC 3053 (Fam)

7.4.4.2.1 A clear objective

One of the key criticisms of s 25 from a transparency perspective is the section's lack of a clear objective. Judges applying the statutory checklist in s 25(2) have been likened to a bus driver who is told how to drive a bus but not told its destination.[836] The amended s 25 above includes an explicit objective of meeting needs, with first consideration being given to minor children of the family. It is only where needs are met that the objectives of compensation and sharing come into play.

There are several reasons for making need, compensation and sharing, rather than a principle of care, the objectives of s 25. First and foremost, these principles are already the objective of the law and were found to be working well by the Law Commission's review of this area.[837] As discussed above, the principle of need, which is the only consideration in the vast majority of cases, is flexible enough to take account of the needs arising through caretaking responsibilities. It is also flexible enough to respond to the circumstances of parties without caretaking responsibilities. This is crucial if the law is to remain able to adapt to the position of all couples, including those without caretaking responsibilities.

Douglas has suggested that the law should move away from need and instead focus on the 'disadvantage generated by the *loss of the relationship*'.[838] Whilst a wider concept than relationship generated loss,[839] this appears to be a narrower concept than need in some respects. Under this model not all losses would be remediable; only losses arising from the ending of the relationship and not those arising from structural disadvantage, such as from the way in which paid work and caretaking are divided in society, would be remedied. Significantly, women's lower earnings are seen to be the result of structural disadvantage.[840] The difficulty with this view is that it is not always possible to separate out the extent

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[836] Patrick Parkinson, 'The Diminishing Significance of Initial Contributions to Property' (1999) 13 Australian Journal of Family Law 52, 53, explaining Justice Chisholm's extra-judicial writing on the equivalent Australian statute cited in Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014)
[837] Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014)
[838] Gillian Douglas, 'Sharing financial losses as well as gains on divorce' (2018) 32 Australian Journal of Family Law 108, 123
[839] Gillian Douglas, 'Sharing financial losses as well as gains on divorce' (2018) 32 Australian Journal of Family Law 108, 123
[840] Gillian Douglas, 'Sharing financial losses as well as gains on divorce' (2018) 32 Australian Journal of Family Law 108, 125

to which losses are related to the relationship as opposed to structural factors. Mrs McFarlane,[841] for example, may have been influenced by the expense of childcare and cultural norms of motherhood to give up her career. However, it is not necessarily clear that she would have made the same decision outside of a secure relationship. For a single mother with her earning potential, it would be possible to pay for help with childcare and maintain a career. Given this complexity, automatically excluding such claims has the potential to reintroduce the discrimination that *White*[842] sought to exclude.

The advantage of an approach based upon need is its flexibility to adapt to different circumstances and respond to the very different results of the interdependence arising from different relationships. This does not detract from the challenges of a discretionary system in a world where legal advice is no longer available. The sort of guidance discussed above is one way of dealing with this, but is likely to be an imperfect solution. A more important factor to consider is likely to be how the court process might be reformed to be more accessible to litigants in person. One option would be to introduce a track system, similar to the one that exists in civil cases, with a simplified procedure applying in cases with limited assets or no complicating features. The sorts of features to consider in deciding upon which track should apply might include the value of assets, the complexity of assets, allegations of non-disclosure and international issues. These factors reflect many of the features in the guidance that currently applies to the question of whether a High Court judge should hear a case.[843] These factors could be applied in a different way, for example with different asset thresholds, to decide upon allocation of cases to different tracks with more or less streamlined procedures.

In the model suggested in this chapter, the principles of compensation and sharing are intended to apply only if needs are met. This reflects the position in existing case law[844] and is designed to distinguish the majority of cases from so-called 'big money' cases. In most cases, a division of all assets, matrimonial and

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[841] *Miller v Miller ; McFarlane v McFarlane* [2006] UKHL 24
[842] *White v White* [2000] UKHL 54
[843] Judiciary of England and Wales, 'Statement on the Efficient Conduct of Financial Remedy Hearings Allocated to a High Court Judge Whether Sitting at the Royal Courts of Justice of Elsewhere' <http://www.familylawweek.co.uk/site.aspx?i=xb1743> accessed 26 February 2019
[844] *Charman v Charman* [2007] EWCA Civ 503

non-matrimonial, is required to meet needs. This contrasts with the position taken by the Divorce (Financial Provision) Bill which envisages only the sharing of matrimonial property, discussed further in the next section. The difference arises because of the different assumptions underlying that Bill and the reforms suggested here. The Bill assumes that family members are free to behave as rational economic actors and should, therefore, be held financially responsible for the choices they make. The reforms discussed here reflect a more relational vision of family decision-making, in which people often sacrifice their own self-interest for the good of the family as a whole. Where the financial consequences of those decisions are shared unequally, fairness requires redress. Where there are not enough matrimonial assets to achieve this, the interdependent nature of family life justifies non-matrimonial property being brought into play.

