Law, Discretion, Gender and Justice in Out-of-Court Financial Settlements

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Abstract

This paper presents some of the findings of our Mapping Paths to Family Justice research with regard to out-of-court settlements in financial cases, considering what parties and practitioners respectively bring to the process of dispute resolution, and how outcomes are influenced by practitioners' and parties' contributions. Practitioners play an important role in determining the extent to which the 'shadow of the law' falls on out-of-court dispute resolution, and this might vary by the type of dispute resolution process and the individual practitioner's views, but is also complicated by the fact that the law's shadow in a highly discretionary system may be distinctly hazy. Parties, in turn, bring to the process their own normative conceptions of a fair outcome, which are markedly gendered. Outcomes thus tend to be a function of the interaction between the respective norms of the parties, their respective needs to settle and willingness or compulsion to compromise, and the nature and direction of practitioner (non-) intervention. Despite these complexities and the range of individual circumstances, some clear patterns of outcomes were observed, some of which gave rise to concerns about systematic disadvantages for women in financial dispute resolution.

Introduction

The discretionary nature of the current law in England and Wales concerning financial remedies has come to be perceived as a significant problem. Indeed, several of the papers in this special issue suggest it is the major problem or challenge in the area of financial remedies. Hence, there have been increasing calls for reform in order to create greater certainty for divorcing couples – not only for those who go to court, but also – or perhaps especially – for those wishing or finding it necessary to settle out of court. The excessively hazy nature of the law's shadow is said to impede private ordering, a difficulty thought to be exacerbated following the cuts to legal aid effected by the Legal Aid, Sentencing and

Punishment of Offenders Act 2012 (LASPO), when more and more people are reliant on private ordering in order to reach post-separation financial arrangements.[1]

The centrality of law to family dispute resolution in financial cases is open to question, however. The notion that people are left floundering about how to divide up their finances because the law fails to give them sufficient direction posits both a linear and a necessary relationship between legal doctrine and financial outcomes. But this fails to capture two important elements of the dynamics of financial dispute settlement. The first of these elements is the norms parties bring to the table with them, and the social and relationship dynamics within which those norms are formulated and advanced.[2] The second is the role of practitioners in mediating or channelling the shadow of the law to their clients. Where practitioners are involved, the law is what practitioners represent it to be,[3] and agreement arises out of the interaction between parties' norms and practitioner representations. Where practitioners are not involved, parties' own norms and relationship dynamics are played out untrammelled. If reform to the law of financial remedies is contemplated, this is the picture against which such reform needs to be considered.

In this article we use data from the Mapping Paths to Family Justice project to illustrate and flesh out these points, and to consider the kinds of patterns of financial

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[1] See, e.g. Baroness Deech's explanation for the introduction of her private member's bill, the Divorce (Financial Provision) Bill (HL Bill 21, 2016-17), quoted in House of Lords Library, *In Focus: Divorce (Financial Provision) Bill [HL]: Briefing for Lords Stages* (2017), available at http://researchbriefings.parliament.uk/ResearchBriefing/Summary/LIF-2017-0004 (accessed 26 January 2018).

[2] See e.g. Simon Duncan and Rosalind Edwards, *Lone Mothers, Paid Work and Gendered Moral Rationalities* (Palgrave Macmillan, 1999); Anne Barlow and Simon Duncan, 'Supporting Families? New Labour's Communitarianism and the "Rationality Mistake": Part I' (2000) 22 *Journal of Social Welfare and Family Law* 23.

[3] See e.g. Becky Batagol and Thea Brown, *Bargaining in the Shadow of the Law: The Case of Family Mediation* (Themis Press, 2011) 259, 264, 270; Austin Sarat and William LF Felstiner, *Divorce Lawyers and their Clients: Power and Meaning in the Legal Process* (OUP, 1995).

settlements that result.[4] The research investigated out-of-court family dispute resolution processes and outcomes in England and Wales in both children's and financial matters between 1996 and 2014. While the focus was on disputes resolved by solicitor negotiations, mediation and/or collaborative law, we also gained insights into cases where none of these dispute resolution methods were used and into cases which proceeded to court. Three methods of data gathering were used: national surveys of the general public and of people who had experienced separation or divorce in the relevant time period; interviews with parties who had experienced one or more dispute resolution processes (n=95) and with practitioners providing those processes (n=40); and observations of a small sample of mediation and collaborative law processes and lawyer-client first interviews. The method of observation was to record (rather than be present in) the relevant session/s and then to read, collectively discuss and analyse the transcripts of the recordings. This paper draws mainly on interview data, supplemented by the observational data which gave a real flavour of the dynamics of dispute resolution processes as well as reality checks on what parties and practitioners said in their interviews. Although the majority of interviews were conducted and sessions were recorded before LASPO came into force, there is no reason to believe that LASPO would have changed the normative landscape, as opposed to the numbers of cases with lawyer, mediator, court or no practitioner involvement.[5]

Parties' norms

[4] The Project was funded by the UK Economic and Social Research Council, Grant no ES/I031812/1. A fuller account can be found in our book, Anne Barlow, Rosemary Hunter, Janet Smithson and Jan Ewing, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave Macmillan, 2017).

