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## **The breadwinner, the homemaker and the worker/carer: new stereotypes for old?**

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### **Outdated stereotypes**

The ideal worker, who is available to work long hours ... is dependent on a domestic norm, that is, a full-time carer engaged in family work of household and childcare....<sup>1</sup>

Once upon a time, not so long ago, the rules were clear in both the market and the family: men went to work and women stayed at home, particularly when the men became husbands and fathers and the women became wives and mothers.<sup>2</sup> In the 1970s<sup>3</sup> and before, there was a dominant model of the family built on marriage between a stereotypical breadwinner and homemaker: the former invariably male and the latter female. During marriage the wife cared for the family, in return she was financially supported by her husband and on divorce her expectation was that this support would continue in the form of ex-spousal maintenance.<sup>4</sup> This gendered model from family law was reflected in employment law where men were full-time workers, earning a family wage and women, if they worked at all, did so for ‘pin money’ and often part time. The ideal employee was full time, permanent and male and the ideal wife was committed to caring for her family.

Recent decades have witnessed significant change in both work and family and these stereotypes and models now seem out of date and of little relevance. Over the past 30 years or so, both family law and employment law have been transformed through legislation and an extensive policy agenda, underpinned by shared objectives of challenging stereotypes, eliminating discrimination and facilitating both men and women in fulfilling equally roles in paid employment and parenting. Equality legislation outlaws different treatment and different pay for male and female workers<sup>5</sup>

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<sup>1</sup>Sara Charlesworth, ‘Managing Work and Family in the “Shadow” of Anti-discrimination Law’ in Jill Murray (ed), *Work Family and the Law: Special Edition Law in Context* 23:1 (2005), 88 at 95.

<sup>2</sup> This is a model which is explored in detail in Jane Lewis, ‘The Decline of the Male Breadwinner Model: Implications for Work and Care’ *Social Politics* 8:2 (2001), 152.

<sup>3</sup> The 1970s can be identified as a key point for many reasons but in the context of this chapter, which focuses particularly on Scotland and more broadly the UK, the 1970s saw the introduction of sex discrimination legislation and the beginning of a period of significant change in adult family law, identified in particular with a move towards no-fault divorce.

<sup>4</sup> The historical background of the legal obligations in Scotland is explored by the Scottish Law Commission in *Aliment and Financial Provision*, Memorandum No 22, Vol. 1 (Edinburgh, 1976). The position in England is explored in John Eekelaar and Mavis Maclean, *Maintenance after Divorce* (Oxford: Clarendon Press, 1986), chapter 1.

<sup>5</sup> Gender equality legislation in the UK stems from the Equal Pay Act 1970 and the Sex Discrimination Act 1975. The law is currently to be found in the Equality Act 2010.

and family law favours gender-neutral language; treating husbands and wives as spouses and mothers and fathers as parents. Not only have the old fashioned, gendered distinctions been questioned but the very split between work and family has been challenged. Men and women, fathers and mothers, are increasingly encouraged to adopt interchangeable roles as employees and parents and expected to move easily between the spheres of workplace and home.

It is not only the shape of these particular models, both familial and workplace, which has shifted but also the discourse within which these models were previously understood; from an assumption of conformity and compliance to an expectation of diversity.<sup>6</sup> Rather than family law made to fit one ideal type of family, family law is now presented as meeting the needs of a range of families. In employment law too, while the full time, permanent employee remains the gold standard, there are statutory moves towards inclusion in terms of more flexible workers and working relationships and intellectual attempts to construct new legal frameworks, capable of encompassing an increasingly diverse workforce.<sup>7</sup> Seemingly simple norms of male breadwinner and female homemaker, have been swept away by multiple narratives and complex discourses around flexibility; capabilities; agency;<sup>8</sup> fatherhood and fathering;<sup>9</sup> parenting, caring and an ethic of care.<sup>10</sup>

### **Transcending the dichotomies**

The dichotomization of market and family pervades our thinking, our language and our culture. It limits and impoverishes the ways we experience our affective and productive lives. The possibilities we can imagine for restructuring our shared existence, and the manner in which we attempt change.<sup>11</sup>

Much of the legal policy and reforms around the intersection of work and family, which has developed over recent decades, has its roots in feminist theory and debate and stems in particular from a familiar feminist device of the dichotomy; used to

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<sup>6</sup> A process made explicit in the family context in Michele Barrett and Mary McIntosh, *The Anti-social Family* (London: Verso, 1982).

<sup>7</sup> See e.g., Mark Freedland, "From the Contract of Employment to the Personal Work Nexus" *Industrial Law Journal* 35:1 (2006) 1.

<sup>8</sup> See e.g. Barbara Hobson, Ann-Zofie Duvander and Karin Hallden, "Men and women's agency and capabilities to create a work life balance in diverse and changing institutional contexts" in *Children, Changing Families and Welfare States*, ed. Jane Lewis (Cheltenham: Elgar, 2006), chapter 13.

<sup>9</sup> See in particular the work of Richard Collier, "A Hard Time to Be a Father? Reassessing the relationship between law, policy and family (practices)" *Journal of Law and Society* 28:4 (2001) 520.

<sup>10</sup> Ideas associated in particular with the work of Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982); Joan C. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993).

