Contemporary Issues in Family Law in England and Wales

1

Rosemary Hunter

Introduction

Although the United Kingdom is a unified jurisdiction for many purposes, this is not the case for family law. Both Scotland and Northern Ireland have their own separate systems of family law. This chapter therefore focuses on family law in England and Wales.

The following discussion of key issues facing family law in England and Wales is organised around four of the themes identified by the editors of this volume: marriage, family finances, family violence and neglect, and autonomy and family law. I have added divorce alongside marriage, as divorce has, somewhat surprisingly, recently re-emerged as an area of contestation in this jurisdiction. I have also introduced a fifth theme – access to justice – as this is one of the major issues currently facing the family law system in England and Wales.

The other themes identified by the editors appear as cross-cutting issues throughout the discussion. Cultural and religious diversity is an issue having a particular impact on marriage and divorce. Informal relationships are a particular issue in relation to family finances. Human rights and child arrangements on separation appear particularly in relation to family violence and neglect, and human rights have also been raised in the context of marriage and access to justice. Finally, gender issues are pervasive in family law and appear throughout the discussion.

Marriage and Divorce

This section introduces four contemporary controversies concerning marriage and divorce in England and Wales. Although the law in these areas is well established, concerns about its operation have led to calls for reform. These are based, first, on perceptions that the law is out of date, as is the case with the formalities required for a valid marriage, and the grounds for

https://doi.org/10.1017/9781316711750.002 Published online by Cambridge University Press

divorce. Second, there are concerns that the law produces injustice for particular groups, as is the case with civil partnerships and the granting of religious divorces by sharia councils. Two of these issues – civil partnerships and grounds for divorce – involve the substantive law, while the other two relate to procedural aspects.

The Future of Civil Partnerships

Civil partnerships were introduced in England and Wales in 2005 in response to pressures for the formal recognition of same-sex relationships. The Civil Partnership Act 2004 provided a same-sex alternative to marriage, which substantially mirrored the legal provisions relating to marriage and produced a status that amounted to 'marriage in all but name'.[1] The lack of the name of marriage, however, remained symbolically significant. While many same-sex couples entered civil partnerships,[2] campaigners continued to argue that equality for gay men and lesbians required access to marriage on the same terms as heterosexual couples, and that a separate status could never be equal.[3] In 2013, the Coalition government passed the Marriage (Same Sex Couples) Act, which amended the Matrimonial Causes Act 1973 to remove the former requirement that, for a valid marriage, the parties had to be respectively male and female.[4] Those who had entered civil partnerships since 2005 were given the option of remaining in a civil partnership or converting their civil partnership to marriage.[5]

This left the question of the future of civil partnerships – should they be phased out, or remain available as an alternative to marriage? So long as they remained available, same-sex couples had two options for formalising their relationships, whereas heterosexual couples only had the option of marriage. This, in turn, led to calls for civil partnerships to be opened up to heterosexual couples, on grounds of equality, and on the basis that some heterosexual couples might prefer the more 'modern' status of civil

[1] *Wilkinson* v. *Kitzinger* [2006] EWHC 2022 (Fam) [88] (Potter P.).

[2] From 21 December 2005 until the end of 2016, almost 65,000 civil partnerships were formed in England and Wales: Office of National Statistics, *Civil Partnerships in England and Wales: 2016* (2017), figure 1.

[3] See e.g. *Wilkinson* v. *Kitzinger* [2006]; and the website of the Equal Love campaign: http://equallove.org.uk

[4] Matrimonial Causes Act 1973, s. 11(c), repealed by the Marriage (Same Sex Couples) Act 2013, Sched. 7, cl. 27.

[5] Marriage (Same Sex Couples) Act 2013, s. 9.

partnership, one which was not heavily freighted with gendered expectations and patriarchal tradition.[6]

In early 2014 the government conducted a review of civil partnerships. The consultation received a large number of responses to an online survey setting out options for the future. Only one third of respondents thought civil partnerships should be abolished, just over half thought civil partnerships should continue to be available in the future, but over three quarters thought civil partnerships should not be extended to heterosexual couples.[7] The demographics of respondents, however, were highly unrepresentative, with almost 60 per cent aged 55 or over.[8] Religious objections to providing heterosexual couples with an alternative to marriage also featured prominently among narrative responses.[9] The government decided to make no immediate changes and to 'wait and see' what proportion of civil partnerships would be converted to marriages.[10] Waiting and seeing would not, of course, provide any indication of the level of demand for heterosexual civil partnerships.

That demand was pursued by a heterosexual couple, Rebecca Steinfeld and Charles Keidan, who brought an action under the Human Rights Act 1998, arguing their inability to enter a civil partnership constituted discrimination in the enjoyment of their rights to family life under articles 8 and 14 of the European Convention on Human Rights.[11] As described by Arden LJ, Ms Steinfeld and Mr Keidan:

> are a young couple in a committed long-term relationship. They wish to formalise their relationship, but they have deep-rooted and genuine ideological objections to marriage based upon what they consider to be its historically patriarchal nature. They consider that the status of civil partnership would reflect their values and give due recognition to the equal nature of their relationship.[12]

All three Court of Appeal judges found that the bar on civil partnerships did constitute discrimination against heterosexual couples. However, two of the three (Arden LJ dissenting) considered that maintenance of that discriminatory position was currently justified as the government continued

[6] See e.g. equalcivilpartnerships.org.uk, especially equalcivilpartnerships.org.uk/why-does-it-matter

[7] Department for Culture, Media and Sport, *Civil Partnership Review (England and Wales): Report on Conclusions* (2014), 8–11.

[8] *Ibid*., 24. [9] *Ibid*., e.g. 9, 12. [10] *Ibid*., 21.

[11] *Steinfeld and Keidan* v. *Secretary of State for Education* [2017] EWCA Civ 81.

[12] *Ibid*. [5].

https://doi.org/10.1017/9781316711750.002 Published online by Cambridge University Press

to evaluate the ongoing viability of civil partnerships. However, they warned that the government's 'wait and see' policy could not continue indefinitely, and the discrimination must be eliminated 'within a reasonable timescale'.[13] In the meantime, private member's bills were introduced into Parliament in July 2016 and again (following the 2017 general election) in July 2017, which would extend the Civil Partnership Act to heterosexual couples.[14] Finally, after defeat in the Supreme Court on the question of justification,[15] the government announced in October 2018 that heterosexual couples will be granted access to civil partnerships.

No-Fault Divorce

Unlike many other western countries, England and Wales has never managed to eliminate complaints of marital fault from its divorce law. The Matrimonial Causes Act 1973 provides for a single ground for divorce, that 'the marriage has broken down irretrievably'.[16] However, irretrievable breakdown must be evidenced by one of five possible facts, three of which are fault-based: adultery, unreasonable behaviour or desertion.[17] The other two facts are based on separation: two years' separation if both parties consent to the divorce, or five years' separation if one of the parties does not consent.[18] The consequence is that the fault-based facts allow for a much quicker divorce than the separation facts, which has advantages, for example, in relation to the finalisation of the parties' financial affairs.[19] In practice, the largest proportion of divorce petitions are based on unreasonable behaviour.[20] An attempt to reform the law in the mid 1990s, among other things to remove any requirement to make allegations of fault, failed for a variety of reasons.[21]

[13] *Ibid.* [161] (Beatson LJ).

[14] Civil Partnership Act 2004 (Amendment) Bill 2016–17, Civil Partnership, Marriages and Death (Registration Etc.) Bill 2017–19, introduced by Tim Loughton MP.

[15] R *(on the application of Steinfeld and Keidan)* v. *Secretary of State for International Development* [2018] UKSC 32.

[16] Matrimonial Causes Act 1973, s. 1(1).

[17] *Ibid.*, s. 1(2)(a), (b), (c).

[18] *Ibid.*, s. 1(2)(d), (e).

[19] This not only facilitates the parties moving on with their separate lives, but also has tax advantages.

[20] Office of National Statistics, *Divorces in England and Wales: 2016*, 6.

[21] Family Law Act 1996, Part II. The legislation was enacted but never brought into force and was eventually repealed. See e.g. H. Reece, *Divorcing Responsibly* (Oxford: Hart, 2003); C. Fairbairn, *No-Fault Divorce* (House of Commons Library Briefing Paper No. 01409, 2017) 10–13.