[5] See also Emma Hitching and Joanna Miles, 'Mediation, Financial Remedies, Information Provision and Legal Advice: The Post-LASPO Conundrum' (2016) 38 *Journal of Social Welfare and Family Law* 175.

In interviews we asked parties what they had thought would be a fair outcome for their dispute, and whether they thought the outcome achieved was fair. Not all parties answered these questions or answered them directly. For those who did answer, we identified themes in the responses and categorised responses according to those themes. In some cases, the answers also enabled us to categorise the position held by the party's ex-partner, as they described what they had both wanted or sources of disagreement between them. Similarly, we read over the transcripts of the recorded sessions, identified statements made by parties which indicated their conceptions of a fair outcome, and categorised those statements within the same themes. In some cases, parties' statements or accounts fell within more than one theme. In these cases we did not attempt to identify a single or dominant norm held by each party but coded for each of the themes they expressed.

The range of norms expressed by parties included both material and emotional or moral norms, that is, norms as to the basis on which finances should be distributed, and views and feelings concerning their own or the other party's behaviour which drove their sense of a fair outcome. Material norms in financial matters included:

- formal equality: a 50/50 split of financial assets
- primary carer: an outcome making adequate provision for the party who would be the primary carer of the children (in all cases in which this norm was articulated the primary carer was the mother); this was closely associated with
- needs: an outcome which met the party's future financial needs; and
- child welfare: an outcome that was perceived to be in the best interests of the parties' children

- contributions: an outcome reflecting the parties' direct financial contributions, which included parties wanting to keep assets perceived as 'theirs', especially pensions[6]
- compensation: an outcome compensating the party for something they had given up in the interests of the family or relationship (such as a full-time job, career or occupational pension).

All of these norms align with various legal rules and principles found in s 25 of the Matrimonial Causes Act 1973 and in the leading case law,[7] but that is because legal rules and principles reflect basic social notions of fairness rather than the other way around. The discipline imposed by the law on this 'normal chaos'[8] is that it decides when particular norms should be prioritised or are inappropriate – a degree of nuance not generally reflected in parties' positions. Very few parties, however, articulated an express desire to order their finances in accordance with what the law might dictate.

In addition to these socio-legal norms, parties were influenced by emotional and moral norms,[9] most of which no longer find legal analogues, although they may have in the past. These included:

- punishment: an outcome which included some element of punishment of the other party for their role in ending the relationship
- reasonableness: an outcome that was fair to the other party

[6] See also Jane Mair, Fran Wasoff and Kirsteen Mackay, 'Family Justice Without Courts: Property Settlement on Separation Using Contracts in Scotland', in Mavis Maclean, John Eekelaar and Benoit Bastard (eds), *Delivering Family Justice in the 21st Century* (Hart Publishing, 2015) 175, 195.
[7] *White v White* [2001] 1 AC 596; *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618.
[8] John Dewar, 'The Normal Chaos of Family Law' (1998) 61 *Modern Law Review* 467.
[9] This point has also been noted by Sue Arthur, Jane Lewis, Mavis Maclean, Steven Finch and Rory Fitzgerald, *Settling Up: Making Financial Arrangements after Divorce or Separation* (National Centre for Social Research, 2002) 72; Emma Hitchings, Joanna Miles and Hilary Woodward, *Assembling the Jigsaw Puzzle: Financial Settlements on Divorce* (University of Bristol, 2013).

- guilt: an outcome which reflected the party's guilt about their own role in ending the relationship, one more generous to the other party than might otherwise have been the case
- pragmatism: a party's preparedness to settle for what they could get, regardless of whether it reflected their needs or legal entitlements
- sacrifice: a party's willingness consciously to settle for less than they may have been able to achieve in order to maintain good relations with the other party or pursue some other objective they considered more important
- self-preservation: the party felt intimidated or highly stressed by the negotiation process and was prepared to agree to anything to get it over with.