<sup>11</sup> Frances E Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" *Harvard Law Review* 96:7 (1983), 1497.

expose, explain and challenge constructed and constricting stereotypes. The public/private dichotomy in particular has been instrumental in challenging the model of male breadwinner and female homemaker in family life and family law: highlighting the split – real and ideological - between the public existence of the husband and the private sphere of the wife.<sup>12</sup>

A classic example of such feminist analysis was Olsen's 1983 critique of the family and the market.<sup>13</sup> In her model, dichotomies operated in conjunction with a series of 'complex dualisms',<sup>14</sup> creating not only a separation of spheres, such as the market and the family, but also associating one with men and masculine values and the other with women and femininity. For so long as our vision remained constrained by the market/family dichotomy, the potential for legal reform would be limited. According to Olsen's classification, the only options were to make the market more like the market or make the market more like the family and, on the other side of the balance, make the family more like the family or make the family more like the market. Her optimism for future transformation lay in the possibility of transcending the dichotomy and its associated dualisms. By so doing, not only could individuals, male or female, move freely between market and family but attributes associated with the feminine family would cease to be undervalued or overlooked in comparison to the higher value accorded to the characteristics of the male market.

Olsen's vision of transcending dichotomies; a family law version of 'third way' thinking,<sup>15</sup> has resonance with many of the legal changes that have taken place since, both within the market – employment law – and within the family. In recent decades, employment law has developed a whole new dimension of rights, aimed at accommodating individuals who have both professional and family responsibilities and family law has been reformed to reflect the workplace equality of men and women and their shared responsibility for care. Breadwinners and homemakers have been reconstructed as 'earner-carers'<sup>16</sup> and the divided sectors of market and family have been reconstituted as an integrated space for work/life balance. A model has developed which is built not only on gender equality but also on integration of work and family commitments, as a consequence of which, the divisions between market and family, if not yet transcended, have at least been blurred.

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<sup>12</sup> See e.g. Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld & Nicolson, 1985), chapter 1. See too Ruth Gavison, "Feminism and the public/private distinction" *Stanford Law Review* 45:1 (1992), 1.

<sup>13</sup> Frances E Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" *Harvard Law Review* 96:7 (1983), 1497.

<sup>14</sup> *Ibid*, at 1575.

<sup>15</sup> Anthony Giddens, *The Third Way* (Cambridge: Polity, 1998): for further discussion of third way thinking in this context see, Selma Sevenhuijsen, "A third way? Moralities, ethics and families: An approach through the ethic of care" in *Analysing Families: Morality and rationality in policy and practice*, ed. Alan Carling, Simon Duncan and Rosalind Edwards (London: Routledge, 2002), 129-144.

<sup>16</sup> Michelle Weldon-Johns, "From modern workplaces to modern families – re-envisioning the work-family conflict" *Journal of Social Welfare and Family Law*, 37:4 (2015), 397-398.

## Modern workplaces and modern families

Similar changes have occurred throughout Europe although at different speeds, with varying impact and to some extent grounded in cultural and social context.<sup>17</sup> Situated within a broad European background, the following discussion will focus on UK employment law and policy and Scots family law.<sup>18</sup>

### *Employment law and the accommodation of family*

Since the 1970s, there have been significant changes in law and policy affecting the employment of women and the provision of family related rights. Initially the focus was on formal equality, required by the Sex Discrimination Act 1975 and the Equal Pay Act 1970. Men and women were to be treated equally in work except where the special status of pregnancy and maternity demanded accommodation of difference in order to achieve substantive equality.<sup>19</sup> A second phase was characterized by enhanced protection of pregnancy and maternity, led by the jurisprudence of the European Court of Justice<sup>20</sup> and detailed in the European Pregnant Workers' Directive.<sup>21</sup> While these developments strengthened legal protection for individual workers, they came at a price and were seen, at least from the UK perspective, as a burden on employers.<sup>22</sup> Pregnant employees were a fact of life and they had to be accommodated but such accommodation was perceived as a problem for business.<sup>23</sup> A third phase was marked by the coming into power of New Labour in 1997, when maternity rights were rebranded as family friendly policies.<sup>24</sup> Family-friendly working and work-life balance:<sup>25</sup> the language itself signaled a break with the old and

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<sup>17</sup> See e.g. European Foundation for the Improvement of Living and Working Conditions, *The Second European Quality of Life Survey: Overview*, (Luxembourg: Publications Office of the European Union, 2009), ch 3:

[http://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef0902en\\_7.pdf](http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef0902en_7.pdf); Claudia Geist, "The welfare state and the home: Regime differences in the domestic division of labour" *European Sociological Review* 21:1 (2005), 23.

<sup>18</sup> Employment law and policy in Scotland is principally regulated by the Westminster Parliament and therefore it is consistent throughout the UK whereas family law is a matter devolved to the Scottish Parliament and it is significantly different from English law, particularly in respect of financial provision on divorce which is the main focus in this chapter.

<sup>19</sup> Sex Discrimination Act 1975, s.2(2); Equality Act 2010, s.13(6).

<sup>20</sup> *Dekker v Stichting Vormingscentrum voor Jonge Volwassenen Plus* [1990] ECR I-3941; *Webb v EMO Air Cargo (UK) Ltd* [1993] 1 CMLR 259; *Tele Danmark A/S v Handels-og Kontorfunktionærernes Forbund I Danmark* [2001] ECR I-6993.

<sup>21</sup> Directive 92/85/EC.