While lawyers and divorcing parties have to some extent learned to live with the peculiarities of the current divorce law, it does have several undesirable consequences. First, it creates perverse incentives to invent or massage facts to meet the legal requirements. Allegations are taken at face value unless the other party contests them (which occurs only rarely).[22] Where the parties are agreed in wanting a divorce, the construction of the divorce petition almost inevitably involves some level of collusion in arriving at a mutually liveable statement of alleged fault on the part of one of the parties.[23] Indeed, in the case of *Ripisarda* v. *Colladon*, the court held that perjury as to the court's jurisdiction to grant a divorce would render the divorce void, but perjury as to the basis for granting a decree would not suffice to make a divorce decree void on the basis of fraud.[24]

Second, there is a risk, albeit a small one, that the facts alleged will not be considered by the court to constitute a sufficient basis to establish that the marriage has broken down irretrievably. In the recent high-profile case of *Owens* v. *Owens*, the Supreme Court upheld a judge's refusal to grant a divorce on the basis that, although it was clear the parties' marriage had completely broken down, the facts alleged in the wife's divorce petition lacked substance and did not reveal behaviour which the wife could not reasonably be expected to live with.[25]

Third, the requirement to allege fault in order to obtain a timely divorce undermines efforts otherwise made to encourage parties to determine post-separation arrangements amicably and cooperatively in their own interests and those of their children. As discussed below, there is a strong policy emphasis in England and Wales on parties resolving post-separation matters between themselves without resort to court or even lawyers. By contrast, the need for one party to blame the other for the breakdown of the marriage can exacerbate tensions and lead to animosity and adversarialism. In light of this, lawyers generally attempt to 'tone down' the allegations in a divorce petition so as to avoid as far as possible giving offence to the other side. But a fine line must be trodden between minimising offence and minimising the risk of a petition

[22] Fewer than 2 per cent of divorces are contested: L. Trinder, D. Braybrook, C. Bryson, L. Coleman, C. Houlston and M. Sefton, *Finding Fault? Divorce Law and Practice in England and Wales: Full report* (London: Nuffield Foundation, 2017) 56, n. 120. See also L. Trinder and M. Sefton, *No Contest: Defended Divorce in England and Wales* (London: Nuffield Foundation, 2018).

[23] Trinder *et al.*, *Finding Fault?*, 38–72.

[24] *Ripisarda* v. *Colladon: in the matter of 180 irregular divorces* [2014] EWFC 35.

[25] *Owens* v. *Owens* [2018] UKSC 41.

https://doi.org/10.1017/9781316711750.002 Published online by Cambridge University Press

being rejected.[26] Furthermore, limitations on the availability of legal aid, as also discussed below, mean that more parties are left to formulate divorce petitions without the assistance of lawyers to negotiate the minefield of fault.

As a consequence, there have been persistent calls for divorce law reform in recent years from a range of family justice system actors, including judges, practitioner organisations, academics and politicians.[27] In September 2018 the government finally responded with a consultation on divorce reform, packaged as a measure to 'reduce family conflict'.[28] Arguably, however, there is no need for further consultation, which merely introduces more delay when the case for reform is already compelling.[29]

In the meantime, changes are being effected from a different direction, with an emphasis on efficiency rather than justice. A major review of the family justice system in 2011 argued that scarce judicial time was wasted on reviewing divorce petitions, which could be done more efficiently by court administrators.[30] In response, the handling of routine divorce petitions has been centralised to a small number of courts, where they are dealt with by legal advisers who conduct minimal scrutiny as to the sufficiency of alleged facts.[31] Further, forthcoming digitisation of the divorce process as part of the 'courts modernisation' programme will mean that divorce petitions are completed and lodged online. Although the online system is still being designed, it is intended to be more than simply an electronic version of the current divorce petition. How – or whether – allegations of fault will survive the digital revolution will soon be revealed.

Marriage Formalities

Another anachronistic element of English and Welsh divorce law are the steps required to create a valid marriage. An ongoing legacy of the fact that England and Wales has an established church is the existence of both religious and civil marriages. But the only religious marriages recognised by the Marriage Act 1949 are those of the Church of England, and Jewish

[26] See Trinder *et al., Finding Fault?*, 103–18. [27] See Fairbairn, *No-Fault Divorce*, 14–20.
[28] Ministry of Justice, *Reducing Family Conflict: Reform of the Legal Requirements for Divorce* (2018).
[29] See Fairbairn, *No-Fault Divorce*, 24–5.
[30] Family Justice Review, *Final Report* (2011) 173–4 and Annex H.
[31] Legal Advisers are legally trained court officials who advise lay benches of magistrates on the law. They may be analogised to court clerks, judicial associates or registrars in other jurisdictions. On the process of scrutiny, see Trinder *et al., Finding Fault?*, 62–72.

and Quaker marriages.[32] Marriages conducted in any other place of worship and/or in accordance with the rituals of any other faith are regarded as civil marriages. The requirements for a civil marriage include the giving of prescribed notice,[33] and the conduct of the ceremony in a registered building, in the presence of an authorised person, and including a specified form of words.[34] A marriage may not be conducted outdoors or in a private home, for example, or in accordance with any unrecognised religious ritual.

If the parties wilfully disregard the formal requirements for the formation of a marriage, the marriage will be void.[35] However, the courts have also developed the category of 'non-marriage' to describe the situation where the parties have undergone 'some questionable ceremony or event [which] while having the trappings of marriage' failed fundamentally to comply with the legal requirements.[36] Thus, for example, an Islamic ceremony performed in a private house,[37] a Hindu ceremony performed in a restaurant[38] and a ceremony in the Moroccan embassy in accordance with Moroccan law[39] have all been classified as non-marriages. The issue has become particularly salient in England and Wales in relation to unregistered Muslim marriages, where a *nikah* ceremony is conducted in the home of one of the parties or in an unregistered mosque, and never followed by a civil ceremony. In the eyes of English law, the marriage does not exist. In recent research on religious tribunals, around half of the marriages observed were unregistered *nikah* marriages.[40] Reasons for non-registration include lack of awareness of the need for separate registration, failure to get around to doing so, not wishing to engage with secular marriage for religious or cultural reasons, the marriage being polygamous (although this is said to be rare) or deliberate evasion of the financial consequences of marriage and divorce.[41] The problems created for women in particular when it comes to divorce and post-divorce financial arrangements are discussed further below. Notably, if a marriage is void it

[32] Marriage Act 1949, Part II and s. 26. [33] *Ibid*., s. 27. [34] *Ibid*., s. 44.
[35] Matrimonial Causes Act 1973, s. 11(a)(iii).
[36] *Hudson* v. *Leigh* [2009] EWHC 1306 (Fam) (Bodey J.). [37] *AM* v. *AM* [2001] 2 FLR 6.
[38] *Gandhi* v. *Patel* [2002] 1 FLR 603. [39] *Dukali* v. *Lamrani* [2012] EWHC 1748 (Fam).
[40] G. Douglas, N. Lowe, S. Gillat-Ray, R. Sandberg and A. Khan, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* (Cardiff University, 2011) 39.
[41] *The Independent Review into the Application of Sharia Law in England and Wales* (Home Office, Cm 9560, 2018) 14.

remains possible for one of the parties to apply for financial orders, but in the case of a non-marriage, financial orders are not available.

In 2014 the government asked the Law Commission to review the law relating to how and where people can marry. In December 2015 the Law Commission issued a scoping paper covering the range of potential issues for review, including questions around preliminaries to a marriage, the marriage ceremony and registration of marriages.[42] However, in 2017 the government decided that 'now is not the right time to develop options for reform to marriage law'.[43] Separate recommendations in 2018 for reforms to ensure the registration of Muslim marriages[44] have not yet received a formal response.

Sharia Councils

Religious divorce is a necessity for those who consider civil divorce to be insufficient in the eyes of God and/or of their community. And for those with only a religious and no civil marriage, religious divorce is the only kind of divorce possible. Although religious divorces are dealt with by a variety of faith bodies, including Roman Catholic and Jewish tribunals, it is the practices of Muslim divorce which have attracted the greatest public attention. In the Sunni Muslim community in England and Wales, bodies known as sharia councils have developed in local areas to deal with matters of religious law, and especially family law. Council members are generally self-appointed volunteers who are scholars and respected persons in the local community, almost always men. They take varying approaches and are not nationally or regionally coordinated. Their primary function is issuing religious divorces for women whose husbands will not agree to a divorce. On the one hand, therefore, they offer a benefit in assisting women to escape their marriages, and the great majority of the petitions they receive are from women. On the other hand, there is evidence that women feel pressured into taking this route by their communities and feel they have little choice in the matter. Councils will usually try to encourage reconciliation before determining if grounds exist for termination of the marriage, and they may also assist in negotiations over children and

[42] Law Commission, *Getting Married: A Scoping Paper* (2015).