The principles of needs and sharing set out in this section are largely meant to reflect the position in existing case law.[845] Whilst the sharing principle applies to both matrimonial and non-matrimonial property, the proportions in which those different types of property are shared may vary.[846] In shorter marriages there may be greater scope to depart from equal sharing than in longer marriages or marriages with children.[847] Likewise, need is a flexible concept that is interpreted according to context.[848] The principle of compensation is, however, intended to apply slightly differently from the current legal position. Compensation has been held to be only for the '"disadvantage" sustained by the party who has given up a career'.[849] Thus its relevance is in practice limited to professional caretakers, like Mrs McFarlane,[850] who had established careers prior to having children. The difficulty of this view of compensation is that it fails to consider the parties' relationship in the round. A decision that one party will prioritise caretaking and the other breadwinning affects them both. The caretaker is likely to lose out in career terms, whereas the breadwinner is likely to benefit. Even if the breadwinner's career does not reach new heights as a result of the decision to focus on work, this decision may stop them from suffering the career detriment

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[845] Specifically *White v White* [2000] UKHL 54*, Charman v Charman* [2007] EWCA Civ 503 *and Miller v Miller : McFarlane v McFarlane* [2006] UKHL 24
[846] *Charman v Charman* [2007] EWCA Civ 503
[847] See, for example, *Sharp v Sharp* [2017] EWCA Civ 408
[848] Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014), para x
[849] *Waggott v Waggott* [2018] EWCA Civ 727
[850] *Miller v Miller : McFarlane v McFarlane* [2006] UKHL 24

they might have suffered from part-time work to accommodate caretaking responsibilities. The extent to which compensation is relevant will of course be fact-specific. It is also important to think about how compensation might be quantified in different cases; for example in a case like *Miller; McFarlane*[851] it is likely that Mrs McFarlane could have pointed to the career benefit to Mr McFarlane as well as the career detriment to herself. It is, therefore, important to avoid double-counting. However, this broader understanding of compensation is essential if the law is truly to recognise the costs of caretaking for all caretakers and not just those in a very narrow category of professionals with established careers.

7.4.4.2.2 Matrimonial vs non-matrimonial property

One of the most complex issues in trying to codify the law of financial provision on divorce is the distinction between matrimonial and non-matrimonial property. Despite identifying this as an area for reform, the Law Commission felt unable to recommend a reform because of the difficulty in reaching consensus on the issue.[852] The Law Commission justified that decision because '[t]his is an issue that affects only a minority – those whose assets exceed their financial needs.'[853]

The Divorce (Financial Provision) Bill defines matrimonial property as follows:

> (1) In this Act "matrimonial property" means all property and interests in property, including any pension rights, which could be the subject of a pension sharing order or a pension compensation sharing order, belonging to the parties or either of them at the date of the relevant financial order which—
> (a) was acquired—
> (i) during the marriage; and
> (ii) otherwise than by gift, inheritance or succession from a third party; and
> (b) does not directly or indirectly represent property acquired by them or either of them before the marriage.

[851] [2006] UKHL 24
[852] Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014), para 8.14
[853] Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014), para 8.14

In the Bill, it is envisaged that only matrimonial property would be shared between the parties. As described in the preceding section, this view is not favoured by an approach based on care. Could this definition, nevertheless, be adopted in big money cases where the sharing principle applies? It is important to draw a distinction between the definition of matrimonial property and the question of how property considered to be matrimonial and non-matrimonial should be shared. On the definitional question, there are some similarities between this definition of matrimonial property and the composition of community property in Sweden and the Netherlands. For example, as described in Chapter 4(ii), inherited property does not form part of community in the Netherlands. In Sweden the exemption is more restrictive and inherited property must be specified to be separate property. In contrast, case law in England and Wales is complex.[854] There is, therefore, perhaps something to be said for a clear definition of what is and what is not matrimonial property in the statute.

The definitional question is, however, separate from the question of how such property should be shared. Whereas in short, childless marriages like *Sharp v Sharp*[855] there is perhaps a justification for limiting sharing to matrimonial property, this becomes much less evident the more entwined the parties' lives become, for example as they have children or are married for longer. If the law is to retain the non-discriminatory approach set out in *White,*[856] it is suggested that it should remain possible to reflect the constraints on choice that exist in such cases, and the extent to which life circumstances interfere with one's ability to behave as an economically rational neoliberal subject.

In the draft amended s 25 set out above, the distinction between matrimonial and non-matrimonial property would remain relevant only to big money cases: it only appears at all in the definition of the sharing principle, which only applies in cases where assets exceed needs. Given the sheer complexity of the law in this area[857] a statutory definition of matrimonial and non-matrimonial property has not been attempted above. Whilst recognising the advantages of statutory definition, it is ultimately concluded that there is a danger that such a definition might be seen

[854] See for example the discussion in *IX v IY* [2018] EWHC 3053 (Fam)
[855] *Sharp v Sharp* [2017] EWCA Civ 408
[856] *White v White* [2000] UKHL 54
[857] See, for example, *IX v IY* [2018] EWHC 3053 (Fam)

to limit the application of the sharing principle to matrimonial property in all cases. For the reasons set out above, this is undesirable. Guidance of the sort produced by the Family Justice Council in relation to Financial Needs[858] would, however, be very valuable in trying to provide litigants in person (and lawyers) with an overview of the law and worked examples about how it might apply in a variety of different cases.

