

CONFIGURATION(S) OF UNPAID CAREGIVING WITHIN CURRENT LEGAL DISCOURSE IN AND AROUND THE FAMILY

*Anne Barlow, Professor of Family Law and Policy, Law School,
University of Exeter*

ABSTRACT

Using a feminist critique, this article explores the sliding scale of value attributed by law to unpaid caregiving in the (heterosexual) family context. Whereas in private family law, recent decisions have radically changed the direction of this discourse and placed a very high value on such a contribution to family life where it occurs in the married context, the same kind of caregiving activity is attributed a far diminished value within cohabitation law whilst, when sited within state-dependent single parenthood, its value becomes at best non-existent or even negative, with paid work assumed to be the carer's ultimate goal. This article considers some issues arising from this evolving legal framework from the perspective of gender relations. What are the implications from an equality-seeking perspective only valuing caregiving highly in dependent patriarchal relationships, particularly in a society that continues to retreat from the welfare state? Might greater participation of men in unpaid caregiving remove obstacles inherent in the gendered nature of the debate and permit a more positive reconfiguration of the discourse surrounding it? What effect might the extension of the law of financial relief to civil partners have on the discourse from an equality perspective?

I. Introduction

Few would dispute that unpaid caregiving as presently constructed in British law and society is a gendered pursuit. It is something which women still do far more than men and is primarily sited within the private sphere of family life. Although ideas may be changing, it is still largely viewed as “women’s work” to which men are not by nature or social conditioning suited.¹ Indeed, in the heterosexual context, one definition of unpaid caregiving might be “all the unpaid caring and homemaking work undertaken traditionally by women within the patriarchal family”. Within the marriage contract and wider family obligations, such caregiving has traditionally been viewed as the (moral) duty of the (good) wife, mother or daughter, with no economic value as such but which is performed in exchange for the male breadwinner’s legal and/or moral duty to provide financial support. This patriarchal template for unpaid caregiving was reproduced and reinforced in Britain during the

¹ See J. Scott “Family and Gender Roles: How Attitudes Are Changing”, University of Cambridge, GeNet Working Paper No. 21, September 2006.

construction of its welfare state,² deliberately locating the principal role of married women within the private domestic sphere rather than in the world of paid work, excluding them from full-rate National Insurance contributions and benefits and casting them in law as dependants of breadwinning men.

This, in turn, as Jane Lewis³ has argued, gave rise to a set of normative expectations about the roles of men and women in the family which have been internalised and continue to exist long after the emergence of modern dual-earner families. The result is that women are performing both paid work (albeit often part-time) and unpaid caregiving with relatively little change in male behaviour.⁴ However, family law (if not men) has begun to respond in interesting ways. First, it has placed an economic value on unpaid caregiving within marriage at the point of divorce; Secondly, it has adopted a gender equality discourse.

II. Unpaid Caregiving Within Marriage

As shall be seen, in the main it is the judiciary rather than the legislature which has taken the lead in a British⁵ law context. However, in Spain, legislation aims to make clear that caregiving is a duty to be shared by both spouses, and that, in theory at least, there will be a price to be paid at the point of divorce if a gender-stereotypical approach has been adhered to. The new law⁶ was promoted by a female Basque National Party MP, Margarita Uria, and followed a humorous government publicity campaign in 2003 aimed at encouraging men to undertake more domestic work in the home. Deciding further measures were needed, the legislation was approved by the Spanish Parliament's Justice Commission and passed as an amendment to the Spanish Civil Code⁷ in July 2005. It obliges men as part of the civil marriage contract to "share domestic responsibilities and the care and attention of children and elderly family members". As was reported in the press, there is something of a hill to climb:

² W. Beveridge *et al.*, *Social Insurance and Allied Services (The Beveridge Report)*, (Cm 6404) 1942, London: HMSO.

³ Lewis "The Gender Settlement and Social Provision: the Work-Welfare Relationship at the Level of the Household." in *Europe and the Politics of Capabilities* (R. Salais and R. Villeneuve, eds. 2005); Lewis "The changing context for the Obligation to Care and to Earn" in *Family Law and Family Values* (Mavis McLean, ed. 2005), p.61.

⁴ See Scott, *op.cit*

⁵ "British law context" in this article principally denotes the position in England and Wales which is at the present time almost identical to that of Northern Ireland in this area of family law. For a summary of recent developments in this field in Northern Ireland, see Glennon, "Family Law in Northern Ireland – Developments, Setbacks and an Uncertain Future" in *The International Survey of Family Law* (A. Bainham, ed. 2004). Whilst the welfare law context is the same, Scotland has for some time taken a different approach to financial provision on divorce based on a principle of equal division of assets which is not needs-based (see Family Law (Scotland) Act 1985). More recently Scotland has also been first within the UK to introduce remedies for financial provision available to cohabitants on relationship breakdown (see now Family Law (Scotland) Act 2006).

⁶ Ley 15/2005 de 08 de Julio por la que se modifican el Código Civil y la Ley de Enjuiciamiento en materia de separación y divorcio [Law amending the Civil Code on matters of separation and divorce (July 8, 2005).

⁷ See the amended articles 68 and 92 of the Spanish Civil Code.

“Spanish men will have to learn to change nappies and don washing-up gloves under the terms of a new law designed to strike a blow at centuries of Latin machismo. The law. . . is likely to provoke a revolution in family affairs in a country where 40% of men reportedly do no housework at all.”⁸

In theory, failure to comply with the new conditions may provide grounds for some element of financial compensation on divorce. Time will tell the extent to which law can reshape behaviour around unpaid caregiving, but clearly this is an important symbolic step aimed at reversing assumptions about its gendered nature.