The predominant norms expressed by the parties and their former partners were clearly gendered. The predominant norm expressed by wives[10] in financial matters was the desire to meet their future needs, usually due to their status as the children's primary carer. After needs, the next largest group of wives expressed the norm of formal equality. However, women were also more likely than men to have mixed feelings and to bring in a range of normative considerations to their financial disputes, including feelings of guilt, pragmatism, sacrifice or self-preservation, concerns about compensation or a desire for reasonableness, which were rarely put forward by men.[11] For example, Kim wanted to be reasonable about finances and agreed to the return of a deposit paid by her ex-partner, despite her solicitor's advice that this was not necessary. Kay agreed to the transfer of the

[10] The matrimonial property regime in England and Wales applies only to divorcing couples, i.e. those who were formerly wives and husbands. Cohabitants dividing property on separation are subject to the general law of property and equity.

[11] Previous studies which have made similar observations include Batagol and Brown, above n 3; Christine Piper, *The Responsible Parent: A Study in Divorce Mediation* (Harvester Wheatsheaf, 1993). See also Trina Grillo, 'The Mediation Alternative: Process Dangers for Women' (1991) 100 *Yale Law Journal* 1545.

former matrimonial home to her ex-husband on payment of a small lump sum because she 'felt so guilty that [she] had left', regardless of the reservations expressed by both the mediator and the District Judge. Patty 'gave up the house' because her ex-husband refused to hand over their child's passport to allow her to leave the country. She explained that 'I just wanted to be done and dusted and I caved in… At the time it was expedient… I just did what I needed to do and got out of it'.

The predominant norms expressed by husbands in financial matters were formal equality and contributions. Men expressed the norm of formal equality twice as often as women. Moreover, they often expressed the two norms of formal equality and contributions together, as in a willingness to split the value of the matrimonial home 50/50 but a desire to retain all of their pension. This normative gender difference of course reflects Smart and Neale's observation that in the process of reconstituting the post-separation family, women tend to think in terms of an ethic of care and responsibility while men tend to think in terms of formal equality and rights.[12]

In addition to gender difference, we also found a process difference, in that the norm of primary carer's needs was often raised in solicitor negotiations and mediation but hardly raised at all in collaborative law. Conversely, parties were substantially more likely to bring norms of formal equality and contributions into collaborative law. This most likely reflects demographic differences, with parties using collaborative law having fewer, older children and tending to be at the end of longer and wealthier relationships on average than those using solicitor negotiations or mediation. Other background normative differences may have contributed to the choice of process, for example the norm of reasonableness was

[12] Carol Smart and Bren Neale, *Family Fragments?* (Polity Press, 1999); see also Mair et al., above n 6, 195.

somewhat more likely to be brought into mediation than into solicitor negotiations, while the process of screening out unsuitable cases from mediation and the status of solicitor negotiations at the time of the research as the default option for more 'difficult' disputes may have resulted in the emotional norms of pragmatism and sacrifice being found somewhat more often in solicitor negotiations than in mediation.

The role of practitioners

The law on financial remedies is not, of course, a matter of complete but of bounded discretion, involving application of case law principles and statutory factors to the circumstances of the particular case. The degrees of freedom increase the more sources of wealth there are, but in a great many cases the legal room for manoeuvre is limited. *Representations* of the law by dispute resolution practitioners, however, fell on a spectrum from wholly indeterminate to fairly certain and predictable. This meant practitioners giving parties less or more guidance or steering with regard to their legal position, with the result that the shadow of the law fell fairly lightly through to quite heavily depending on the practitioner's preferred approach.[13]

Practitioners' orientations in fact operated along two axes, one concerning the conduct of dispute resolution (what role they thought the law ought to have in the process) and the other concerning the outcomes of dispute resolution (what kind of agreements they were prepared to countenance). In terms of the process, practitioners ranged from negative

[13] See also Hitchings and Miles, above n 5. The phrase 'the shadow of the law' inevitably invokes the famous article by Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950. For the purposes of this article, however, the phrase is used descriptively to refer to the extent to which legal norms are influential in the negotiation process, rather than intending to import or to contribute to debates concerning the detail of Mnookin and Kornhauser's bargaining theory.

representations of law, through 'norm educating', to being quite directive about what a court would expect. In terms of outcomes, they ranged from giving absolute priority to party autonomy[14] through to benchmarking the agreement against what a court would be likely to order. In combination, practitioners could be broadly divided into four groups: hands-off, mild-to-moderately interventionist, moderate-to-significantly interventionist and directive.