7.5 Conclusion

It is suggested that the reforms proposed in this chapter are preferable to an alternative approach based on neoliberal autonomy. Such a framework better recognises the way in which caretaking is undertaken within families, and, crucially, retains the ability to adapt to changing circumstances. If, as Deech suggests, gender equality will be achieved in a generation, the draft amended s 25 retains the flexibility to adapt. However, the Swedish experience suggests that gender equality may be elusive, even if concerted societal efforts are made to promote it. For so long as work and care are divided unequally, the law should be able to respond to the needs of caretakers and their children. Caretaking is indispensable to society. Thus, both law and policy should aim support 'responsible families, in which people are able to compromise their place in the world outside the home for the sake of their partners, their children and their elderly or disabled relatives, and can be properly compensated for this if things go wrong'.[859]

[858] Advice Now, 'A survival guide to sorting out your finances when you get divorced' <https://www.advicenow.org.uk/guides/survival-guide-sorting-out-your-finances-when-you-get-divorced> accessed 25 February 2019

[859] Brenda Hale, 'Equality and autonomy in family law' (2011) Journal of Social Welfare and Family Law 3, 12

Appendix 1: Participant overview (omitted)

Appendix 2: Comparison between original and amended Matrimonial Causes Act 1973, s 25

25 Matters to which court is to have regard in deciding how to exercise its powers under ss. 23, 24 [F54F2, 24A, 24B and 24E].

(1) It shall be the duty of the court in In deciding whether to exercise its powers under section 23, 24 [F55, 24A [F56, 24B or 24E]] above, and, if so, in what manner – -

(a) It shall be the objective of the court to have regard to all meet the circumstances financial needs of the case, first parties and of any children of the family who have not attained the age of 18. First consideration being must be given to the welfare while a minor of any child of the family who has not attained the age of eighteen.

(b) If the resources available exceed the amount required to meet the financial needs of the parties and children of the family who have not yet attained the age of 18, then the court shall have regard to the principles of compensation and sharing in deciding how to divide the parties' assets.

(2) As regards the exercise of the powers of the court under section 23(1)(a), (b) or (c), 24 [F57 F5 , 24A [F58F6, 24B or 24E]] above in relation to a party to the marriage, the court shall in particular have regard to the following matters— when deciding how best to achieve the objectives set out in s 25(1) and 25(1A) —

(a) all 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;

(fx) the caretaking responsibilities which each of the parties has undertaken during the marriage and the likely impact of such caretaking responsibilities on their future financial needs.

(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.

(2A) For the purposes of this section -

'financial needs' means the sum required to meet the housing and income needs of the parties and any children of the family both at the time of the court's determination and in the future. That sum shall be determined in light of the parties' standard of living during the marriage and such other of the factors set out in s 25(2) as may be relevant.

'compensation' means that where either of the parties has, or is likely to, suffer an economic disadvantage or receive an economic benefit arising from the way in which the parties have conducted their marriage, any financial award should reflect this.

'sharing' means that unless an unequal division of assets is required by the principles of financial needs or compensation, the parties' matrimonial property shall be divided equally between them. The proportions in which non-matrimonial property should be shared between the parties is to be determined by reference to the factors in s 25(2).

'caretaking' means the direct meeting of needs for care of family members.

Appendix 3: Project information and consent form

Parents (one parent interviewed)

INFORMATION AND CONSENT FORM

RECONSIDERING THE LEGAL DISCONNECT BETWEEN FINANCIAL AND CHILD ARRANGEMENTS ON SEPARATION: IS CARING COMPATIBLE WITH SHARING?

1. What is this project?

This project aims to understand how parents divide financial and childcare responsibilities after they separate. It also aims to understand why parents reach the arrangements they do and what factors influence their decisions. In particular, it aims to understand how influential past patterns of childcare and breadwinning responsibilities are on these decisions. Additionally, this research aims to find out whether there is a link between childcare arrangements and the financial settlements parents reach on separation.

2. Who is conducting this research?

I am a PhD student at the University of Exeter and this research forms part of my PhD. My supervisor is Professor Anne Barlow – a.e.barlow@exeter.ac.uk. This research is funded by the Economic and Social Research Council (ESRC).

I also undertake occasional work as a solicitor but I am conducting this research as a PhD student and will not be able to offer legal advice.

3. What does being part of this study mean for me?

It will involve one interview, either face to face or by telephone, which is likely to last around an hour. I would like to record this interview with your permission.

You can stop the interview at any time and you do not need to answer any questions that you do not wish to answer.

Sections of the transcript of your interview may be published, either in journal articles or elsewhere, following this research. Your real name and the real names of your spouse and children will not be used.

You will receive a £10 Amazon voucher for taking part.

4. Who can I contact for further information?

For further information about the research or your interview data, please contact:

Anna Heenan

Law School
University of Exeter
Amory Building
Rennes Drive
Exeter
EX4 4RJ
UK

acsh201@exeter.ac.uk

If you have concerns/questions about the research you would like to discuss with someone else at the University, please contact:

Professor Anne Barlow

Law School
University of Exeter
Amory Building
Rennes Drive
Exeter
EX4 4RJ
UK

a.e.barlow@exeter.ac.uk

(+44)(0)1392 723159

Further advice and support on these issues can be obtained from:

British Association for Counselling and Psychotherapy (http://www.bacp.co.uk/)

Parent Connection (http://theparentconnection.org.uk/pages/is-this-for-me)

Relate (Relate.org.uk)

Resolution (http://www.resolution.org.uk/)

5. What will happen to my interview data?

Your interview data will be held in accordance with the Data Protection Act.