[43] Dominic Raab MP, Minister of State for Justice, letter to the Law Commission, 11 September 2017, available at www.lawcom.gov.uk/project/marriage-law

[44] Home Office, *Independent Review into Sharia Law*, 17–18.

https://doi.org/10.1017/9781316711750.002 Published online by Cambridge University Press

property. There are concerns that in the process, the issue of domestic abuse, as well as civil law norms regarding post-divorce child arrangements and property division may be ignored.[45]

Public debates on sharia councils have accused them of both oppressing women and illegitimately setting up a parallel legal system. Thus, for example, the media persistently refer to them as 'Sharia courts'. The prominent black and minority women's organisation Southall Black Sisters argues that abused Muslim women need to be accorded equality and human rights rather than to be rendered vulnerable to further abuse by patriarchal religious power.[46] A series of private member's bills have been introduced into the House of Lords seeking to prevent sharia councils from discriminating against or coercing women and from making false claims about the legal status of their rulings.[47] The House of Commons Home Affairs Committee launched an inquiry into the operation of sharia councils in Britain in 2016 which was abandoned due to the 2017 general election, and in the same year the Home Office established an independent review of the application of sharia law in England and Wales. This review reported in February 2018, although it was widely boycotted by women's human rights organisations unhappy with the terms of reference and appointments of advisers.[48] The review identified both good practices of sharia councils and bad practices which discriminated against women and failed to safeguard women and children from abuse.[49] The majority of members recommended regulation of sharia councils by the establishment of a state body to promulgate and monitor the implementation of a code of

[45] See S. S. Ali, 'Authority and authenticity: Sharia councils, Muslim women's rights and the English courts' (2013) 25(2) *Child and Family Law Quarterly* 113; S. Bano, *Muslim Women and Sharia'h Councils: Transcending the Boundaries of Community and Law* (Basingstoke: Palgrave Macmillan, 2013); S. Bano (ed.), *Gender and Justice in Family Law Disputes: Women, Mediation and Religious Arbitration* (Lebanon, NH: Brandeis University Press, 2017); Home Office, *Independent Review into Sharia Law*; D. Pearl and W. Menski, *Muslim Family Law* (3rd edn, London: Sweet & Maxwell, 1998).

[46] See e.g. Southall Black Sisters, 'Further supplementary written evidence submitted by Southall Black Sisters' to Home Affairs Committee Sharia Councils Inquiry (10 January 2017) at www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/inquiries/parliament-2015/inquiry6/publications

[47] Arbitration and Mediation Services (Equality) Bill 2016–17. For discussion, see R. Grillo, *Muslim Families, Politics and the Law: A Legal Industry in Multicultural Britain* (Farnham: Ashgate, 2015).

[48] See Home Office, *Independent Review into Sharia Law*, Annex C. [49] *Ibid*., 15–16.

https://doi.org/10.1017/9781316711750.002 Published online by Cambridge University Press

practice.[50] The government, however, immediately rejected this recommendation on the basis that it would confer legitimacy on sharia councils and support perceptions of a parallel legal system. It also noted that legislation was already in place to protect the rights of women and prevent discriminatory practices, and sharia councils must abide by this law.[51]

Family Finances

In England and Wales, parties to a marriage maintain their own separate property. Assets acquired during the marriage are jointly owned if the parties so specify, but this is not an automatic consequence of the marriage. On divorce, however, all of the parties' individual as well as their jointly owned property becomes available for redistribution according to a discretionary scheme which seeks to achieve overall fairness between the parties in the circumstances of each case.[52] Two current controversies concerning post-separation financial arrangements are first, the relative merits of discretion versus bright-line rules for property division; and, second, the fact that the discretionary scheme is available only to married couples and does not extend to cohabitants. As indicated above, for this purpose, parties to unregistered 'non-marriages' are treated as cohabitants.

Rules versus Discretion

While an equal split of marital assets following separation has a superficial appeal, the result is often post-divorce poverty for women and the children for whom they remain primary carers.[53] The gender division of labour which still prevails in most heterosexual families[54] – even if somewhat

[50] *Ibid*., 19–22.

[51] Secretary of State for the Home Department, 'Written statement on faith practices', Hansard HC, 1 February 2018, col. 30WS.

[52] Matrimonial Causes Act 1973, s. 25; *White* v. *White* [2000] UKHL 54.

[53] See e.g. L. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York: Free Press, 1985). For more recent US figures: United States Census Bureau, 'Divorce rates highest in the South, lowest in the Northeast, Census Bureau reports' (CB11-144, 2011), available at www.census.gov/newsroom/releases/archives/marital_status_living_arrangements/cb11-144.html

[54] The extent to which it also operates in same-sex families is not yet clear – see e.g. C. Bendall, 'Some are more "equal" than others: Heteronormativity in the post-*White* era

https://doi.org/10.1017/9781316711750.002 Published online by Cambridge University Press

modified by women working part-time and men taking a more active parenting role – leaves most couples in an unequal financial position at the end of the marriage. The breadwinner (usually the man) has maintained his income, earning capacity and pension savings throughout the marriage and is thus in a position to recover or indeed improve his financial position post-divorce. The homemaker (usually the woman), on the other hand, has lost income, earning capacity and pension savings, and is often in a position of continuing economic dependency, whether on her former husband or the state, in order to maintain herself and her children.[55] However, the overall financial position of families varies enormously, and judicial discretion enables these differences to be catered for. The exercise of discretion is governed by some fundamental principles: marriage is seen as a partnership of equals and there is no discrimination between financial and non-financial contributions to the welfare of the family.[56] Meeting the future needs of the children and then of the adults are the first considerations.[57] Relationship-generated economic disadvantage is to be compensated where possible.[58] Equal sharing is desirable – especially where assets exceed needs – but may be departed from in the interests of fairness.[59]

Two criticisms are made of this regime of property division. One is that women do too well out of it. This argument is typically made by wealthy businessmen and those who represent them. The argument is that privileged wives who have enjoyed a life of ease and luxury should not be handed a half share of the assets accumulated by their ex-husbands through their arduous business labours. The excessive generosity of the law has allegedly made London the divorce capital of Europe (or the world!)

of financial remedies' (2014) 36(3) *Journal of Social Welfare and Family Law* 260; R. Leckey, 'Must equal mean identical? Same-sex couples and marriage' (2014) 10(1) *International Journal of Law in Context* 5.

[55] See H. Fisher and H. Low, 'Who wins, who loses and who recovers from divorce?', in J. Miles and R. Probert (eds.), *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Oxford: Hart, 2009) 227; H. Fisher and H. Low, 'Recovery from divorce: Comparing high and low income couples' (2016) 30(3) *International Journal of Law, Policy and the Family* 338.

[56] *White* v. *White* [2000].

[57] Matrimonial Causes Act 1973, s. 25(1); *Miller* v. *Miller, McFarlane* v. *McFarlane* [2006] UKHL 24.

[58] *Miller, McFarlane* [2006].

[59] *White* v. *White* [2000]; *Miller, McFarlane* [2006]; *Charman* v. *Charman* [2007] EWCA Civ 503.

as women (or their lawyers) who bring proceedings in England and Wales know they will do better there than in many other jurisdictions.[60] This argument has provided at least part of the impetus for the legal recognition of prenuptial agreements discussed below. The other criticism is that discretionary property division results in an unacceptable level of uncertainty of outcomes,[61] making litigation either more likely (because each party's 'best alternative to a negotiated agreement' is unclear) or riskier (because who knows how a judge might decide?).