At the hands-off end of the spectrum several collaborative practitioners and mediators we interviewed and observed represented the law to clients strategically as something that is unhelpful and therefore to be avoided. Here the uncertainty of the law and the unpredictability of discretionary decision-making, far from being seen as an impediment to settlement, was used to *promote* settlement. In the words of one lawyer in the course of a collaborative meeting:

> Well who knows, toss a coin what the law says because we have got such a discretionary system in this country, you can argue until the cows come home, you know. And that's why kind of in a sense law is helpful on one level but very unhelpful on another. (Clarissa Chesterton,[15] recorded collaborative process 214)

Or as stated to the parties by a mediator:

> What I can say [about going to court] is it is an uncertain outcome. I guarantee neither of you will predict the outcome because it depends on evidence, it depends on six months of statements and witnesses and a barrister and the judge on the day,

[14] All forms of private ordering, and mediation in particular, are promoted on the basis that they respect and enhance party autonomy, a highly valued commodity within liberal societies. There is an extensive literature debating both the priority given to party autonomy and the precise meaning and requirements of autonomy in the legal and dispute resolution context. One of the best discussions in relation to family law is by Sharon Thompson in *Prenuptial Agreements and the Presumption of Free Choice* (Hart Publishing, 2015). It is not the purpose of this article to engage directly with these debates but rather to show how the idea of autonomy is (or is not) operationalised in dispute resolution processes, and the implications for parties and outcomes.

[15] All names of practitioners and parties are pseudonyms.

> the opinion. … Well, you ask your lawyer, ask your solicitors, 'Can you guarantee me an outcome?' And if they can't, then that's why mediation is the way to go. If they can't guarantee an outcome… (Peter Young, recorded mediation 207)

Another mediator told us she had 'certain little visuals, sort of analogies that I use, painting pictures that I hope help [clients] to remember things'. One of these was 'Twelve different District Judges in a room with the same set of facts come out with 13 different decisions' (Jane Davison). While the collaborative lawyers interviewed saw one of the advantages of collaborative law, compared to mediation, as being their ability to give legal advice directly as part of the process, they also stressed that what a court would decide in the particular case was not the primary focus of negotiations. As one collaborative lawyer put it, clients usually sign up to the collaborative process because they want to come to an agreement that is more creative than a court-ordered outcome (Matthew King).

Collaborative lawyers were most prominent among the group espousing total adherence to party autonomy in relation to outcomes, accompanied by a minority of mediators (all from legal backgrounds). One collaborative lawyer acknowledged that what the court might order would influence her perception of a good outcome, but 'the collaborative process has taught me to let go of that to a certain extent' (Rachel Matthews). So long as the client understands the long-term implications of their decisions and does not feel pressurised, it is up to them if they choose to reach an agreement which is outside the parameters of what a court is likely to order. Another said he would consider the likely court outcome as a bare minimum safety net, but collaborative law worked at a different level, with the parties' aspirations rather than court outcomes being the guiding principles (David Leighton).

The mild-to-moderately interventionist group was also primarily comprised of mediators and collaborative lawyers. They tended to operate according to a touchstone of 'fairness' which they would use mentally to assess any proposed agreements, but may not articulate directly to the parties. For example, one of the recorded collaborative cases (213) involved an older couple with no dependent children separating by mutual agreement, and resulted in an equal division of assets and a clean break. In this case, the lawyers provided very little explicit legal advice, other than on the specific issue of inherited property. Since the parties arrived by their own devices at an outcome the practitioners considered to be fair, there seemed little need for direct legal intervention. Some mediators said they would assess the proposed agreement against what a court would order and if they thought it was too favourable to one party, they would try to get the parties to look at it from each other's perspectives, caucus with the parties separately to try to understand their motivations for the agreement, tell them a court would be unlikely to make such an order and/or suggest the need for legal advice.

Two mediators commented on the need to explain the principles of fairness to parties in financial cases, in terms of needs, contributions and equal sharing.[16] One of these noted the tension between men's expectations of formal equality and legal notions of fairness:

[16] The leading case of *White v White* [2001] 1 AC 596 established the principle that the overall aim of the law in this area is to achieve fairness between the parties. The subsequent case of *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618 elaborated on how fairness between the parties was to be achieved, by reference to the consideration of needs, compensation and equal sharing (in that order). In practice, 'small money' cases (in which needs exceed assets) are decided by reference to needs, while 'big money' cases (in which assets exceed needs) are decided by reference to equal sharing, with compensation playing a somewhat muted role in between. There is much less emphasis on contributions in the English law compared to Australian law, with contributions in marriages of reasonable duration more or less assumed to be equal. *White v White* also established that there must be no discrimination between economic / breadwinner and non-economic / homemaker contributions.