The information you provide will be used for research purposes and your personal data will be processed in accordance with current data protection legislation and the University's notification lodged at the Information Commissioner's Office. Your personal data will be treated in the strictest confidence and will not be disclosed to any unauthorised third parties. The results of the research will be published in anonymised form and anonymised data may be uploaded to the UK Data Service in accordance with ESRC requirements.

a. Interview recordings

The digital recording of your interview will be deleted as soon as there is an authoritative written transcript of your interview.

b. Interview transcripts and contact details

Interview data will be held and used on an anonymous basis, with no mention of your name, but we will refer to the group of which you are a member.

Your personal and contact details will be stored separately from your interview transcript and may be retained for up to 5 years.

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).

Third parties will not be allowed access to interview tapes and transcripts except as required by law or in the event that something disclosed during the interview causes concerns about possible harm to you or to someone else.

CONSENT

I have been fully informed about the aims and purposes of the project.

I understand that:

- there is no compulsion for me to participate in this research project and, if I do choose to participate, I may withdraw at any stage;
- I have the right to refuse permission for the publication of any information about me;
- any information which I give will be used solely for the purposes of this research project, which may include publications or academic conference or seminar presentations;
- all information I give will be treated as confidential;
- the researcher will make every effort to preserve my anonymity.

..........................………………..……..   ....…………………..……

(Signature of participant)   (Date)

………………………………………   …………………………….……

(Printed name of participant)   (Email address of participant if they have requested to view a copy of the interview transcript.)

..........................……………………..   ....……………………..

(Signature of researcher)   (Printed name of researcher)

One copy of this form will be kept by the participant; a second copy will be kept by the researcher(s).

Your contact details are kept separately from your interview data.

Parents (both parents interviewed)

INFORMATION AND CONSENT FORM

RECONSIDERING THE LEGAL DISCONNECT BETWEEN FINANCIAL AND CHILD ARRANGEMENTS ON SEPARATION: IS CARING COMPATIBLE WITH SHARING?

1. What is this project?

This project aims to understand how parents divide financial and childcare responsibilities after they separate. It also aims to understand why parents reach the arrangements they do and what factors influence their decisions. In particular, it aims to understand how influential past patterns of childcare and breadwinning responsibilities are on these decisions. Additionally, this research aims to find out whether there is a link between childcare arrangements and the financial settlements parents reach on separation.

2. Who is conducting this research?

I am a PhD student at the University of Exeter and this research forms part of my PhD. My supervisor is Professor Anne Barlow – a.e.barlow@exeter.ac.uk. This research is funded by the Economic and Social Research Council (ESRC).

I also undertake occasional work as a solicitor but I am conducting this research as a PhD student and will not be able to offer legal advice.

3**. What does being part of this study mean for me?**

It will involve one interview, either face to face or by telephone, which is likely to last around an hour. I would like to record this interview with your permission.

You can stop the interview at any time and you do not need to answer any questions that you do not wish to answer.

Sections of the transcript of your interview may be published, either in journal articles or elsewhere, following this research. Your real name and the real names of your spouse and children will not be used.

You will receive a £10 Amazon voucher for taking part.

4. Who can I contact for further information?

For further information about the research or your interview data, please contact:

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Parent Connection (http://theparentconnection.org.uk/pages/is-this-for-me)

Relate (Relate.org.uk)

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a. Interview recordings

The digital recording of your interview will be deleted as soon as there is an authoritative written transcript of your interview.

b. Interview transcripts and contact details

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Your personal and contact details will be stored separately from your interview transcript and may be retained for up to 5 years.

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).

Third parties will not be allowed access to interview tapes and transcripts except as required by law or in the event that something disclosed during the interview causes concerns about possible harm to you or to someone else.

CONSENT

I have been fully informed about the aims and purposes of the project.

I understand that:

- there is no compulsion for me to participate in this research project and, if I do choose to participate, I may withdraw at any stage;
- I have the right to refuse permission for the publication of any information about me;
- any information which I give will be used solely for the purposes of this research project, which may include publications or academic conference or seminar presentations;
- all information I give will be treated as confidential;
- the researcher will make every effort to preserve my anonymity.

I also consent to you interviewing my former spouse as part of this project.

....

(Signature of participant) (Date)

....

(Printed name of participant) (Email address of participant if they have requested to view a copy of the interview transcript.)

....

(Signature of researcher) (Printed name of researcher)

One copy of this form will be kept by the participant; a second copy will be kept by the researcher(s).

Your contact details are kept separately from your interview data.

Lawyers

INFORMATION AND CONSENT FORM

RECONSIDERING THE LEGAL DISCONNECT BETWEEN FINANCIAL AND CHILD ARRANGEMENTS ON SEPARATION: IS CARING COMPATIBLE WITH SHARING?

1. What is this project?

This project aims to understand how parents divide financial and childcare responsibilities after they separate. It also aims to understand why parents reach the arrangement they do and what factors influence their decisions.

This research also aims to understand:

a. How childcare and breadwinning responsibilities are divided between parents during relationships and the impact that this has when they separate; and
b. How satisfactory legal professionals consider this to be.

2. Who is conducting this research?

I am a PhD student at the University of Exeter and this research forms part of my PhD. My supervisor is Professor Anne Barlow – a.e.barlow@exeter.ac.uk. It is funded by the Economic and Social Research Council (ESRC).