These arguments appear to be somewhat exaggerated, since the vast majority of property cases that reach a court involve settlements achieved by negotiation between the parties and/or their lawyers and embodied in consent orders.[62] Litigation is also more likely to end in settlement than in adjudication,[63] and cases that proceed to appellate level tend to involve very large sums in dispute.[64] Having recently considered the question of whether a statutory formula for property division should be introduced, the Law Commission concluded that no change in the law was needed, although it suggested the production of further guidance on how to determine parties' future needs, especially for the benefit of the growing numbers of litigants in person in the family courts (as discussed below).[65]

Nevertheless, the argument persists that the uncertainty and unpredictability of the law impedes out-of-court settlement of property disputes, especially where parties cannot afford legal representation. A further series of private member's bills introduced over successive parliaments by Baroness Ruth Deech have sought to reform the law to create greater certainty, in order to facilitate mediation and reduce litigation and its associated costs.[66] The bill would provide for equal division of property

[60] See e.g. F. Gibb, '"Meal ticket for life deals" must be stopped, urge law chiefs', *The Times* online, 20 November 2017.

[61] See e.g. House of Lords Library, *In Focus: Divorce (Financial Provision) Bill [HL]: Briefing for Lords Stages* (2017) 1, available at http://researchbriefings.parliament.uk/ResearchBriefing/Summary/LIF-2017-0004; Law Commission, *Matrimonial Property, Needs and Agreements* (2014) 5.

[62] E. Hitchings, J. Miles and H. Woodward, *Assembling the Jigsaw Puzzle: Understanding Financial Settlement on Divorce* (University of Bristol, 2013) 33.

[63] *Ibid*.

[64] The unrepresentative nature of these cases is stressed in E. Hitchings and J. Miles, 'Financial remedies on divorce: The need for evidence-based reform' (London: Nuffield Foundation Briefing Paper, 2018).

[65] Law Commission, *Matrimonial Property*, 5–6.

[66] The latest version is the Divorce (Financial Provision) Bill [HL] 2017–19.

and pensions acquired during the marriage, binding prenuptial agreements, and time-limited maintenance. But although these are the headline provisions, each element is hedged about with a series of exceptions relating to the needs of children, conduct which has adversely affected financial resources, serious financial hardship, and a range of other factors.[67] The net result, arguably, would be no more certain than the current law. It would simply institute a different starting point. The tendency of bright-line rules such as 50/50 division of marital property to create greater injustices means that discretion remains the utilitarian preference.

Cohabitants

England and Wales, like many other western jurisdictions, has seen a steady decline in the rate of marriage since the early 1970s and a corresponding rise in cohabitation as an alternative to marriage.[68] In many areas of law, cohabitation and marriage are treated as functionally the same, for example in relation to social welfare, social housing, immigration, and parenting. In relation to property, however, the law maintains a formal distinction. While divorcing couples are governed by the property regime described above, couples separating from cohabitation are subject to the general rules of property law. General property law does not enable redistribution of assets following separation, it merely determines the property rights of the parties at that point. This is particularly problematic in the situation where the family home is in the sole name of one of the parties. A cohabiting primary caregiver may find herself at the end of a relationship with continuing care of her children but with little income and no housing.

The Law Commission conducted an inquiry into the financial consequences of relationship breakdown after cohabitation in 2005–7 and made recommendations designed to ameliorate some of the hardships and injustices faced by former cohabitants.[69] The Commission did not suggest equalisation of the position of cohabitants and married couples, but rather suggested a new statutory regime to apply to cohabitants who met the eligibility requirements (related to the length of the relationship or whether there were children) on an opt-out basis. The focus of remedies would be on

[67] Divorce (Financial Provision) Bill [HL] 2017–19, cl. 2–6.
[68] Office of National Statistics, *Families and Households: 2017* (2017) 4.
[69] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (2007).

the parties' contributions during the relationship, with the aim of achieving a fair sharing of the enduring economic benefits and disadvantages of the relationship. The major rationale for treating married and cohabiting couples differently was the fact that cohabiting couples had not made the same financial commitments to each other as had married couples. The ability to opt out was also designed to respect couples' autonomy.[70] Yet research has shown that the 'choice' not to get married may be that of only one of the parties, not necessarily both, and also that such choices are rarely made by reference to or in full knowledge of the financial consequences.[71]

Neither the Labour government that received the report nor the Coalition government that succeeded it evinced any interest in enacting the Law Commission's proposals. Any reforms that might be perceived to undermine marriage were considered politically unfeasible. Indeed, the Labour government funded a publicity campaign to alert cohabitants to the legal disadvantages of cohabitation and to encourage them to get married in order to protect themselves financially.[72] This made little difference. When it comes to intimate relationships, people tend not to act as 'rational maximisers' but take an optimistic view of the future.[73]

In the absence of legislative reform, some efforts have been made by the courts to adapt property law to the situation of former cohabitants. This has seen the rise of the common intention constructive trust as the primary means by which cohabitants' shares in the family home may be determined more fairly than their strict legal position may indicate. The UK's highest court has developed the principles relating to common intention constructive trusts in two leading cases, *Stack* v. *Dowden*[74] and *Jones* v. *Kernott*,[75] led by Lady Hale, a family law expert and the only woman member of the Court at the time. Among other things, these principles recognise non-financial contributions to

[70] *Ibid*., 1.

[71] A. Barlow, S. Duncan, G. James and A. Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century* (Oxford: Hart, 2005); G. Douglas, J. Pearce and H. Woodward, *A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown* (Cardiff University, 2007); R. Probert, *The Changing Legal Regulation of Cohabitation* (Cambridge University Press, 2012) 200–20, 262–4; R. Tennant, J. Taylor and J. Lewis, *Separating from Cohabitation: Making Arrangements for Finances and Parenting* (Department of Constitutional Affairs Research Report 7/2006).

[72] See A. Barlow, C. Burgoyne and J. Smithson, *The Living Together Campaign: An Investigation of Its Impact on Legally Aware Cohabitants* (Ministry of Justice Research Series 5/07, 2007).

[73] *Ibid*. [74] *Stack* v. *Dowden* [2007] UKHL 17. [75] *Jones* v. *Kernott* [2011] UKSC 53.

the property and to the relationship generally in quantifying the parties' shares of the beneficial ownership, and therefore go some way towards equalising the position of cohabiting homemakers and primary carers with their breadwinning partners. Some commentators have seen this as representing the familialisation of property law, a process which 'retunes' property law principles developed in the context of commercial relationships to cater to the specific needs of family members, thereby 'challeng[ing] the doctrinal purity of property law',[76] and for that reason disapproved by many orthodox property lawyers.[77]

One significant remaining drawback of property law, however, is that where a home is in the sole name of one of the parties rather than in joint names, either an express intention to share the beneficial ownership of the property or financial contributions to the purchase price are required in order to give rise to a constructive trust.[78] Arguably, this problem is more academic than real, since most cohabiting couples now acquire property in joint names, and this is a more obvious and straightforward means of protecting one's interests than getting married.[79] A second drawback is that property law only applies to property. It does not extend, for example, to other assets such as pensions,[80] and it does not provide a basis for any claim to ongoing income support. Fundamentally, it is focused on past contributions rather than future needs. In these respects, therefore, it is much more limited than the regime applying to formerly married couples.

This area has been the subject of yet another series of private member's bills, which aim to implement the scheme proposed by the Law Commission a decade ago.[81] As with most of the other bills noted above it appears to have little chance of enactment. Arguably, too, with the passage of time and the increasing normalisation of cohabitation as an alternative form of long-term relationship, the maintenance of distinct regimes for cohabitants and married couples appears less and less justified.

[76] A. Haywood, '"Family property" and the process of "familialization" of property law' (2012) 24 *Child and Family Law Quarterly* 284; T. Etherton, 'Constructive trusts: A new model for equity and unjust enrichment' (2008) 67 *Cambridge Law Journal* 265; M. Pawlowski, 'Imputing beneficial shares in the family home' (2016) 22(4) *Trusts and Trustees* 377.

[77] See summary and references in Haywood, 'Family property', 303.

[78] *Lloyds Bank* v. *Rosset* [1991] 1 AC 107

[79] R. Auchmuty, 'The limits of marriage protection in property allocation when a relationship ends' (2016) 28 *Child and Family Law Quarterly* 303.

[80] Douglas *et al.*, *Failure of Trust*, 77–8.