<sup>22</sup> See e.g. Nicole Busby, "Divisions of Labour: maternity protection in Europe" *The Journal of Social Welfare and Family* 22:3 (2000), 277.

<sup>23</sup> Jane Mair, "Maternity Leave: Improved and Simplified?" *Modern Law Review* 63 (2000), 877.

<sup>24</sup> *Fairness at Work*, White Paper, Cm 3968, 1998, chapter 5:

<http://webarchive.nationalarchives.gov.uk/http://www.berr.gov.uk/files/file24436.pdf>; accessed 14 March 2016.

<sup>25</sup> A range of measures relating to paternity leave, parental leave and flexible working were introduced over time by various statutory provisions including the Maternity and Parental Leave etc Regulations 1999; Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002; Paternity and Adoption Leave Regulations 2002.

the move to a new message that these rights were not just for mothers. The burdens and the benefits were more evenly spread, and new policies were presented with a positive spin. Facilitating the accommodation of work and family could bring benefits for all; increased gender equality in paid work and in parenting, better motivated and more productive employees, higher rates of employment and lower welfare costs.

The work and family agenda has continued to develop through various consultations, reforms and regulations, most recently in the form of *Modern Workplaces*.<sup>26</sup> While gender specific maternity and paternity rights continue to exist, they have now been overlaid by a new statutory framework for shared parental leave which emphasizes individual choice, family flexibility and co-parenting.<sup>27</sup> This shift in UK law and policy is situated within a broader EU context. In Europe the recognition of family responsibilities was initially constructed within the context of sex equality,<sup>28</sup> it developed through special rights for pregnant workers<sup>29</sup> and provision for parental leave<sup>30</sup> and burgeoned into a key policy concern described as the reconciliation of family and professional life.<sup>31</sup> The challenge is no longer restricted to the individual employer trying to arrange cover for the occasional female employee on maternity leave but it has grown to encompass the social, political and personal imperative to make ‘two spheres of life [work and family] mutually compatible’.<sup>32</sup> The benefits are no longer presented narrowly in terms of individual employees or their families but the reconciliation of work and family sits at the heart of EU policies for growth and inclusion; a strand of citizenship; central to the achievement of increased employment targets<sup>33</sup> and a key strategy for tackling problems of demographic change.<sup>34</sup>

### *Family law and the expectation of work*

Family friendly policies and the work-life agenda have begun to cross the dividing line between market and family, from the side of the workplace, but what of movement in the other direction? While employment law has been changing in order

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<sup>26</sup> The various stages of the government’s *Modern Workplaces Consultation* are available at [www.bis.gov.uk/assets/biscore/employment-matters/docs/m/12-1269-modern-workplaces-response-flexible-working.pdf](http://www.bis.gov.uk/assets/biscore/employment-matters/docs/m/12-1269-modern-workplaces-response-flexible-working.pdf) (accessed 14 March 2016).

<sup>27</sup> Introduced by the Children and Families Act 2014 and effective in respect of babies born on or after 5 April 2015. The detailed framework is set out by the Shared Parental Leave Regulations 2014, SI 2014/3050.

<sup>28</sup> E.g. in *Dekker v Stichting Vormingscentrum voor Jonge Volwassenen Plus* [1990] ECR I-3941.

<sup>29</sup> Directive 92/85/EC.

<sup>30</sup> Parental Leave Directive 96/34/EC, replaced by Directive 2010/18/EU.

<sup>31</sup> See e.g., European Council Conclusions: *Reconciliation of work and family life in the context of demographic change*, December 2011.

<sup>32</sup> *Ibid*, p6.

<sup>33</sup> Commission Communication on Europe 2020 *A strategy for smart, sustainable and inclusive growth* COM(2010) 2020 final, Brussels, 3.3.2010 :

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>.

<sup>34</sup> See European Commission Roadmap, *New start to address the challenges of work-life balance faced by working families*, August 2015, [http://ec.europa.eu/smart-regulation/roadmaps/docs/2015\\_just\\_012\\_new\\_initiative\\_replacing\\_maternity\\_leave\\_directive\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_012_new_initiative_replacing_maternity_leave_directive_en.pdf); accessed 14 March 2016.

to accommodate the worker/carer, to what extent have these moves been mirrored in family law?

In Scots law there is little legal regulation or judicial commentary on the marriage relationship to give insight into what is expected in terms of spousal roles and so it is to the rules relating to divorce and in particular to property sharing and financial provision that we must look for retrospective comment on marriage. The law on financial provision on divorce was reformed in 1985 and at that time a key objective was to address criticisms of the previous system with its over-reliance on continuing maintenance for ex-wives. The Family Law (Scotland) Act 1985 represented a fresh approach based on a more modern model which saw marriage as an equal partnership and, in various ways, reflected the already, or anticipated, changing employment and social position of women and the expected participation of men in care.