I also undertake occasional work as a solicitor but I am conducting this research as a PhD student.

3. What does being part of this study mean for me?

It will involve one interview, either face to face or by telephone, which is likely to last around an hour. I would like to record this interview with your permission.

You can stop the interview at any time and you do not need to answer any questions that you do not wish to answer.

Sections of the transcript of your interview may be published, either in journal articles or elsewhere, following this research. Your real name will not be used.

4. Who can I contact for further information?

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a. Interview recordings

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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).

Third parties will not be allowed access to interview tapes and transcripts except as required by law or in the event that something disclosed during the interview causes concerns about possible harm to you or to someone else.

CONSENT

I have been fully informed about the aims and purposes of the project.

I understand that:

- there is no compulsion for me to participate in this research project and, if I do choose to participate, I may withdraw at any stage;
- I have the right to refuse permission for the publication of any information about me;

- any information which I give will be used solely for the purposes of this research project, which may include publications or academic conference or seminar presentations;
- all information I give will be treated as confidential;
- the researcher will make every effort to preserve my anonymity.

....

(Signature of participant) (Date)

…………………………………… ………………………………..……

(Printed name of participant) (Email address of participant if they have requested to view a copy of the interview transcript.)

.............................………………….. ....………………..

(Signature of researcher) (Printed name of researcher)

One copy of this form will be kept by the participant; a second copy will be kept by the researcher(s).

Your contact details are kept separately from your interview data.

Appendix 4: Certificate of Ethics Approval

COLLEGE OF SOCIAL SCIENCES AND INTERNATIONAL STUDIES

Amory Building
Rennes Drive
Exeter UK EX4 4RJ

www.exeter.ac.uk/socialsciences

CERTIFICATE OF ETHICAL APPROVAL

Academic Unit: Law School

Title of Project: Reconsidering the Legal Disconnect between Financial and Child Arrangements on Separation: Is Caring Compatible with Sharing?

Research Team Member(s): Anna Heenan

Project Contact Point: acsh201@exeter.ac.uk

This project has been approved for the period

From: 30th June 2016
To: 15th November 2018

Ethics Committee approval reference: 201516-104

Signature:

Date: 29th June 2016

(Lise Storm, Chair, SSIS College Ethics Committee)

Appendix 5: Interview guides

Parents

Interview Schedule

Introduction

Thank you for agreeing to speak with me today. Do you have any questions for me before we start?

I just want to remind you about a couple of things in the consent form.

- You don’t have to answer any questions you don't want to.
- You can stop the interview at any time.
- The interview is being recorded but you can stop the recording at any time.

Everything you tell me will be completely anonymous. You won’t be identified and I will not pass on any personal information about you or your family to anyone else.

The interview will take around an hour.

Section A: Introduction

1. *I’d like to start by finding out a little bit more about the background if that’s ok? When did you separate and what happened?*

Prompts

- Were you married or cohabiting?
- How long ago did you separate?
- How many children / ages / children of both of you?

Section B: Your experiences of making arrangements for your children and dividing your finances

Children

2. *Could you tell me a bit about the arrangements you reached for your children when you separated?*

Prompts

- How many nights do they spend with each of you?
- How are holidays divided?
- How do you deal with practicalities?
  - School picks ups / drop offs?
  - Buying clothing / school uniforms etc
  - Doctor / dentist appointments etc

3. *Could you tell me about how you found it adapting to these arrangements?*

Prompts

- How did they compare with the arrangements in place beforehand?
- How old were children at separation compared with how old are they now?
- How do your working hours compare pre and post separation? Did you both work and do you now?

4. *Something I am interested in is how easy or difficult it is for parents to balance work and family responsibilities. Has this been an issue for you?*

   Prompts

- What difficulties have you faced?
- Are they better or worse post-separation?
- Who cares for the children while you are at work?
- How important is informal care? E.g. grandparents, friends etc?

5. *And can I ask you how this compares to the situation when you and your partner were together?*

Prompts

- Did you both work?
- How important was informal care?
- Did you take parental leave when children were born?
- Did you want to work part-time at any stage? Was this possible?

Finances

6. *I'd like to move on to the financial side of things if that's ok? Could you tell me a bit about how you and your partner divided up your assets when you separated?*

Prompts:

- Did you and your partner share details of your financial circumstances before you reached an agreement?
- Do you feel you have a good overview of what the assets were? Why / why not?
- What assets were there e.g. house, other assets, income, pensions?
- Values?
- Income etc?
- What did you each come out of the relationship with?

7. *Just out of interest, how did your finances work when you were together?*

Prompts

- Did you have a joint account?
- Did you share all expenses equally?
- Pre-nups?

8. *Is either of you paying any maintenance?*

Prompts

- What is the maintenance for? Children or partner or both?
- Why / why not?
- How did you agree the amount? E.g. were there trade offs etc?

Nature of arrangements

9. *How did you and your partner decide on childcare arrangements and the division of finances?*

Prompts

- Legal advice? Online resources etc?

10. *What do you think were the most important factors in the arrangements you reached?*

Prompts

- Which of these factors was most important when it came to the children?
- What about the finances?
- Did you ever consider the legal background?
- Did you consider e.g. needs? Contributions? Caring responsibilities? Equality?