[81] The latest version is the Cohabitation Rights Bill [HL] 2017–19, Part 2.

https://doi.org/10.1017/9781316711750.002 Published online by Cambridge University Press

Family Violence and Neglect

Policy attention to child abuse and neglect and family violence in recent years has followed somewhat conflicting trajectories. There has been a perceived need by the state to be seen to be 'doing something' in these areas, while at the same time wishing to maintain the overriding goal of minimising public sector spending. This has resulted in a preference for symbolic gestures such as criminalisation and child protection performance targets rather than the provision of real resources to tackle abuse and provide safety for its victims. At the same time there is a disconnect between taking abuse seriously in public law domains (criminal law and child protection) and the pro-contact culture in private family law proceedings, which has led to allegations of domestic abuse being ignored or minimised in such cases.[82]

The Criminalisation of Forced Marriage and Domestic Abuse

Forced marriage has been recognised as a form of domestic violence and a violation of human rights,[83] yet the government remained ambivalent about the regulation of forced marriage. A regime of civil injunctions to prevent forced marriages and protect those who had been forced into marriage was enacted in 2007 but was initiated by a private member's bill rather than by the then Labour government.[84] The government did attempt a form of indirect regulation via immigration law by increasing restrictions on spousal visas, but the motivations for this initiative were dubious[85] and the regulations were struck down as 'a colossal interference' with the right to respect for family life.[86] Consultations conducted in 2000 and 2005–6 canvassed the idea of making it a criminal offence to force

[82] See e.g. M Hester, 'The three planet model: Towards an understanding of contradictions in approaches to women and children's safety in contexts of domestic violence' (2011) 41 *British Journal of Social Work* 837.

[83] See e.g. House of Commons Home Affairs Committee, *Domestic Violence, Forced Marriage and 'Honour'-Based Violence*, 6th report of Session 2007–8 (HC 263–1, 2008); A. Gill and S. Anitha (eds.), *Forced Marriage: Introducing a Social Justice and Human Rights Perspective* (London: Zed Books, 2011).

[84] Forced Marriage (Civil Protection) Act 2007, inserting a new Part 4A into the Family Law Act 1996.

[85] See e.g. R. Hunter, 'Constructing vulnerabilities and managing risk: State responses to forced marriage', in S. FitzGerald (ed.), *Regulating the International Movement of Women: From Protection to Control* (Abingdon: Routledge, 2011) 11.

[86] *R (Quila and another)* v. *Secretary of State for the Home Department* [2011] UKSC 45 [32] (Lord Wilson).

https://doi.org/10.1017/9781316711750.002 Published online by Cambridge University Press

someone into marriage, but the majority of respondents opposed the creation of a criminal offence on the grounds that it was likely simply to drive the practice underground and make it harder to tackle.[87]

Nevertheless, the Coalition government returned to the issue of criminalisation in 2011.[88] Independent research among NGOs again produced a majority opposed to criminalisation,[89] but the government pressed on. The chief arguments in favour of criminalisation relied on the deterrent effect of criminal law and sending a strong message that forced marriage would not be tolerated.[90] Two new offences of forced marriage were created in Part 10 of the Anti-Social Behaviour, Crime and Policing Act 2014.[91] There are a range of practical problems in enforcing this legislation, however, and convictions have remained rare.[92] For example, young women are reluctant to bring criminal charges against their families, and risk retaliation, estrangement from their families and isolation from their communities if they do so.[93] Research following the introduction of forced marriage civil protection orders showed that women seeking to avoid or escape forced marriages need substantial material support and services,[94] which have been less forthcoming than 'law in the books'. Education and prevention work in communities is

[87] P. Uddin and N. Ahmed, *A Choice by Right: The Report of the Working Group on Forced Marriage* (Home Office, 2000); Foreign and Commonwealth Office and Home Office, *Forced Marriage: A Wrong Not a Right* (2005); A. Gill and S. Anitha, 'The illusion of protection? An analysis of forced marriage legislation and policy in the UK' (2009) 31 *Journal of Social Welfare and Family Law* 257, 260–1.

[88] Home Office, *Forced Marriage Consultation* (2011).

[89] A. Gill, *Exploring the Viability of Creating a Specific Offence for Forced Marriage in England and Wales: Report on Findings* (University of Roehampton, 2011).

[90] Home Office, *Forced Marriage – A Consultation: Summary of Responses* (2012); N. Pearce and A. Gill, 'Criminalising forced marriage through stand-alone legislation: Will it work?' (2012) 42 (May) *Family Law* 534.

[91] Anti-Social Behaviour, Crime and Policing Act 2014, s. 121(1) (offence to use violence, threats, or any other form of coercion to cause someone to enter a marriage without their free and full consent) and s. 121(3) (offence to practice any form of deception with the intention of causing a person to leave the UK intending them to be subject to a forced marriage outside the UK).

[92] e.g. L. Fisher, 'Forced marriage law is failing', *The Times* online, 15 August 2017.

[93] See e.g. *Forced Marriage Cops* (Channel 4 documentary, 2015) available at www.youtube.com/watch?v=SPeepNAD4fM

[94] Ministry of Justice, *One Year on: The Initial Impact of the Forced Marriage (Civil Protection) Act 2007 in Its First Year of Operation* (2009); Pearce and Gill, 'Criminalising forced marriage through stand-alone legislation'; L. Tickle, 'Criminalising forced marriage fails to protect girls', *Guardian* online, 22 September 2015.

also underfunded.[95] Partly this is a structural issue of public sector management: central government can legislate, while responsibility for the commissioning and funding of services in England and Wales has been decentralised to local authorities, which have been subject to major funding cuts in recent years.

The area of domestic abuse more generally has seen a similar pattern of de-funding or underfunding of domestic abuse services, including refuge accommodation,[96] combined with 'being seen to do something' in the form of a new criminal offence. While perpetrators of abuse could be charged under general laws concerning offences against the person, there was no specific crime of domestic violence until s. 76 of the Serious Crime Act 2015 introduced the crime of controlling or coercive behaviour in an intimate or family relationship. This law importantly recognises the coercive control dynamics of domestic abuse, going beyond the simplistic notion that the only serious form of harm in a domestic context is physical violence, but action under the law has been just as limited and disappointing as in relation to forced marriage.[97] Longstanding problems with the policing and prosecution of domestic abuse have not been fully addressed,[98] suggesting that government reliance on the criminal justice system as the primary means to prevent abuse and hold abusers accountable[99] is misplaced. And, once again, while the government has articulated national expectations for local service provision,[100] the funding necessary to give effect to these expectations is severely limited.

[95] See Hunter, 'Constructing vulnerabilities and managing risk'.

[96] See e.g. House of Commons Home Affairs Committee, *Domestic Violence*, 71–4; L. Buchanan, 'Women's refuges budgets slashed by nearly a quarter over past seven years', *Independent* online, 16 October 2017; J. Grierson, 'Women's lives at risk from changes to funding for refuges, say charities', *Guardian* online, 26 November 2017.

[97] In the year ending December 2016 there were five cautions, 155 prosecutions and fifty-nine convictions for coercive and controlling behaviour: Office for National Statistics, *Domestic Abuse in England and Wales: Year Ending March 2017* (2017) 40.

[98] HM Inspectorate of Constabulary and Fire & Rescue Services, *A Progress Report on the Police Response to Domestic Abuse* (2017); H. Summers, 'CPS accused of failing domestic violence victims after woman loses eye in attack', *Guardian* online, 27 January 2017; C. Bishop, 'Why it's so hard to prosecute cases of coercive or controlling behaviour', *The Conversation*, 31 October 2016.

[99] HM Government, *Ending Violence Against Women and Girls: Strategy 2016–2020* (2016).

[100] Home Office, *Violence Against Women and Girls: National Statement of Expectations* (2016)

The Crisis in Public Law

A major review of the family justice system in 2011 concluded that the system lacked coordination and efficiency, and in particular, that child protection proceedings took an unacceptably long time to conclude from the child's perspective.[101] Such proceedings took an average of forty-eight weeks in (lower level) Family Proceedings Courts and sixty-one weeks for more complex cases in the county courts.[102] The Family Justice Review recommended that they should be concluded in a maximum of twenty-six weeks. This extremely challenging target required significant changes of practice in terms of new procedural guidance, strict judicial case management, pre-proceedings preparation of cases and minimising the number of hearings and the use of expert assessments and reports. While the average duration of hearings is now close to twenty-six weeks, this is still some distance from a maximum duration of twenty-six weeks.[103] Nevertheless, the twenty-six-week maximum was enshrined in primary legislation by the Children and Families Act 2014.[104]

At the same time, a moral panic over failures of child protection services to identify children at risk of significant harm and to prevent child deaths led to a substantial increase in the number of applications to family courts for formal care and supervision orders.[105] The result has been a sense of crisis in the courts, with the pressures to reduce case processing times combined with a burgeoning case load.[106] Emerging evidence suggests courts have responded by changing the kinds of orders they are making. With less time to obtain opinions from independent experts and to assess various options for children's welfare, courts are tending to make more 'wait and see'-type orders rather than definitive interventions. Children are more likely to be left in the care of their parents or transferred to the care of

[101] Family Justice Review, *Final Report* (2011). [102] *Ibid*., 91.