The 1985 Act is based on five statutory principles set out in section 9: that the property of the couple accumulated during the marriage should be shared fairly on divorce<sup>35</sup>; that any economic advantage obtained as a result of contributions of the other spouse or any economic disadvantage suffered as a result of contributions made to the other spouse, or the family, should be balanced on divorce<sup>36</sup>; that the ongoing burden of childcare in respect of children under the age of 16 should be shared fairly<sup>37</sup>; that a spouse who has been substantially dependent on the other during marriage may be given a period of readjustment subject to a maximum of three years<sup>38</sup> and, that, provision can be made for the relief of severe financial hardship arising from the divorce.<sup>39</sup>

The preferred outcome on divorce is that there should be a clean financial break between the parties, ideally secured by means of equal sharing of the matrimonial property (first principle). The second principle, while expressed in neutral terms, is intended to recognise the potential for disadvantage on divorce which might result where one spouse sacrifices paid employment in favour of providing unpaid domestic care.<sup>40</sup> The third principle reinforces the shared responsibilities of both parents and is intended to take account of the indirect costs of childcare which are likely to fall on the parent with future primary care of the children. The fourth principle reflects and encourages the interaction of work and family which is found in employment law: even where one spouse has been out of paid employment for a while there is an expectation that he or she will return to it as quickly as possible, and any additional support during that period of readjustment will be subject to a maximum of three years. The fifth principle is intended as a last resort, to be used only rarely, usually

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<sup>35</sup> *Ibid*, s.9(1)(a): 'the first principle'.

<sup>36</sup> *Ibid*, s.9(1)(b): 'the second principle'.

<sup>37</sup> *Ibid*, s.9(1)(c): 'the third principle'.

<sup>38</sup> *Ibid*, s.9(1)(d): 'the fourth principle'.

<sup>39</sup> *Ibid*, s.9(1)(e): 'the fifth principle'.

<sup>40</sup> Recognition of non-financial contributions is specifically provided s.9(2).

where there is insufficient matrimonial property to share and where readjustment to independent live is not otherwise attainable.

The range of principles reflects the diversity of relationships, it is sufficiently broad to take account of different models of married life. The starting point for fair sharing of matrimonial property<sup>41</sup> is that it should be shared equally unless there are special circumstances leading to some other method of division being fair.<sup>42</sup> Special circumstances specifically exclude earned income as the source of money used to acquire matrimonial property and to that extent any higher claim of the breadwinner is ignored.<sup>43</sup> The value of childcare and other domestic services, such as housework, is specifically acknowledged in terms of the second principle<sup>44</sup> with the express inclusion of non-financial contributions and in the third principle which makes provision for sharing the continuing economic burden of childcare,<sup>45</sup> as distinct from financial provision or maintenance owed direct to the children. The fourth principle, which provides for a period of readjustment for a spouse who has been substantially dependent during marriage on the other, seems to have in mind specifically the parent who has adjusted his or her paid employment during marriage in order to undertake domestic care. Any provision for readjustment under this principle is subject to a maximum of three years and in deciding what award to make, if any, the court is directed to consider a range of factors including the age and earning capacity of the claimant and any intention to undertake a course of education or training.<sup>46</sup>

While the five principles reflect a range of different types of marriage and a variety of spousal roles, there is an underpinning preference for a clean break type of settlement and this can be seen particularly in the orders which the court may make. Section 8 highlights flexibility and diversity in that it provides for capital sum payment, property transfer, pension sharing and periodical allowance but the use of periodical allowance is clearly limited. An order for periodical allowance may be made only where justified by the third, fourth or fifth principles and even then, only where the other orders would be insufficient or inappropriate.<sup>47</sup> While there is flexibility for couples to arrange their spousal roles as they wish, there is a clear expectation that, on divorce, they should be able to readjust, if necessary, to independence and economic self-sufficiency.

### **Work/Family Balance and the Place of Care**

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<sup>41</sup> FLSA 1985, s.9(1)(a).

<sup>42</sup> FLSA 1985, s.10(1).

<sup>43</sup> FLSA 1985, s.10(6).

<sup>44</sup> FLSA 1985, s.9(1)(b) and (2).

<sup>45</sup> FLSA 1985, s.9(1)(c).

<sup>46</sup> FLSA 1985, s.11(4).

<sup>47</sup> FLSA 1985, s.13(2).



We need to create a new system of parental leave that works for modern lives and respects a family's right to choose how to care for their child.<sup>48</sup>

In challenging the split between public and private and seeking to transcend the dichotomy between market and family, there were linked objectives. One was to move beyond the gendered nature of both paid employment and family care and to facilitate greater choice and easier movement between the two so that individual men and women could be both public employees and private family members. This is an objective made explicit in much of the policy underpinning the move from maternity rights through family friendly reforms to the vision of a modern workplace. Facilitated by a range of flexible employment rights, and supported by the domestic involvement and shared care-giving of a partner, employees should be able to combine work and family and move successfully and seamlessly between them. Belief in this framework is clearly built into the family law framework for financial provision on divorce. Equality in the market will be best achieved when equality in the family is in place and fairness on divorce relies on the market working as expected. There is, however, growing frustration with the pace of change in terms of both paid work and family care. The patterns which emerge, both from research and from experience, remain clearly gendered.<sup>49</sup>

A second anticipated effect of moving beyond the market/family dichotomy was the equalisation of values and commodities associated with each: in this specific context, the equal recognition of paid work and unpaid care. Work/life agenda laws and policies, however, continue to attract criticism for their narrow work-centric perspective and their undervaluation of care. This one-sided perspective is clear in EU policy and highlighted, for example, in a Resolution of the European Parliament from 2009 where, with reference to the fact that women with dependent children had only a 62% employment rate, it was commented that, 'it is intolerable to allow the resources in question [ie mothers] and their potential to go to waste'.<sup>50</sup> Similar concerns have been raised in the UK, sparked for example by plans of the previous Coalition government to introduce improved child care vouchers for dual-earning couples while overlooking parents who stayed at home.<sup>51</sup> The focus to date has been principally on

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<sup>48</sup> *Modern Workplace Consultation - Government Response on Flexible Parental Leave, to Modern Workplaces Consultation*, November 2012, Foreword:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/82969/12-1267-modern-workplaces-response-flexible-parental-leave.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/82969/12-1267-modern-workplaces-response-flexible-parental-leave.pdf).