11. *Do you think there was any connection between your financial agreement and the arrangements reached for the children?*

12. *Do you think the arrangements you reached were fair?*

Prompts

- Why / why not?
- Is that the case for both the arrangements for the children and the financial arrangements?
- How has it affected your financial position? What about your partner's?

<u>Section C: What factors are important in reaching settlements</u>

I'd like to ask your views on the sorts of factors that are important when parents separate more generally.

13. *What do you think are the most important factors when it comes to making arrangements for children when parents separate?*

Prompts

- Children's views?
- The importance of both parents playing a role?
- The status quo (the way that parents divided caring responsibilities before separation)?
- Equality?

14. *What do you think are the most important factors when it comes to dividing finances when a relationship ends?*

Prompts

- Who earned the money?
- Whether either party brought money into the relationship?
- What each party needs to start again?
- How each party has behaved?
- Whether parents are married?

15. *And do you think that caring responsibilities and financial responsibilities should be given the same value when it comes to dividing assets on divorce?*

Prompts

- Why? Why not?

16. *And what about when it comes to making the arrangements for children?*

17. *What do you think about the idea of one partner paying maintenance to another?*

Prompts

- Should they have to?
- Why?
- For spouse? Children?
- Do you think there should be a time limit?
- How should the amount be calculated?

<u>Section D: Scenarios[860]</u>

So in the final sections I'd like to ask your opinion on some scenario questions.

Could I ask you for your thoughts on the following?

18. *What sort of arrangement do you think might work best for the children here?*

19. *[Working parent] wants a shared care arrangement and feels that [Primary carer] should look to return to work full-time. What do you think about this?*

20. *How do you think the parents should divide up their assets here? Why?*

21. *Do you think any maintenance should be paid here?*

Prompts

- Should maintenance be paid for partner / children / both?
- For how long?
- How much?

[860] The scenarios are set out in the final section of this appendix

- [If answers are justified on the basis that parties are not married, ask what difference it would make if they were married?]

22. *Would it make any difference to your answer to either of the scenario questions if the genders of the couple were reversed?*

That concludes everything that I wanted to ask you, but is there anything else you wanted to tell me or you think that I should know?

Thank you very much for your help.

Lawyers: Sweden

Interview Schedule: Sweden Family Lawyers

Section A: Introduction

Introduction

1. *Could you start by giving me a bit of an overview of your practice?*

Prompts

- How many lawyers?
- Approximately what percentage of your work is in family law?
- What sort of clients? E.g. asset base, business or private client etc

2. *And could you tell me a little bit about your own experience?*

Prompts

- How long have you been practising in family law?
- What sort of family law work do you spend most of your time doing?
- How common is it for you to advise registered partners as compared with married couples?

3. *How are most of your cases resolved?*

Prompts

- Mediation
- Court hearing
- Between the parties
- others

4. *What do you think are the biggest issues relating to divorce and financial settlements reached on divorce at the moment?*

Prompts:

- Pension sharing?
- Alimony?
- Scope of community (e.g. whether to include pre-owned assets)?

Section B: Family Law in Sweden

5. *So that I can get a better idea of how the law in Sweden deals with dividing assets on divorce, please could you talk me through the advice that you would be likely to give in each of the following situations?*[861]

[861] The scenarios are set out in the final section of this appendix

Prompts

- Process
    - How would the different elements of community of property / maintenance / child maintenance and child arrangements be dealt with? E.g. would you deal with all aspects or would a notary deal with the dissolution of the community, for example?

- Community of property
    - What would happen in relation to the house?
    - If either couple had come to see you before they started living together, would you have advised them to make an agreement?

- Maintenance / alimony
    - What arrangements might be made to ensure an income for the primary carer and the children?
    - Is it likely that they would be made here?
    - What is the impact, if any, of social security on this situation?

- Child maintenance
    - What arrangements might be made in relation to child maintenance here?
    - How would this differ if there was a shared care arrangement / the child lived with both parents?

- Arrangements for the children
    - What sort of arrangement would you advise for the children here?
    - What if [working parent] wanted a shared care arrangement?

- Do you think the arrangements in terms of community and maintenance that you have just outlined are fair?
    - Do you think the financial arrangements would meet their needs?
    - Would the parents be equally placed to start again? Should they be?
    - What should the law aim to achieve in financial terms? E.g. meeting needs / reflecting the sums each party has contributed etc?

Community of property

6. *How common is it for people to make marital property agreements?*

Prompts:

- Approximately how many people seek your advice on this issue every year?
- What are the typical terms? For example, is it common for all property to be held separately?
- What sort of clients are most likely to opt out of the default regime? E.g. substantial assets, business assets, children, second marriages etc

7. *Do you think deferred community is a good system?*

Prompts:

- Why / why not?

- Advantages / disadvantages
- Impact on childcarer / breadwinner?

8. *Would you reform deferred community and, if so, how?*

Maintenance / Alimony

9. *How common is it for alimony to be paid in practice?*

Prompts:

- In approximately what percentage of your cases is it paid?
- How long does it tend to be paid for?
- How does this fit with payment of child maintenance?

10. *How satisfactory is the law on maintenance?*

Prompts:

- Paid too often / not often enough?
- Too much / too little
- Too long / too short a term
- How is the amount of maintenance calculated?