> The problem is that people don't always appreciate that…just because, you know, you have got a house that is jointly owned, you don't have to share it 50/50. That seems to be obviously what a lot of men in particular think is going to be the outcome, and of course you have to say 'well, it isn't necessarily the case and what we need to do is to take into account of all the factors that the law says you should take into account before a decision is made' and erm, that often means it isn't quite as equal as they would like it to be… (Mike Carter)

Likewise, some collaborative lawyers would 'have conversations about fairness' (Richard Benson) if they felt a proposed agreement diverged from this standard. A good illustration of such a conversation occurred in one of our recorded collaborative processes (204), in which the husband, Gary, was happy to share the proceeds of the sale of the house equally but wanted to maintain all other assets and liabilities as they stood. That would leave him with his pension intact and the wife, Sandra, with a substantial debt incurred in her name but used for the welfare of the family. Moreover, Gary would be buying a new house while Sandra, who worked part-time, would be going into rented accommodation with the children and would remain as the primary carer. Both lawyers made an effort to convince Gary that such an outcome would be perceived as unfair, by reference to the court's approach and the risk that the court would not accept a consent order embodying such an unequal division. But these arguments were not effective in shifting Gary's position. He reluctantly agreed to nominal maintenance, on his lawyer's strong advice that the local courts considered it 'almost a prerequisite' where there were young children involved, but he could not see any unfairness in the division of assets, and threatened to seek equal shared residence of the children if forced to share his pension. In the end, and despite there being a break in the session for Sandra's lawyer to speak to her separately (presumably to

reinforce her strong legal position) it was Sandra who gave in, displaying elements of pragmatism and sacrifice in acknowledging that Gary was adamant and would not change his mind, insisting that she had enough to meet her needs, and being prepared to agree to finalise matters and keep the peace.

The moderate-to-significantly interventionist group was comprised of mediators and solicitors. These practitioners acted as 'norm educators' in actively giving legal advice or information, equipping clients with knowledge of legal norms which might differ from and potentially trump clients' personal norms. Mediators, for example, would give information on the factors the court might take into account when deciding a financial settlement, or guide parties as to the parameters of legal acceptability for the purposes of a consent order. A few mediators said that if they thought a person was giving too much away due to guilt, they would try to steer them away by warning that the court may not ratify their agreement, and/or express their reservations in the final MOU. Mediators also routinely referred clients for legal advice. This is one area where LASPO will have changed the situation, since the option of parties obtaining legal advice alongside mediation is now considerably less available to those reliant on legal aid, which may place more onus on mediators to provide legal information at the outset in order to inform parties' decision-making.[17]

In our recorded mediation sessions, we observed a notable contrast between the cases concerning children's matters and financial matters. The former contained few if any references to the law, legal principles, courts or judges. By contrast, the financial mediation case we recorded was saturated with law. Its structure, content and goals were all legally

[17] See also Hitchings and Miles, above n 5.

determined. Unlike the children's mediations, which involved fairly free-flowing discussions of the issues raised by the parents, the financial mediation was tightly structured by the mediator and followed the legally necessary steps of disclosure of assets and income, determination of expenses and future needs, determination of the basic principle of division, and decisions about the distribution of assets to effect that division. The content included both extensive legal information and urgings to obtain legal advice. And the goal was to reach an agreement which could be turned into a consent order by a solicitor, which in turn meant that the terms of the agreement had to be within the bounds of acceptability by a court.[18] As a general proposition in England and Wales, court orders are available, encouraged and positively desirable in financial cases, but not in children's cases.[19] The need to persuade the court to ratify a consent order thus exerts a certain discipline in terms of both the procedure followed (disclosure, legal information) and the outcome proposed (in accordance with legal principles).

The majority of mediators said they would be concerned that proposed agreements fell within the parameters of what a court might decide. If a proposed agreement fell outside this ambit, they would provide information about what courts have laid down as fair and appropriate in similar circumstances, explore other possible options, reality test and discuss the practical implications, recommend legal advice and/or flag their concerns to the

[18] See also Mavis Maclean and John Eekelaar, *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Hart Publishing, 2016) 97, 112-13, 115.

[19] The Children Act 1989 includes s 1(5), the no-order principle, which requires that a court should only make an order in a children's matter if it considers that to do so would be better for the child than making no order. Received wisdom holds that it is better for the child for parents to agree between themselves and to have self-determined, informal and flexible arrangements rather than having child arrangements imposed by court order. Thus, where arrangements have been agreed in mediation (which in England is predominantly community-based and occurs prior to any appearance in court), it is not normally considered necessary or desirable to turn them into a formal consent order.

parties' solicitors in the MOU.[20] Some noted their duty under the Resolution Code to point out to the parties that their proposed agreement may not be accepted by a court.[21] Clearly, the existence of judicial discretion and the notion of legal parameters provides a way of reconciling party autonomy with the shadow of the law: autonomy can still be honoured within a finite range of possibilities. As such, it resolves a particular problem in the theory and practice of family mediation, that of adhering to the principle of neutrality as to outcomes while ensuring that outcomes promote children's welfare[22] and can survive judicial scrutiny. It is thus perhaps not surprising that so many mediators espoused the 'legal parameters' approach.