[103] Ministry of Justice, *Family Court Statistics Quarterly, England and Wales, July–September 2017* (2017) 3: the average duration of public law cases in July–September 2017 was twenty-eight weeks, with 59 per cent of cases dealt with within twenty-six weeks.

[104] Children and Families Act 2014, s. 14, amending the Children Act 1989, s. 32.

[105] Official statistics measure the number of children involved in proceedings rather than the number of cases. There was a 75 per cent increase in the number of children involved in child protection proceedings between 2000 and 2016, with an increase of 18 per cent between 2011 and 2016: Ministry of Justice, *Family Court Statistics Quarterly, England and Wales: Annual 2016 Including October–December 2016* (2017) 8.

[106] See Family Rights Group, *Care Crisis Review: Options for Change* (London: Family Rights Group, 2018).

another family member, subject to supervision, rather than being transferred to the care of the local authority. As the researchers who detected this trend observe, this was not an intended outcome of the reforms and 'it is not clear that there is an evidence base' for this change.[107] Whether changing the pattern of orders has produced better or worse outcomes for children remains to be determined.

Taking Abuse Seriously in Child Arrangements Cases

The Children Act 1989 states that in decisions concerning children's upbringing, the child's welfare shall be the court's paramount consideration.[108] The Family Justice Review rejected the suggestion that this should be supplemented by a presumption that children's welfare would best be promoted by spending equal time with each parent following separation.[109] Fathers' rights groups continued to lobby strongly, however, and the government announced that it would introduce a presumption concerning children's contact with both parents. Protracted wrangling over the wording of the presumption ultimately resulted in 2014 in a complex and convoluted provision which, paraphrased, states that courts are to presume that the involvement of each parent in the life of the child will further the child's welfare, unless there is evidence that the parent's involvement will put the child at risk of suffering harm.[110] Arguably, this does little more than codify the previous law, which always included at least an 'assumption' that it was in children's best interests to maintain contact with both parents.[111]

The courts' strong orientation towards maintaining direct contact between children and non-resident parents[112] creates problems in cases involving abusive parents – in practice, almost always abusive fathers.

[107] J. Masson, J. Dickens, K. Bader, L. Garside and J. Young, 'How is the PLO working? What is its impact on court process and outcome? The outcomes of care proceedings for children before and after care proceedings reform study interim report', *Family Law Week*, 17 February 2017; J. Masson, J. Dickens, K. Bader, L. Garside and J. Young, 'Achieving positive change for children? Reducing the length of child protection proceedings: Lessons from England and Wales (2017) 41 *Adoption and Fostering* 401.

[108] Children Act 1989, s. 1(1).

[109] Family Justice Review, *Final Report* (2011) 21 [109].

[110] Children Act 1989, s. 1(2A), (2B), (6) and (7).

[111] See e.g. *Re R (A Minor) (Contact: Biological Father)* [1993] 2 FLR 762; *Re M (Contact: Welfare Test)* [1995] 1 FLR 274; *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124; *Re L (Contact: Domestic Violence)* [2000] 2 FLR 334; *V* v. *V (Contact: Implacable Hostility)* [2004] 2 FLR 851.

[112] See e.g. *Re C (Direct Contact: Suspension)* [2011] EWCA Civ 521 [47] (Munby P.); *Re K (Children)* [2016] EWCA Civ 99.

https://doi.org/10.1017/9781316711750.002 Published online by Cambridge University Press

Despite extensive evidence of the seriously detrimental effect on children of witnessing or being exposed to domestic abuse, or having their primary carer subjected to abuse,[113] there is no countervailing presumption that an abusive parent should be disqualified from direct or unsupervised contact. Rather, the Court of Appeal has ruled that allegations of domestic abuse which might affect the court's decision about contact must first be adjudicated to determine their veracity. Subsequently, proven allegations must be weighed alongside all other factors going to the question of the child's welfare in order to make a final decision.[114] Research has consistently shown, however, that contact continues to trump safety, despite the formulation of detailed guidance specifying how courts should proceed in cases with allegations of abuse before, during and after 'fact-finding hearings'.[115] Allegations may be dismissed as 'historic' or otherwise deemed irrelevant to the question of contact; fact-finding hearings are avoided or curtailed; and findings may have few consequences.[116] It is rare

[113] J. L. Edleson, 'The overlap between child maltreatment and woman battering' (1999) 5 *Violence Against Women* 134; L. Harne, *Violent Fathering and the Risks to Children: The Need for Change* (Bristol: Policy Press, 2011); P. Jaffe, J. Johnston, C. Crooks and N. Bala, 'Custody disputes involving allegations of domestic violence: Towards a differentiated approach to parenting plans' (2008) 46 *Family Courts Review* 500; L. Kelly, N. Sharp and R. Klein, *Finding the Costs of Freedom: How Women and Children Rebuild Their Lives after Domestic Violence* (London: Solace Women's Aid, 2014); K. Kitzman, N. Gaylord, A. Holt and E. Kenny, 'Child witnesses to domestic violence: A meta-analytic review' (2003) 71 *Journal of Consultative Clinical Psychology* 339; A. Mullender and R. Morley, *Children Living with Domestic Violence* (London: Whiting & Birch, 1994); L. Radford and M. Hester, *Mothering Through Domestic Violence* (London: Jessica Kingsley, 2006); C. Sturge and D. Glaser, 'Contact and domestic violence – the experts' court report' (2000) 30 *Family Law* 615.

[114] *Re L (Contact: Domestic Violence)* [2000] 2 FLR 334.

[115] A. Barnett, 'Contact at all costs? Domestic violence and children's welfare' (2014) 26 *Child and Family Law Quarterly* 439; A. Barnett, '"Like gold dust these days": Domestic violence fact-finding hearings in child contact cases' (2015) 23 *Feminist Legal Studies* 47; M. Coy, K. Perks, E. Scott and R. Tweedale, *Picking up the Pieces: Domestic Violence and Child Contact* (London: Rights of Women, 2012); M. Harding and A. Newnham, *How Do County Courts Share the Care of Children between Parents? Full Report* (Nuffield Foundation, 2015); J. Hunt and A. Macleod, *Outcomes of Applications to Court for Contact Orders after Parental Separation or Divorce* (London: Ministry of Justice, 2008); R. Hunter and A. Barnett, *Fact-finding Hearings and the Implementation of the President's Practice Direction – Residence and Contact Orders: Domestic Violence and Harm* (Family Justice Council, 2013); A. Perry and B. Rainey, 'Supported, supervised and indirect contact orders: Research findings' (2007) 21 *International Journal of Law, Policy and the Family* 21; Women's Aid, *Nineteen Child Homicides* (Bristol: Women's Aid, 2016).

[116] Hunter and Barnett, *Fact-finding Hearings*; Barnett, 'Contact at all costs?'; 'Like gold dust these days'.

for contact to be refused altogether, and if supervised contact at a contact centre is ordered, it will usually be time-limited. The notion that contact should be safe and beneficial for children[117] is defeated by the assumption that contact is always beneficial for children, and human rights-based arguments justifying restrictions on contact[118] have gained little traction. A recent parliamentary report and hearing on domestic abuse, child contact and the family courts called, among other things, for specialist training for all judges and court welfare officers on all aspects of domestic violence, and for expert safety and risk assessments to be carried out in all cases involving an abusive parent.[119] None of its recommendations have yet been implemented. Even a proposed minimal legislative change to restrict direct cross-examination of victims of domestic abuse by their abusers in family court proceedings[120] was discontinued due to the 2017 general election, and has not yet been reintroduced.

Autonomy and Family Law

The rhetoric of autonomy has played an increasingly prominent role in family law policy in recent years. As Sharon Thompson has observed, however, and as noted above in relation to cohabitation, there is a tendency to *presume* autonomy rather than to question whether it actually exists, and if so, who is exercising it.[121] Autonomy is promoted as an unqualified good without critical scrutiny as to its (often gendered) operation and its effects, particularly for children. The two major areas in which autonomy has been promoted are in relation to out-of-court dispute resolution and prenuptial agreements.