11. *Does spousal maintenance favour mothers or fathers? Why?*

12. *Would you reform the law? How?*
    a. *E.g. what factors should be used to calculate the amount of maintenance?*
        i. *Needs*
        ii. *Ability to pay*
        iii. *Standard of living during the marriage*

13. *Do you think that the absence of spousal maintenance means that child maintenance becomes more contentious?*

Pensions

14. *How much of an issue are spouse's pensions on divorce?*

15. *How do you generally deal with pensions?*
    a. *What are the differences between occupational pensions, the state pension and private pensions?*

16. *How satisfactory is the law on pensions?*

Children

17. *What are the most common arrangements for parents to make in relation to their children?*

Prompts:

- How common is shared care?
- Is this good / bad?

18. Do you think that the law is in need of reform?

Prompts:

- Why / why not?
- How?

Section C: Attitudes and reforms

19. What financial responsibilities do you think people owe to each other at the end of a marriage?
   a. To divide their assets fairly?
   b. To meet financial needs? If so, what about needs not generated by the relationship?
   c. To support one another to become financially independent?
   d. To continue the standard of living enjoyed during the marriage?

20. Is this the same or different when people are cohabiting?

Prompts

- Is length of cohabitation important?
- Presence of children?

21. Do you think that caring responsibilities and financial responsibilities should be given the same value when it comes to dividing assets on divorce?

Prompts

- Why / Why not?

22. And what about when it comes to making the arrangements for children?

23. Do you think Swedish law is fair to both mothers and fathers?

Prompts

- Why / why not?
- Should it be?

Lawyers: Netherlands

Question schedule: Netherlands Lawyers

Section A: Introduction

Introduction

1. *Could you start by giving me a bit of an overview of your practice?*

   Prompts
- How many lawyers?
- Approximately what percentage of your work is in family law?
- What sort of clients? E.g. asset base, business or private client etc

2. *And could you tell me a little bit about your own experience?*

   Prompts

- How long have you been practising in family law?
- What sort of family law work do you spend most of your time doing?
- How common is it for you to advise registered partners as compared with married couples?

3. *How are most of your cases resolved?*

   Prompts
- Mediation
- Court hearing
- Between the parties
- Others

4. *What do you think are the biggest issues relating to divorce and financial settlements reached on divorce at the moment?*

   Prompts:

- The default community of property regime
- The desire to keep cases out of the courts
- Alimony / the TREMA guidelines
- Online dispute resolution
- Other

Section B: Family Law in the Netherlands

5. *So that I can get a better idea of how the law in the Netherlands deals with dividing assets on divorce, please could you talk me through the advice that you would be likely to give in each of the following situations?*[862]

Prompts

[862] The scenarios are set out in the final section of this appendix

a. Process
   - How would the different elements of community of property / maintenance / child maintenance and child arrangements be dealt with? E.g. would you deal with all aspects or would a notary deal with the dissolution of the community, for example?

b. Community of property
   - What would happen in relation to the house?
   - If either couple had come to see you before they married / entered into a registered partnership, would you have advised them to opt out of the default regime?
   - [Question 1 only] What difference would it make if the parties were not in a registered partnership?

c. Reform of community
   - What difference would the new community of property scheme being introduced in January 2018 make to the outcome here?

d. Maintenance / alimony
   - What arrangements might be made to ensure an income for the primary carer and the children?
   - Is it likely that they would be made here?
   - What is the impact, if any, of social security on this situation?

e. Child maintenance
   - What arrangements might be made in relation to child maintenance here?
   - How would this differ if there was a shared care arrangement / the child lived with both parents?

f. Arrangements for the children
   - What sort of arrangement would you advise for the children here?
   - What if [working parent] wanted a shared care arrangement?

g. Do you think the arrangements in terms of community and maintenance that you have just outlined are fair?
   - Do you think the financial arrangements would meet their needs?
   - Would the parents be equally placed to start again? Should they be?
   - What should the law aim to achieve in financial terms? E.g. meeting needs / reflecting the sums each party has contributed etc?

Community of property

6. *How common is it for people to opt out of the default community of property regime?*

   Prompts:

- Approximately how many people seek your advice on this issue every year?
- Approximately how many of those opt out of the default regime?
- What sort of clients are most likely to opt out of the default regime? E.g. substantial assets, business assets, children, second marriages etc

7. *I understand that it is possible for the court to deviate from community of property in special circumstances and the principles of reasonableness and fairness require it. Have you ever had a case where this has happened?*

   Prompts:
- When?
- What were the circumstances? E.g. need, because someone paid in more etc?

8. *Do you think universal community of property is a good system?*

   Prompts:
- Why / why not?
- Advantages / disadvantages
- Impact on childcarer / breadwinner?

9. *Would you reform the default community of property regime and, if so, how?*

   Prompts:

- How do the new reforms work?
- What do you think of them?

Maintenance / Alimony

10. *How common is it for alimony to be paid in practice?*

    Prompts:
- In approximately what percentage of your cases is it paid?
- How long does it tend to be paid for?
- How does this fit with payment of child maintenance?
- How are the TREMA standards used in practice?
    - Are they used in all cases?
    - Are they often departed from?
    - Can you talk me through an example of a recent case in which they were used?

11. *How satisfactory is the law on maintenance?*

    Prompts:
- Paid too often / not often enough?
- Too much / too little
- Too long / too short a term
- What do you think of the TREMA guidelines?