Finally, the directive group were mainly solicitors engaged in traditional negotiations. They were generally agreed that the primary role of a lawyer in solicitor negotiations is to explain the law applying to the client's dispute and how that dispute might be decided by a court. Advice about the law and legal process could be used both to deflate clients' unreasonable expectations and to protect clients from selling themselves short. Solicitors

[20] See also Maclean and Eekelaar, above n 15, 101.

[21] Resolution is an association of solicitors and other family justice professionals committed to non-adversarial approaches to the practice of family law. The association provides training for practitioners in both mediation and collaborative law, and the Code of Conduct for mediator members of Resolution at the time of the research included this duty. The Resolution Code of Conduct has subsequently been replaced by the Family Mediation Council's Code of Practice for Family Mediators (September 2016), which does not include the same duty. Rather, the Code specifies that 'The Mediator must not seek to impose any preferred outcome on Participants, or to influence them to adopt it, whether by attempting to predict the outcome of court proceedings or otherwise. However, if the Participants consent, the Mediator may inform them (if it be the case) that he or she considers that the resolutions they are considering might fall outside the parameters which a court might approve or order' [5.3]: https://www.familymediationcouncil.org.uk/wp-content/uploads/2016/09/FMC-Code-of-Practice-September-2016-2.pdf, accessed 26 January 2018.

[22] See Robert E Emery, '*Re-negotiating Family Relationships: Divorce, Child Custody and Mediation* (Guildford Press, 2nd edn, 2012) 140; David Greatbatch and Robert Dingwall, 'Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators' (1989) 23 *Law and Society Review* 613, 615. In England and Wales this is relevant in financial as well as children disputes. Section 25(1) of the Matrimonial Causes Act 1973 provides that in making financial orders, the court must give first consideration to the welfare of any child of the family aged under 18.

mentioned managing parties' expectations by reference to what a judge would be likely to order. For example, where one party was motivated by a desire to punish the other for their behaviour in ending the relationship, solicitors said they would educate clients that the courts view conduct and the circumstances of the relationship breakdown as irrelevant to financial outcomes.[23] Conversely, if a client was motivated by guilt over their own behaviour in ending the relationship, solicitors would give them clear advice about how the court would approach the matter and the likely outcome if the case was to go before a judge. For example in recorded solicitor-client interview 205, the client, Geoffrey Parsons, was separating from his civil partner after a six-year relationship in which he had contributed around 80 per cent of the cost of their jointly-owned home. The home was now mortgage free and sufficiently valuable to enable them both to rehouse with half the proceeds, however the client wanted to offer more to assuage his feelings of responsibility for the relationship's demise.

> *Caroline Underwood (solicitor)*
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> I think the way the court would approach it is that that is in joint names and he needs to start again and he is not that young and his income is pretty low so his mortgage capacity is very low. So I think rather than looking at where that came from and of course it all came from you, he actually needs half.
>
> *Geoffrey Parsons*
>
> I've got no problems with that.

[23] Section 25(2)(g) of the Matrimonial Causes Act 1973 provides that conduct is a factor to be taken into account in making financial orders only 'if that conduct is such that it would in the opinion of the court be inequitable to disregard it'. This has been interpreted as imposing a high threshold of egregious behaviour. See, e.g. *K v K (Conduct)* [1990] 2 FLR 225 (alcohol abuse and degradation of family finances); *Whiston v Whiston* [1995] Fam 198 (bigamy); *J v S-T (formerly J)* [1998] Fam 103 (non-disclosure of transgender status); *K v L* [2010] EWCA Civ 125 (sexual abuse of grandchildren); cf *H v H (Financial Relief: Attempted Murder as Conduct)* [2006] 1 FLR 990 (attempted murder of wife treated as a 'magnifying factor' in the wife's claim rather than as the husband's conduct *per se*).

Caroline Underwood

But he doesn't need more than half.

Geoffrey Parsons

That's it, I have got no problems. The way I was looking at it was that I thought they may well say that [the other party should get around two-thirds].

Caroline Underwood

No.

Geoffrey Parsons

To give him that little bit extra.

Caroline Underwood

I don't think so because I think if you tell me…he can rehouse. ….

Geoffrey Parsons

It's not a house and it's not necessarily got a garden.

Caroline Underwood

It doesn't have to be, it's a one bedroom flat we are talking about.

Solicitors engaged in traditional negotiations tended to place less emphasis on the range of possible outcomes and more on benchmarking proposed agreements against what a court would be likely to order. This was expressed not necessarily as a matter of choice for the parties but as an indicator of the solicitor's own professional competence. Indeed, one solicitor demonstrated her positional orientation by saying that an even better outcome would be if she could get more for her client than the court would be likely to order, if she could 'exceed the parameters' or 'beat the curve' (Francesca Lamont), while another described his role in a negotiated cases as 'a hired gun. You are there to get the most, you know, the best deal for your client...' (John Astwood).