[117] Sturge and Glaser, 'Contact and domestic violence'; Family Procedure Rules Practice Direction 12J, paras. 27, 38–40.

[118] S. Choudhry and J. Herring, 'Righting domestic violence' (2006) 20 *International Journal of Law, Policy and the Family* 95; S. Choudhry and J. Herring, 'Domestic violence and the Human Rights Act 1998: A new means of legal intervention?' [2006] Public Law 752. And see J. Birchall and S. Choudhry, *"What About My Right Not to be Abused?" Domestic Abuse, Human Rights and the Family Courts* (London: Women's Aid and Queen Mary University of London, 2018).

[119] All Party Parliamentary Group on Domestic Violence, *Domestic Abuse, Child Contact and the Family Courts* (2016); 'Domestic abuse victims in family law courts', HC Hansard, 15 September 2016, vol. 614, col. 1081.

[120] Prisons and Courts Bill 2016–17, cl. 47.

[121] S. Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Oxford: Hart, 2015).

https://doi.org/10.1017/9781316711750.002 Published online by Cambridge University Press

The Promotion of Family Mediation

While alternative dispute resolution has long been an integral part of the family justice system, traditionally it took the form of out-of-court negotiations between solicitors, aiming to broker a resolution on behalf of their clients.[122] As Alison Diduck has observed, however, the 'A' in ADR has increasingly come to stand for 'autonomous' dispute resolution,[123] with parties expected to settle post-separation issues between themselves without the assistance of either courts or lawyers. The preferred dispute resolution route in the eyes of policymakers is now family mediation, with a neutral mediator assisting the parties to reach agreement about arrangements for their children and finances. One of the key claimed benefits of mediation is that parties are able to make decisions that best suit their individual circumstances rather than having matters taken out of their hands by lawyers, or having standardised arrangements imposed on them by a judge who knows little about their family. Further, it is assumed that agreements reached between the parties will be more likely to 'work' and hence be more durable than those imposed following litigation.

This positive picture is complicated, however, by the fact that actual demand for mediation among the divorcing and separating population remains low.[124] Despite increasingly coercive measures to encourage people to discover the benefits of mediation, including requiring applicants to consider mediation prior to commencing court proceedings,[125] and cutting legal aid for all forms of family dispute resolution other than mediation,[126] the take-up of family mediation remains disappointing.[127] A recent study comparing mediation with lawyer-led family dispute

[122] See e.g. H. Genn, *Paths to Justice: What People Do and Think about Going to Law* (Oxford: Hart, 1999) 115.

[123] A. Diduck, 'Justice by ADR in private family matters: Is it fair and is it possible?' (2015) *Family Law* (May) 616.

[124] See R. Hunter, 'Inducing demand for family mediation – Before and after LASPO' (2017) 39 *Journal of Social Welfare and Family Law* 189.

[125] Children and Families Act 2014, s. 10; Family Procedure Rules Practice Direction 3A – Family Mediation Information and Assessment Meetings.

[126] Legal Aid, Sentencing and Punishment of Offenders Act 2012. Here, the autonomy agenda dovetails neatly with the public sector cost-cutting agenda noted above.

[127] See Family Mediation Task Force, *Report of the Family Mediation Task Force* (Ministry of Justice, 2014); Hunter, 'Inducing demand for family mediation'; Ministry of Justice and Legal Aid Agency, *Legal Aid Statistics Quarterly, England and Wales, July to September 2017* (2017) 8.

resolution options – solicitor negotiations and collaborative law – found that while mediation has obvious strengths and benefits, it is not suitable for all parties or cases, and the exclusive policy emphasis on mediation is not justified.[128] In particular, mediation is problematic in cases where the parties are not able to participate in the process on an equal footing, including where one of the parties is not emotionally ready to mediate, and where there is a history of domestic abuse.[129] Where such cases enter mediation, the more vulnerable party is likely to find the process traumatic, the chances of settlement are low, and any outcome reached is likely simply to reflect the power imbalance between the parties.[130] While the dominant party may be exercising their autonomy, that of the other party is seriously undermined. More generally, disputes between separating couples are characterised by gendered norm conflicts, which may simply be incapable of autonomous resolution.[131]

The other potential casualty of parental autonomy is consultation with children. In court proceedings, children's wishes and feelings must be ascertained and taken into account. But none of the forms of out-of-court family dispute resolution routinely includes input from children or acknowledges children's rights to be heard. Child-inclusive mediation, while available in theory, is rarely conducted. By focusing on party autonomy rather than, say, family autonomy, the voice of the child is marginalised and muted.[132]

Prenuptial Agreements

Traditionally, the law in England and Wales held prenuptial agreements to be unenforceable on the basis that by contemplating the possibility of divorce, they undermined the notion of marriage as a lifetime commitment

[128] A. Barlow, R. Hunter, J. Smithson and J. Ewing, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Basingstoke: Palgrave Macmillan, 2017).

[129] *Ibid*., chs. 5–7; R. Hunter, A. Barlow, J. Smithson and J. Ewing, 'Mapping paths to family justice: Matching parties, cases and processes' (2014) 44 *Family Law* (Oct.) 1404.

[130] Barlow *et al., Mapping Paths*. Whereas these kinds of experiences have been highlighted as problematic in relation to sharia councils, there has been much less public concern expressed about the potentially oppressive operation of 'mainstream' mediation.

[131] *Ibid*., ch. 8.

[132] See J. Ewing, R. Hunter, A. Barlow and J. Smithson, 'Children's voices: Centre-stage or sidelined in out-of-court dispute resolution in England and Wales?' (2015) 27 *Child and Family Law Quarterly* 43; Family Mediation Task Force, *Report*, 27.

and so were contrary to public policy.[133] This position came under increasing pressure in the context of wealthy businessmen seeking to protect their assets after the decision in *White* v. *White* (discussed above),[134] and also in the context of greater exposure of the English courts to international marriages and the more common practice of prenuptial agreements in overseas jurisdictions. One such case coming before the UK Supreme Court in 2010 changed the law.

Radmacher v. *Granatino*[135] concerned a German heiress and her international banker husband, who had signed a prenuptial agreement prior to their marriage in Germany. Having moved to England and divorced there, the enforceability of the prenuptial agreement came before the English courts. The Supreme Court ultimately decided that 'the court should give effect to a [pre- or post-] nuptial agreement that is freely entered into by each party with a full appreciation of its implications, unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.'[136] In reaching this decision, the court emphasised the importance of respecting the parties' autonomy to decide how their own financial affairs should be regulated.[137] There was a strong dissent, however, from Lady Hale, who emphasised other values, particularly the duties and obligations of marriage and gender equality.[138] In essence, the court split between commercial law thinking – that people should be bound by their contracts – and family law thinking – the need to protect financially weaker or more vulnerable parties, and it was no coincidence that this philosophical split was also a gender split. If the developing law on constructive trusts represents the familialisation of property law, it might be said that this development in relation to prenuptial agreements signalled a shift towards the contractualisation of family law.

Thompson's feminist critique of prenuptial agreements, however, explains why these agreements are not like business contracts. They are not the result of arm's length, self-interested, win–win bargaining between equal parties but almost always involve gendered power imbalances. She notes that these power imbalances must be ignored in order for prenuptial agreements to function, and therefore it is not a case of *the parties* exercising their autonomy, but of *one party* doing so. She advocates an approach that

[133] *N* v. *N (Divorce: ante nuptial agreement)* [1999] 2 FCR 583 (Fam Div).
[134] e.g. *Crossley* v. *Crossley* [2008] 1 FLR 1467 (CA). [135] [2010] UKSC 42.
[136] *Ibid*., para. 75. [137] *Ibid*., para. 78. [138] *Ibid*., paras. 132, 137.

would promote and guarantee rather than presume individual autonomy by, for example, looking for mutual benefit and mutual empowerment, and not overlooking its opposite.[139]

While the decision in *Radmacher* clearly fails to go this far, it does at least incorporate prenuptial agreements under the general umbrella of fairness between the parties. Thus, in both *Radmacher* itself and subsequent cases, prenuptial agreements have been varied to ensure that the needs of the parties' children and the financially weaker party are catered for,[140] or in some instances have been disregarded altogether on grounds of fairness.[141] The Law Commission has recommended legislative reform to enable 'qualifying nuptial agreements' to be enforced as contracts without judicial scrutiny as to fairness, but nevertheless also considered that it should not be possible to contract out of providing for the financial needs of both parties and any children.[142] Thus, in this area, a slightly more nuanced approach to autonomy has thus far prevailed.