<sup>49</sup> European Foundation for the Improvement of Living and Working Conditions, *Third European Quality of Life Survey – Quality of life in Europe: Families in the economic crisis* (Luxembourg Publications Office of the European Union, 2014):

[http://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef1389en.pdf](http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1389en.pdf).

<sup>50</sup> European Parliament resolution of 3 February 2009 on non-discrimination based on sex and intergenerational solidarity (2008/2118 (INI).

<sup>51</sup> <http://www.telegraph.co.uk/news/politics/9959640/Nick-Clegg-denies-Coalition-is-penalising-stay-at-home-mothers.html>: accessed 14 March 2016.

the rights of parents to work but increasingly it is argued that the right to work should be accompanied by a right to care.<sup>52</sup>

That the workplace should struggle to accommodate domestic responsibilities and family life is, perhaps, only to be expected. Employment and employers are being asked to respect obligations and accommodate patterns of behaviour which are, at best, only indirectly linked to their primary concern for productivity and profit. The traditional and accepted site of care is, however, within the family and it is there, in family law, that we might expect to find evidence of much greater understanding of caring roles and the value of care. As Herring has highlighted, '[c]are is at the centre of family life'.<sup>53</sup> To what extent, however, is the centrality of care and its value to family life is that reflected in financial provision on divorce? Or, in an attempt to move away from gendered roles in family law, has care become secondary to paid employment and the full time carer-spouse become less valued than the spouse who combines family care with paid employment. The statutory framework for financial provision on divorce reflects in several ways the expectation of gender equality in the workplace and the possibility of relatively easy movement between paid employment and family based support. As with the detailed provisions of employment law, however, the test lies in how they work in practice.

#### *A practical challenge*

The *Second European Quality of Life Survey: Family life and work*<sup>54</sup> found that 'Europeans are more dissatisfied with the amount of time they spend with their family than with the amount of time spent at work, family life being more adapted to employment requirements than work arrangements are to family life'. Undoubtedly there have been significant improvements in family related employment rights but the real test is not how extensive or innovative they sound but how they work in practice. No matter how reasonable and generous the rights may appear, they are only likely to be of long term benefit if they accommodate some at least of the practical challenges of real, every day family life.

'Child-care is, of course, a longer term business than childbirth'<sup>55</sup> and in practice caring for children will continue long after the specific rights to maternity, paternity and parental leave have been exhausted. The Scottish principles for financial

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<sup>52</sup> An idea developed by Nicole Busby in *A Right to Care? Unpaid Work in European Employment Law* (Oxford: OUP, 2011).

<sup>53</sup> Jonathan Herring, *Caring and the law* (Oxford: Hart, 2013), 187.

<sup>54</sup> See e.g. European Foundation for the Improvement of Living and Working Conditions, *The Second European Quality of Life Survey: Overview*, (Luxembourg: Publications Office of the European Union, 2009), ch 3:  
[http://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef0902en\\_7.pdf](http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef0902en_7.pdf).

<sup>55</sup> Elizabeth M. Meehan, *Women's Rights at Work: Campaigns and Policy in Britain and the United States* (London: Macmillan, 1985), 187.

provision on divorce appear to accommodate the ongoing nature of childcare, particularly in the second principle which provides for recognition of career disadvantage and the third principle which requires the future sharing of the burden of childcare. In practice, however, their effectiveness may be limited. The disadvantage of a career break may not be immediately obvious but is likely to emerge and increase over time. Section 11(2) of the Family Law (Scotland) Act 1985 states that disadvantage must have been suffered either before or during the marriage but, as interpreted in *Dougan v Dougan*,<sup>56</sup> there are significant limitations if the court takes the view that ‘future loss ... is imponderable’.<sup>57</sup> The court in this case had the benefit of clear and detailed figures showing the loss of earnings likely to be suffered by the woman because of, first, a change of position to a lower grade in order to secure a change of workplace location to bring her closer to her future husband, and second, a move to part time work in order to care for her daughter. The mother in this case had suffered little disadvantage during the marriage itself but the decisions she made during that time were likely to lead to long term disadvantage. This was a very short marriage where in fact the child was born after the couple had separated and the father, although paying child support, was in no other way involved with the care or upbringing of the child. ‘The issue of future loss [arose] sharply in this case because the marriage was a short one’<sup>58</sup> but the sheriff felt constrained by the terms of the Act and unable to take into account the future loss, although a capital sum payment was ordered in respect of her past disadvantage.

If in fact the legislation does not permit the court to take account of ongoing or future disadvantage, this is a major limitation and fails to take realistic account of the ongoing impact of an earlier career choice. This was recognised by another sheriff in a case of the same year, *Cahill v Cahill*<sup>59</sup> where, doubting the approach in *Dougan*, he commented that the provision of the Act which defines disadvantage<sup>60</sup>:

specifically refers to earning capacity and if earning capacity becomes disadvantaged in the course of marriage I have difficulty in seeing how that loss can be evaluated except by reference to an extended period of time part of which may be after the dissolution of the marriage.<sup>61</sup>

If disadvantage by giving up employment or moving to part time working is to be taken into account, then it has to be done in a way which realistically reflects the likely pattern of career progression. The impact of childcare on earning potential is likely to continue long after the point of childbirth or the end of parental leave entitlement.