12. *Does spousal maintenance favour mothers or fathers? Why?*

13. *Would you reform the law? How?*
    a. *E.g. what factors should be used to calculate the amount of maintenance?*
        i. *Needs*
        ii. *Ability to pay*
        iii. *Standard of living during the marriage*

Children

14. *What are the most common arrangements for parents to make in relation to their children?*

Prompts:

- How common is shared care?
- Is this good / bad?

15. *Do you think that the law is in need of reform?*

Prompts:

- Why / why not?
- How?

<u>Section C: Attitudes and reforms</u>

16. *What financial responsibilities do you think people owe to each other at the end of a marriage?*
    a. *To divide their assets fairly?*
    b. *To meet financial needs? If so, what about needs not generated by the relationship?*
    c. *To support one another to become financially independent?*
    d. *To continue the standard of living enjoyed during the marriage?*

17. *Is this the same or different when people are cohabiting and not in a registered partnership?*

Prompts

- Is length of cohabitation important?
- Presence of children?

18. *Do you think that caring responsibilities and financial responsibilities should be given the same value when it comes to dividing assets on divorce?*

Prompts

- Why / Why not?

19. *And what about when it comes to making the arrangements for children?*

20. *Do you think Dutch law is fair to both mothers and fathers?*

Prompts

- Why / why not?
- Should it be?

Scenario questions

In Sweden and the Netherlands scenario A was used in all interviews. As explained in chapter 3, in England and Wales, half of the participants were given scenario A and half were given scenario B. Where possible, those in similar situations (e.g. married female primary caretakers) were given different scenarios.

Scenario A

Scenario 1

David and Jane are in their mid-30s. They have been cohabiting[863] for 15 years and have recently separated. They have three children, aged 2, 4 and 6. Since the second child was born, David has worked part-time hours that allow him to do school and nursery drop offs and picks up every day.

David has only been back at work around 6 months and earns around £8,000 a year as a carer. Jane works full-time, earning £30,000 a year. They have a house, owned in joint names, which has a net equity of around £250,000. In addition, Jane has savings of £15,000. David has no assets in his sole name.[864]

[Sweden only] David and Jane do not have a cohabitation agreement.

[Netherlands only] David and Jane have adopted (by choice or by default) the default community regime.

Scenario 2

Emma and Jonathan are in their mid-forties with three children, the eldest is 12 and there are[865] twins aged 10. They separated 6 months ago[866] after being married for 20 years and are currently trying to agree the arrangements for their children and to divide their finances. The main asset is a house with a net equity of £400,000.[867]

Until separation, Emma did not work and looked after the children. Jonathan took a month's parental leave after the birth of each child but then returned to work. Emma worked in an administrative role until their first child was born, earning around £30,000 per annum. She returned to work after the first child was born but gave up work after the twins were born when it was agreed that they should

[863] In the Netherlands version of this scenario the parties are said to be in a registered partnership. A registered partnership is equivalent to marriage whereas unmarried cohabitants have no claims against one another. The intention was to find out more about registered partnerships which, for heterosexual couples, had no equivalent in Swedish or English law when research was conducted.
[864] In the Swedish version of this scenario, the figures given were SEK 80,000, 300,000, 2,500,000 and 150,000 respectively. In the version of this scenario used in the Netherlands, the figures were €8,000, €30,000, €250,000 and €15,000 respectively.
[865] In the Swedish version of this scenario, the words 'there are' were replaced by 'they have'.
[866] In both the Swedish and Netherlands versions of this scenario, the sentence says that they have recently separated.
[867] In the Swedish version of this scenario, the figure for the net equity was SEK 400,000. In the version of this scenario used in the Netherlands the figure for the net equity was €400,000

focus on Jonathan's career. Jonathan works in the City and is currently earning £100,000 plus bonuses of up to £150,000.[868]

[Sweden only] Emma and Jonathan do not have a marital property agreement.

[Netherlands only] Emma and Jonathan have adopted (by choice or by default) the default community regime.

Scenario B

Scenario 1

David and Jane are in their mid-30s. They have been cohabiting for 15 years and have recently separated. They have three children, aged 2, 4 and 6. Since the second child was born, Jane has worked part-time hours that allow her to do school and nursery drop offs and picks up every day.

Jane has only been back at work around 6 months and earns around £8,000 a year as a carer. David works full-time, earning £30,000 a year. They have a house, owned in joint names, which has a net equity of around £250,000. In addition, David has savings of £15,000. Jane has no assets in her sole name.

Scenario 2

Emma and Jonathan are in their mid-forties with three children, the eldest is 12 and there are twins aged 10. They separated 6 months ago after being married for 20 years and are currently trying to agree the arrangements for their children and to divide their finances. The main asset is a house with a net equity of £400,000.

Until separation, Jonathan did not work and looked after the children. Emma took a month's parental leave after the birth of each child but then returned to work. Jonathan worked in an administrative role until their first child was born, earning around £30,000 per annum. He returned to work after the first child was born but gave up work after the twins were born when it was agreed that they should focus on Emma's career. Emma works in the City and is currently earning £100,000 plus bonuses of up to £150,000.

[868] In the Swedish version of this scenario, the figures given were SEK 300,000 1,000,000 and 1,500,000 respectively. In the version of this scenario used in the Netherlands, the figures given were €30,000, €100,000 and €150,000 respectively.

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