Access to Justice – the Crisis in Private Law

The final and perhaps the most worrying contemporary issue in family law in England and Wales concerns the ability of divorcing and separating couples to access the family justice system. As noted above, while England and Wales previously had a relatively generous legal aid scheme for family law matters, public sector austerity measures introduced by the 2010–15 Coalition government included severe cuts to legal aid, such that for most family law parties, legal aid remains available only for mediation. As I have argued elsewhere, access to mediation does not constitute access to justice.[143] In particular, the withdrawal of legal aid for legal representation has left many divorcing and separating people floundering, trying to negotiate a complex and uncoordinated terrain of web-based information,

[139] Thompson, *Prenuptial Agreements*, chs. 5–6.

[140] e.g. *V* v. *V* [2011] EWHC 3230 (Fam); *Luckwell* v. *Limata* [2014] EWHC 502 (Fam); *SA* v. *PA (Premarital Agreement: Compensation)* [2014] EWHC 392 (Fam).

[141] e.g. *GS* v. *L* [2011] EWHC 1759 (Fam); *Kremen* v. *Agrest (No. 11) (Financial Remedy: Non-disclosure: Post-nuptial Agreement)* [2012] EWHC 45 (Fam); *Gray* v. *Work* [2015] EWHC 834 (Fam).

[142] Law Commission, *Matrimonial Property*, chs. 5–6.

[143] R. Hunter, A. Barlow, J. Smithson and J. Ewing, '"Access to what?" LASPO and mediation', in A. Flynn and J. Hodgins (eds.), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Oxford: Hart, 2017) 239.

unbundled services and do-it-yourself offers, in the absence of the traditional source of support, i.e. expert, individualised advice from a solicitor.[144]

Contrary to the government's expectations that people would exercise their autonomy and choose mediation to resolve family law disputes, the immediate effect of the legal aid cuts has been a significant rise in the number of people appearing in court as litigants in person.[145] This has placed enormous burdens on the court system, as well as on litigants themselves, since self-representation is highly stressful and rarely effective.[146] There has been little systematic effort to adjust court procedures to cater for litigants in person as the 'new normal', with the experience for the litigant very much depending on which judge and (if relevant) which lawyer on the other side they happen to encounter.[147]

Legal aid does remain available for victims of domestic violence, however those seeking legal aid are required to produce one of the enumerated forms of 'evidence' of domestic violence.[148] The regulations concerning evidence were initially extremely narrow, so that many victims of violence found themselves unable to obtain the necessary documentation.[149] Following successful judicial review proceedings,[150] the regulations have been widened, but difficulties remain.[151] In particular, there is an overemphasis on physical violence, while abuse in the form of coercive control

[144] See e.g. Ipsos Mori Social Research Institute, *The Varying Paths to Justice: Mapping Problem Resolution Routes for Users and Non-Users of the Civil and Administrative and Family Justice Systems* (Ministry of Justice, 2015); R. Lee and T. Tkacukova, *A Study of Litigants in Person in Birmingham Civil Justice Centre* (CEPLER Working Paper 02/2017, University of Birmingham, 2017); Low Commission, *Tackling the Advice Deficit: A Strategy for Access to Advice and Legal Support on Social Welfare Law in England and Wales* (London: Legal Action Group, 2014); L. Trinder, R. Hunter, E. Hitchings, J. Miles, R. Moorhead, L. Smith, M. Sefton, V. Hinchly, K. Bader and J. Pearce, *Litigants in Person in Private Family Law Cases* (Ministry of Justice, 2014).

[145] Ministry of Justice *Family Court Statistics Quarterly*, 5.

[146] Trinder *et al., Litigants in Person*; Lee and Tkacukova, *Study of Litigants in Person.*

[147] Trinder *et al., Litigants in Person*; J. Mant, 'Litigants in person and the Family Court: The accessibility of private family justice after LASPO' (Preliminary PhD research findings, University of Leeds, 2018).

[148] Civil Legal Aid (Procedure) Regulations 2012, Reg. 33 and Sched. 1.

[149] Rights of Women, Women's Aid and Welsh Women's Aid, *Evidencing Domestic Violence: A Barrier to Family Law Legal Aid* (2013).

[150] *R (Rights of Women)* v. *Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91.

[151] See F. Syposz, *Research Investigating the Domestic Violence Evidential Requirements for Legal Aid in Private Family Disputes* (Ministry of Justice, 2017).

is unlikely to give rise to the kind of documentation required. Moreover, even if a victim is able to obtain legal aid, her abuser will not be eligible, and may use the opportunity of his own self-representation to continue to harass her through repeated court applications and, as discussed above, by directly cross-examining her in court. While judges do have discretion to control and prevent abusive questioning, the available research indicates their general unwillingness to exercise that discretion robustly.[152]

Moreover, many other forms of personal and circumstantial vulnerability besides domestic violence may render it extremely difficult for a litigant to advocate for their own interests in court. The legal aid cuts were accompanied by provision for funding in 'exceptional' cases in which failure to extend legal aid would constitute a breach of the applicant's human rights.[153] However, the human rights criteria were also initially interpreted extremely narrowly and few awards were made,[154] until successful litigation forced the Legal Aid Agency to take a more inclusive approach.[155] The proportion of applications granted rose from under 10 per cent in October–December 2013 to 54 per cent in July–September 2017.[156] Still, the number of applications remains relatively low and the scheme fills only a very small part of the 'LASPO gap'[157] created by the cuts. The problem of access to justice remains one of the biggest challenges facing the family justice system. While a 'post-implementation review' of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is currently underway, frequent ministerial changes and the distraction caused by Brexit have impeded policy attention to this area and made it difficult to predict future directions.

[152] N. Corbett and A. Summerfield, *Alleged Perpetrators of Abuse as Litigants in Person in Private Family Law: The Cross-Examination of Vulnerable and Intimidated Witnesses* (Ministry of Justice Analytical Services, 2017).

[153] Legal Aid, Sentencing and Punishment of Offenders Act 2012, s. 10.

[154] Ministry of Justice and Legal Aid Agency, *Legal Aid Statistics in England and Wales 2013–2014* (2014) 26–7; House of Commons Justice Committee, *Impact of Changes to Civil Legal Aid under Part I of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, 8th report of session 2014–15 (HC311, 2015) 14–20; House of Commons Public Accounts Committee, *Implementing Reforms to Civil Legal Aid*, 36th report of session 2014–15 (HC 808, 2015).

[155] *Gudanaviciene* v. *Director of Legal Aid Casework* [2014] EWCA Civ 1622; *Director of Legal Aid Casework* v. *IS* [2016] EWCA Civ 464.

[156] Ministry of Justice and Legal Aid Agency, *Legal Aid Statistics Quarterly (2017)*, 10.

[157] R. Hunter, 'Exploring the "LASPO gap"' (2014) 44 *Family Law* (May) 660. And see E. Marshall, S. Harper and H. Stacey, *Family Law and Access to Legal Aid* (Public Law Project, 2018).

Conclusion

Several unifying strands emerge from the above account of contemporary issues in family law in England and Wales. Family law policy is marked by commitments to the value of marriage, to private ordering and to minimising public sector spending. In family law practice children's contact with both parents is highly valued but human rights, freedom from domestic abuse and gender equality, while not ignored, are less clearly prioritised. Arguments from efficiency, rationalisation and modernisation currently tend to have more purchase than arguments from equality and justice. In the last five years governments have enacted significant reforms in the areas of child contact, child protection, domestic violence offences, dispute resolution and legal aid funding, but have resisted reform in the areas of civil partnerships, marriage regulation, no-fault divorce, cohabitation and domestic violence as it relates to arrangements for children after parental separation. Family law responds well to a diverse and pluralistic society when providing for post-divorce financial arrangements, but less well when it comes to cultural and religious diversity and diversity of family forms. It is a site on which strongly held values collide. As a result, it seems family law is likely to remain an area of controversy and contestation for the foreseeable future.