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<sup>56</sup> 1998 SLT (Sh Ct) 27.

<sup>57</sup> *Ibid*, 30.

<sup>58</sup> *Ibid*.

<sup>59</sup> 1998 SLT (Sh Ct) 96.

<sup>60</sup> FLSA 1985, s.9(2).

<sup>61</sup> 1998 SLT (Sh Ct) 96 at 99.

### *Who cares?*

For the work and family agenda to achieve its full potential, change is required not only in the workplace but also in the family: there needs to be a ‘de-gendering of care’.<sup>62</sup> One of the apparent benefits of modern parental or family based rights as opposed to earlier focus on maternity rights is that they challenge an entrenched view that childcare is the responsibility of the mother. While there have undoubtedly been changes in family life in recent decades, they may, however, be less marked than anticipated. A recent report prepared for the European Commission into *The Role of Men in Gender Equality*<sup>63</sup> found evidence of ‘a remarkable change in men’s participation in care’ but only ‘in certain parts of Europe’<sup>64</sup> and even then, the position remained that ‘men with young children continue to have higher employment rates compared to those without children, while for women the opposite holds’.<sup>65</sup> There are differences across Europe and the reasons and motivations are complex but the evidence is clear that family roles and family responsibilities remain gendered. A recent study in Scotland of separation agreements showed that, of those couples who made arrangements for post-separation childcare, 90% agreed that residence of the children would be with the mother.<sup>66</sup> To some extent in contradiction of the high media and policy profile of shared parenting, and despite employment policy which seeks to promote shared roles, practical responsibility in many cases appears to remain with mothers. There is a danger as employment rights expand and improve, and as policy becomes more ambitious, of assuming that work and family balance is within the reach of many employees. The effectiveness of employment law and policy must, however, be assessed realistically against the background of family life, which may not be as equal as we sometimes assume. While employment law promotes the model of shared parental leave and family law subscribes to shared parenting, it is important that each remains aware of what is happening in practice.

### *The value of care?*

Domestic labour is never abstracted, never quantified ...<sup>67</sup>

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<sup>62</sup> Ruth Rubio-Marin, “The (dis)establishment of gender: Care and gender roles in the family as a constitutional matter” *International Journal of Constitutional Law* 13:4 (2015) 787, at 806.

<sup>63</sup> *The Role of Men in Gender Equality – European strategies and insights*; prepared for European Commission, DG Justice – Unit D2 Gender equality Contract ref no VC/2010/0592, (Luxembourg: Publications Office of the European Union, 2013):

[http://ec.europa.eu/justice/genderequality/files/gender\\_pay\\_gap/130424\\_final\\_report\\_role\\_of\\_men\\_en.pdf](http://ec.europa.eu/justice/genderequality/files/gender_pay_gap/130424_final_report_role_of_men_en.pdf); accessed 14 March 2016.

<sup>64</sup> *Ibid*, 7.

<sup>65</sup> *Ibid*, 5.

<sup>66</sup> (Mair, Wasoff and Mackay, *All Settled?*, 2013,

[www.cfr.ac.uk/assets/MinutesofAgreement20131.pdf](http://www.cfr.ac.uk/assets/MinutesofAgreement20131.pdf))

<sup>67</sup> Bonnie Fox, “Women’s Double Work Day: Twentieth-century Changes in the Reproduction of Daily Life” in *Hidden in the Household: Women’s Domestic Labour under Capitalism*, ed. Bonnie Fox (Ontario: The Women’s Press, 1980), 184.

The second principle of the Family Law (Scotland) Act 1985, which enables balancing of advantage and disadvantage and which expressly ‘includes indirect and non-financial contributions ... in particular, any such contribution made by looking after the family home or caring for the family’,<sup>68</sup> appears ideally suited to reflect the central role of domestic care within the family and to compensate for economic disadvantage which might result for those who have restricted their paid work in order to care for their family. In general, this principle has had relatively little effect, one reason being that the court is directed to take into account the extent to which any such disadvantage has already been balanced by sharing of the matrimonial property or otherwise. This ‘otherwise’ is often interpreted as referring to the wife’s maintenance during the relationship. The courts are rarely willing to engage in a process of financial accounting but instead fall back on expectations of the standard roles of breadwinner and homemaker.

While the 1985 Act is sometimes criticised for being overly prescriptive, it is clear in many of the decisions that, within the principles, there remains considerable scope for judicial discretion and the court’s impression of the parties and the extent to which they have fulfilled their expected roles can be significant. In *Adams v Adams*,<sup>69</sup> while the wife (pursuer) argued that her husband (defender) had been able to further his career whereas she had been prejudiced by caring for the children, it was stressed by the court that:

in all the years during which they lived together, the defender contributed more than the pursuer to the household finances and during the periods when she was out of employment [following the births of their children] he supported the family on his own.<sup>70</sup>

In *Wilson v Wilson*,<sup>71</sup> however, the impression of the husband (defender) was that he had taken advantage of the care provided by his wife (pursuer) in order to focus on his business and that the:

economic advantage derived by the defender through retaining or ploughing back profits in the company had not throughout the marriage been balanced by an economic advantage to the pursuer such as a better lifestyle.<sup>72</sup>

While Mrs Adams’ caring contribution was at least matched by her husband’s financial contribution and therefore no balancing payment was required, Mrs Wilson was entitled to recognition on divorce for her domestic care, which had not been

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<sup>68</sup> FLSA 1985, s.9(2).