When it comes to the shadow of the law, then, there appear to be differences between dispute resolution processes, as well as variations within each process depending on the individual practitioner.[24] Overall, the law cast the deepest and most extensive shadow over solicitor negotiations. It cast a lighter but still clearly discernible shadow over mediation, more so in financial than in children's cases. At the time of our research, solicitors played an important role in helping to bring the shadow of the law to bear on mediation, by giving advice before or alongside the mediation process, checking agreements were fair and drawing up consent orders; and mediators relied on them to do so, especially where they had reservations about the agreement. This role, however, has been substantially diminished by the LASPO legal aid reforms, with the possible result that the law has become less normative in mediation.

Finally, the shadow of the law appeared to fall most lightly of all on collaborative law processes and collaborative lawyers displayed the greatest level of adherence to the value of party autonomy. The commitment to party autonomy, the norms of co-operation and the lack of a credible threat of court proceedings in collaborative law,[25] however, could have the consequence that power dynamics between the parties went unchecked and a vulnerable party was not protected. Similarly, the exaggerated representation of judicial discretion in

[24] Cf Emma Hitchings, 'Official, Operative and Outsider Justice: The Ties That (May Not) Bind in Family Financial Disputes' (2017) 29 *Child and Family Law Quarterly* 359, who advances an argument based on distinctions between processes, but does not allow for practitioner variation within processes.

[25] The hallmark of the collaborative law process is that both parties and their lawyers sign a participation agreement in which they all agree that if either party decides to initiate court proceedings, both of the lawyers will cease to act. This is intended to act as a strong incentive to cooperation by increasing the cost to both parties and their lawyers of failing to reach an agreement. But where one party seeks to exploit a more powerful position in order to gain an unfair advantage in negotiations, the other party's ability to call their bluff and take them to court is significantly restricted by the cost of doing so (including the cost of finding another lawyer).

order to encourage out-of-court settlement could also deprive less powerful parties of important legal support.

The encounter between parties' norms and the shadow of the law

Where both parties shared the same norms, whether of formal equality or the needs of the primary carer, the matter almost inevitably resolved with that outcome, regardless of how the case may have been decided by a court. In situations of norm disparity or norm conflicts, however, three possible outcomes were observed. One was that the parties reached a compromise, which split the difference between them in a way which generally fell within the parameters of legal possibility, although may not have reflected how a court would have actually decided the particular case, and may not have been substantively just.[26] The second was that the practitioner(s) intervened to steer the outcome in accordance with the relevant legal norms. The third was that the matter remained unresolved.

In terms of practitioner intervention, parties described being steered towards a particular outcome in financial cases almost twice as often as they did in children's cases. The parties in our interview sample were considerably more likely to have received advice from a solicitor than information from a mediator about appropriate outcomes, including solicitors giving advice prior to the parties entering mediation. The largest group here were women who felt empowered by the advice they received, not having realised that their non-financial contributions to the welfare of the family and their role as primary carer would be

[26] Our conception of substantive justice draws on the work of Nancy Fraser, *Justice Interruptus: Critical Reflections on the Postsocialist Condition* (Routledge, 1997). It requires that financial outcomes should not perpetuate relationship-generated disadvantage (redistribution) and should appropriately acknowledge and value ongoing care work (recognition). They should provide each party with an equal ability to move on with their lives, taking into account all the circumstances and the surrounding context. For further analysis, see Barlow et al., *Mapping Paths to Family Justice* (2017) 8-9, 201-2.

taken into account in decisions about the division of property. Yet several of the women in our party interviews and one in the recorded collaborative process discussed above (204) chose to ignore their legal advice and settled for less for reasons of guilt, pragmatism or sacrifice. Indeed, one of the collaborative practitioners interviewed noted that he had had cases in which men had been keen to use the collaborative process because they perceived their wives were feeling guilty, with the implication that the process would therefore deliver them a better deal than one in which a solicitor was actively representing the wife's interests (Matthew King).

Equally concerning were a group of cases in which women's lawyers apparently failed in their professional obligations to explain their legal position adequately or to pursue their financial interests. For example, Jayne's solicitor did not give her the advice she sought before entering mediation about a reasonable percentage split of the assets, and she was forced to do her own research on the internet. In solicitor negotiations, Freda's solicitor did not pursue her ex-husband's pension, and she wished in hindsight that they had. In almost half of the (admittedly small number of) collaborative cases in our party and observational samples the wife felt insufficiently advised, reached a clean break agreement in circumstances in which ongoing spousal maintenance should have been provided for, or agreed to a needs-based division which left her with less than half of the assets.