<sup>69</sup> 1997 SLT 144 (OH).

<sup>70</sup> *Ibid* at 148.

<sup>71</sup> 1999 SLT 249 (OH).

<sup>72</sup> *Ibid*, 254.

adequately compensated during their relationship. While it can be misleading to look at these specific issues in isolation from the overall scheme of financial provision, it is notable that the assessment of contributions in these cases is highly impressionistic.

In a few cases, the question of the value of the wife's unpaid domestic care has been considered in relation to 'bought in' care. *Coyle v Coyle*<sup>73</sup> concerned a relatively wealthy couple who had been married for 20 years. Mrs Coyle gave up a successful career with British Caledonian airways and the prospect of significant further opportunities when she got married because her husband did not want her to work. While she ran the house and cared for their three children, her husband worked long and unsocial hours in the family business with the result that his share of the business rose from £44,000 when they married to £619,000 by the date of separation. She sought to argue that her husband had sustained an economic advantage (ie the ability to work hard free from family responsibilities) derived from her contributions in terms of domestic care. This was rejected by the court which did not accept that there was any clear identifiable advantage which derived from her identifiable contribution. Instead of calculating the financial value of 20 years of domestic care or attempting to assess the benefit of a well run family to the ability of the husband to develop his business, the court looked instead to what would have happened if the wife had not taken on the role of homemaker. 'Clearly, if the pursuer had not been available to run the house and care for the children, other help would have had to be employed.'<sup>74</sup> Instead of assessing the cost of this employed help to the husband, the court took the view that if the wife had not been available it would have been because she was pursuing her career which in turn would have allowed her to bring in extra money to the family which could then have been used to pay for care, with the surplus being added to the family finances. In somewhat circular reasoning, the value of care given simply disappeared.

### **New stereotypes for old**

Much of the focus of the work and family agenda has been on facilitating parents and other family members in maintaining and improving their access to employment. From the feminist calls of the 70s for wages for housework to more recent public dispute about tax free childcare and 'stay at home mums', however, the issue is the same – childcare and domestic work remain undervalued and often invisible within economic policy and political debate. Working parents may be given short-term concessions at work in order to facilitate their caring responsibilities but long term it is their participation in paid employment which is really valued. Caring, traditionally has had its place within the family but as the focus shifts to facilitating participation of both men and women in paid employment throughout the life cycle, there is a risk that care will become increasingly invisible there too. The 1985 Family Law

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<sup>73</sup> 2004 Fam LR 2 (OH).

<sup>74</sup> *Ibid*, 9.

(Scotland) Act favours a clean financial break on divorce with limited scope for ongoing maintenance payments between ex-spouses. This system of family law assumes an employment model of equal opportunities and easy combination of work and care, which for many remains more an aspiration than a reality. Family law assumes that a spouse will have been able to combine work and family or at least be able to re-enter the labour market relatively easily where support within the family is no longer available.

Equal treatment, equal pay and shared parenting are all works ‘in progress’ and while change is happening, we should be wary of the headlines. It is easy to be impressed by the volume of reform and the extent of provision in employment law for family rights and to believe that work-life balance is within reach. Looking only at the statutory framework of financial provision on divorce, it is similarly credible that, within three short years of readjustment, a financially dependent carer will have returned to an independent worker but continuing evidence of the ‘motherhood penalty’<sup>75</sup> makes it clear that such a view would be naïve. Moves are afoot to transcend the market/family dichotomy but ‘... care, human interdependence, and reproduction are only slowly and hesitantly coming out of the shadows of private life’<sup>76</sup> and we should remember that challenging divisions and dualisms requires the inclusion and equalization of both sides not the domination of only one. Within the narratives of diversity and choice, a new ideal lurks: the outdated characters of male employee and female carer are perhaps being replaced by a new, gender-neutral role model – the worker/carer; the individual with work/life balance; the person who has it all.

## **Bibliography**

### *Articles and Books*

Michele Barrett and Mary McIntosh, *The Anti-social Family*, Verso, London, 1982

Nicole Busby, “Divisions of Labour: maternity protection in Europe” *The Journal of Social Welfare and Family* 22:3 (2000), 277

Richard Collier, “A Hard Time to Be a Father? Reassessing the relationship between law, policy and family (practices), *Journal of Law and Society* 28:4 (2001) 520

John Eekelaar and Mavis Maclean, *Maintenance after Divorce*, Clarendon Press, Oxford, 1986,

---

<sup>75</sup> See, e.g., the recent TUC analysis: *Women who become mothers before 33 suffer a 15% pay penalty* at <https://www.tuc.org.uk/economic-issues/equality-issues/women-who-become-mothers-33-suffer-15-pay-penalty-says-tuc>: accessed 14 March 2016.