While some of the norms brought into the dispute resolution process by the parties were reflected in outcomes, others tended to be discarded along the way. In financial cases husbands succeeded with formal equality and contributions-based arguments, while wives succeeded with formal equality and primary carer/needs-based arguments, although as indicated, wives' guilt, pragmatism, sacrifice and self-preservation might also be reflected in agreements. Parties' desires to punish the other party were generally not reflected in

settlements, while wives' arguments for compensation for relationship-generated disadvantage do not appear to have been successful. Thus, legal norms did not trump non-legal norms in any straightforward manner. The non-legal norms of guilt, pragmatism, sacrifice and self-preservation could remain in play while the legal norm of compensation was universally discarded[27] – in all cases, these normative outcomes operated to the disadvantage of women.

The most common patterns of norm disparity and their outcomes in financial cases are set out in the following Table:

Typical norm disparities and outcomes

Husband's norms	Wife's norms	Resolved with no or limited practitioner intervention	Resolved with active practitioner intervention	Unresolved
Formal equality / contributions / own needs	Primary carer's needs / compensation / child welfare	Compromise on formal equality	Primary carer's needs	Unable to compromise
Formal equality / contributions	Guilt / sacrifice / pragmatism	Wife conceded husband's position	Wife's /primary carer's needs or fairness-based	
Own needs / child welfare	Own needs / child welfare (different conception)	Needs-based compromise	Needs-based compromise	Entrenched differences in conception of needs

Notably, only one of the financial cases in which a 50/50 split of the assets was agreed (generally on a clean break basis) could be described as a 'big money' case, so that equal division was likely to take care of each party's future needs. Moreover, only one of these

[27] This appears also to have occurred in the reported cases. The titles of articles commenting on the developing case law on compensation are illuminating: Sarah Foreman, 'Is Compensation a Dead Duck?' (2014) 44 *Family Law* 1025; Valentine Le Grice, 'Compensation: A Dead Parrot or a Sleeping Beauty?' (2018) 48 *Family Law* 48.

cases also had an equal shared care arrangement for the children. In a number of these cases, the equal division of moderate assets took place in the context of conventional residence/contact arrangements for the children, and are therefore likely to have left the primary carer and the children insufficiently provided for. Equal division did not compensate the primary carer for relationship-generated economic disadvantage, take into account the greater costs of child care to be incurred by the primary carer, or provide each party with an equal ability to move on with their lives.

Agreements reached in mediation were more likely to be based on formal equality, either as a result of shared norms or compromise. Agreements reached in the lawyer-led processes were more varied, but were more likely to feature needs of the primary carer in solicitor negotiations, and contributions in collaborative law. The Table illustrates the importance of practitioner intervention in shifting outcomes from a 'default' position of formal equality or less to one that better served the interests of children and/or the needs of the party in the weaker financial position, and in steering outcomes away from 'inappropriate' fault-based or exploitative norms. The pattern of outcomes between dispute resolution processes suggests that this kind of intervention was more likely to occur in solicitor negotiations than in either mediation or collaborative law, although it could not always be relied upon even in solicitor negotiations. On the other hand, legal norms may have only a limited or no role to play when the parties' initial norms are in agreement.

Conclusion

This analysis throws up several challenges for potential law reform in relation to financial remedies. For the apparently increasing number of parties sorting out their finances without practitioner involvement, how can the effects of emotional norms such as punishment, guilt

and sacrifice be eliminated or mitigated? How can the message be conveyed that in cases where there is more than enough money to go around for the future, equal sharing (rather than contributions) should be the norm, while in cases where there is not enough money to go around, the future needs of the children and their primary carer should take priority (rather than the norms of formal equality and a clean break)? These questions serve as a reminder of the virtues of a discretionary system and the disadvantages of bright-line rules. Furthermore, in the cases where practitioners continue to be involved, how can it be ensured that all of them – collaborative lawyers, mediators and solicitors – actively support their clients to meet their future needs and/or to share assets equitably, as well as pursuing compensation for relationship-generated disadvantage?

The two problems identified here do not appear to be remediable by law reform. In relation to practitioners, what is needed is not different law but greater commitment to using the existing law to ensure outcomes are fair and just to both parties, and specifically to women, since our research demonstrates that it is women who are systematically disadvantaged. This is a matter for education and training, practice cultures, professional associations and ultimately professional regulation. In relation to parties making arrangements without the assistance of family justice professionals, a potentially more satisfactory approach to achieving the objectives of fairness and justice, rather than trying to 'simplify' the law, would be to develop smart and responsive online tools to help guide parties in sorting out their finances after divorce or separation. Such tools would build in the legal norms appropriate to the particular circumstances of the case while operating to counter punitive or self-defeating personal norms. Thus, they may conceivably assist to deliver more consistently fair arrangements more quickly and at lower cost than any of the current dispute resolution options.