<sup>76</sup> Ruth Rubio-Marin, “The (dis)establishment of gender: Care and gender roles in the family as a constitutional matter” *International Journal of Constitutional Law* 13:4 (2015) 787, at 816

Bonnie Fox, "Women's Double Work Day: Twentieth-century Changes in the Reproduction of Daily Life" in Bonnie Fox (ed.), *Hidden in the Household: Women's Domestic Labour under Capitalism*, The Women's Press, Ontario, 1980, 184

Mark Freedland, "From the Contract of Employment to the Personal Work Nexus" *Industrial Law Journal* 35:1 (2006) 1

Ruth Gavison, "Feminism and the public/private distinction" *Stanford Law Review* 45:1 (1992), 1

Claudia Geist, "The welfare state and the home: Regime differences in the domestic division of labour" *European Sociological Review* 21:1 (2005), 23.

Anthony Giddens, *The Third Way* (Polity, 1998)

Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development*, Cambridge, Harvard University Press, 1982

Jonathan Herring, *Caring and the law* (Oxford: Hart, 2013)

Barbara Hobson, Ann-Zofie Duvander and Karin Hallden, "Men and women's agency and capabilities to create a work life balance in diverse and changing institutional contexts" in Jane Lewis (ed.), *Children, Changing Families and Welfare States*, Elgar, Cheltenham, 2006, chapter 13

Jane Lewis, "The Decline of the Male Breadwinner Model: Implications for Work and Care" *Social Politics* 8:2 (2001)

Jane Mair, "Maternity Leave: Improved and Simplified?" *Modern Law Review* 63 (2000), 877

Elizabeth M Meehan, *Women's Rights at Work: Campaigns and Policy in Britain and the United States* (London: Macmillan, 1985)

Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld & Nicolson, 1985)

Frances E Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" *Harvard Law Review* 96:7 (1983), 1497

Ruth Rubio-Marin, "The (dis)establishment of gender: Care and gender roles in the family as a constitutional matter" *International Journal of Constitutional Law* 13:4 (2015) 787

Selma Sevenhuijsen, "A third way? Moralities, ethics and families: An approach through the ethic of care" in *Analysing Families: Morality and rationality in policy and practice*, ed. Alan Carling, Simon Duncan and Rosalind Edwards (London: Routledge, 2002) 129-144

Joan C Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care*, (New York: Routledge, 1993)



Michelle Weldon-Johns, "From modern workplaces to modern families – re-envisioning the work-family conflict" *Journal of Social Welfare and Family Law*, 37:4 (2015), 395-415

#### *Reports and Official Publications*

European Foundation for the Improvement of Living and Working Conditions  
Second European Quality of Life Survey: Overview, (Luxembourg: Publications Office of the European Union, 2011):  
[http://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef0902en\\_7.pdf](http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef0902en_7.pdf)

European Foundation for the Improvement of Living and Working Conditions, *Third European Quality of Life Survey – Quality of life in Europe: Families in the economic crisis*, (Luxembourg: Publications Office of the European Union, 2014):  
[http://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef1389en.pdf](http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1389en.pdf)

Council of the European Union Conclusions, *Women and the Economy: Reconciliation of work and family life as a precondition for equal participation in the labour market*, 2 December 2011, 17816/11 SOC 1050:  
[http://ec.europa.eu/justice/gender-equality/files/concil\\_conclusion\\_pl2011\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/concil_conclusion_pl2011_en.pdf)

European Commission Roadmap, *New start to address the challenges of work-life balance faced by working families*, August 2015, accessed at  
[http://ec.europa.eu/smart-regulation/roadmaps/docs/2015\\_just\\_012\\_new\\_initiative\\_replacing\\_maternity\\_leave\\_directive\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_012_new_initiative_replacing_maternity_leave_directive_en.pdf)

*Fairness at Work*, White Paper, Cm 3968, 1998,

Mair, Wasoff and Mackay, *All Settled?*, 2013,  
[www.crfr.ac.uk/assets/MinutesofAgreement20131.pdf](http://www.crfr.ac.uk/assets/MinutesofAgreement20131.pdf)

Modern Workplaces Consultation: [www.bis.gov.uk/assets/biscore/employment-matters/docs/m/12-1269-modern-workplaces-response-flexible-working.pdf](http://www.bis.gov.uk/assets/biscore/employment-matters/docs/m/12-1269-modern-workplaces-response-flexible-working.pdf).

Opinion Matters, *Shared Parental Leave: Public Attitudes*, 2015:  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/394623/bis-15-32-shared-parenting-leave-public-attitudes.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/394623/bis-15-32-shared-parenting-leave-public-attitudes.pdf)

Scottish Law Commission, *Aliment and Financial Provision*, Memorandum No 22, Vol. 1, Edinburgh, 1976

#### Cases

*Adams v Adams* 1997 SLT 144 (OH)

*Cahill v Cahill* 1998 SLT (Sh Ct) 96

*Coyle v Coyle* 2004 Fam LR 2 (OH)

*Dekker v Stichting Vormingscentrum voor Jonge Volwassenen Plus* [1990] ECR I-3941 (ECJ)

*Dougan v Dougan* 1998 SLT (Sh Ct) 27

*Tele Danmark A/S v Handels-og Kontorfunktionærernes Forbund I Danmark* [2001] ECR I-6993 (ECJ)

*Webb v EMO Air Cargo (UK) Ltd* [1993] 1 CMLR 259 (ECJ)

*Wilson v Wilson* 1999 SLT 249 (OH)