It is also in the marriage context that unpaid caregiving has been seen as worthy of recognition and financial compensation in England, Wales and Northern Ireland, but again its value is only realisable on divorce. This is a very recent development and a complete reversal of female caregivers’ original legal disempowerment. Indeed, for most if not all of the last century, Blackstone’s assessment that mothers were entitled to “no power, but only reverence and respect”⁹ held true. Despite the pivotal caregiving role of a married mother in a child’s birth and upbringing, this carried little or no legal significance right up to the last quarter of the twentieth century. Married fathers constituted a child’s sole legal guardian during marriage until the Guardianship Act 1973. The Guardianship of Infants Act 1925 was the first time a mother was even permitted to apply for custody of her child on divorce. This was in contrast to unmarried mothers who were vested with full parental authority (but were of course socially and legally stigmatised in other ways).¹⁰

The Married Women’s Property Act 1882, abolishing the doctrine of unity (“*couverture*”) whereby a wife’s legal identity and property were subsumed into that of the husband on marriage,¹¹ finally allowed married women to retain their own separate property for the first time. In doing so, a European-style system of community of property for England and Wales, which would have entitled a married woman to half the legislatively defined “community assets” of the family, was rejected. The adopted system of separate property, gave women no right to make any claim upon the husband’s property, either during marriage or on divorce. As Professor McGregor summarised the position in a Parliamentary debate in 1979, the separate property regime had:

“unintentionally institutionalised inequality in the economic relations of husbands and wives. By preventing husbands getting their hands on their wives’ money, the statute denied

⁸ Adler, “Housework Looms for Spanish Men”, BBC News, 17 June 2005, <http://news.bbc.co.uk/1/hi/world/europe/4100140.stm>

⁹ Blackstone’s *Commentaries*, Vol. 1, 1869, pp.452-453.

¹⁰ See, e.g. the Bastardy Acts of 1872 and 1923 and the humiliating affiliation procedures requiring a mother to provide corroborative evidence of the child’s paternity before any child maintenance could be ordered under the Affiliation Act 1957. The maintenance ordered was in any event generally very low and the Act was not repealed until the Family Law Reform Act 1987.

¹¹ See further S. Cretney, *Family Law in the Twentieth Century* (OUP, Oxford, 2005), p.403.

wives rights in their husbands' money. And in the real world it was mostly husbands who had the money."¹²

On divorce prior to 1970, no financial value was placed on a wife's caregiving during the marriage. This was deemed to be the *quid pro quo* for having been maintained by her husband, however much greater the "market value" of such caregiving services might actually have been. Only maintenance from income was available¹³ at the discretion of the court and only to a blameless wife¹⁴ who remained sexually faithful to her ex-husband,¹⁵ with capital (including the family home), being retained by the owner of the property, most often the husband.

The injustice of this was hotly debated and considered by the Law Commission throughout the 1970s.¹⁶ Finally, though, any automatic resource-sharing system such as community of property or statutory co-ownership of the matrimonial home was rejected and instead, on divorce in England and Wales, a discretionary system of redistribution of both income and capital assets was established in order to alleviate the financial hardship suffered by women on marriage breakdown.¹⁷

The criteria which govern this discretionary redistribution, now contained in section 25 of Matrimonial Causes Act 1973,¹⁸ are interesting in that they

¹² Official Report (House of Lords) 18 July 1979, vol. 401 col. 1437. For an example of how harshly this operated, see *Gissing v Gissing* [1971] A.C. 886.

¹³ This was first established in the Matrimonial Causes Act 1857 and, until the Matrimonial Causes Act 1907, was only payable where there were sufficient assets against which the maintenance could be secured. See further Cretney, *op.cit.*, p.397.

¹⁴ It had to be established in *Fisher v Fisher* (1861) 2 SW&Tr 410 that even a blameless wife had the right to maintenance where she initiated the divorce. Although there was not general provision for property adjustment, the court could order an adulterous wife's property to be settled on the husband and children, Matrimonial Causes Act 1857, s.45. See Cretney, *op.cit.*, p.444.

¹⁵ Maintenance could be and frequently was denied or terminated even long after the divorce, if the former wife committed adultery, see, e.g. *M v M* [1962] 2 All ER 895, where maintenance was terminated when a wife who had been granted a divorce on the grounds of her husband's adultery had a child by another man some 11 years after she separated from her husband. See further C. Smart, *The Ties that Bind* (Routledge and Kegan Paul, London, 1984).

¹⁶ See Law Commission 1969, *Financial Provision in Matrimonial Proceedings*, Law Com. No. 25, HMSO, London; Law Commission 1971, *Family Property Law Working Paper No. 42*. HMSO, London; Law Commission 1973, *First Report on Family Property: A New Approach* Law Com no. 52 HMSO, London; Law Commission 1978, *Third Report on Family Property: The Matrimonial Home Co-ownership and Occupation Rights) and Household Goods)* Law Com no. 86 HMSO, London.

¹⁷ The Matrimonial Proceedings and Property Act 1970 was introduced alongside divorce reform in the Divorce Reform Act 1969 and see now Part II Matrimonial Causes Act 1973, the consolidating Act. This now permits not only periodical maintenance payment orders but lump sum orders, property adjustment orders and orders for sale of property of either party.

¹⁸ The Matrimonial Causes (Northern Ireland) Order 1978, art.27 contains the same criteria in the Northern Ireland context and they have also been replicated in the Civil Partnership Act 2004, Sch.5, Pt.5, para.21(2) and now also govern financial provision on dissolution of same-sex civil partnerships.

recognise that both financial and non-financial contributions to the welfare of the family should be weighed into the equation. This list of matters, to which the court must have regard when making financial provision orders, includes all the circumstances of the case, the standard of living during the marriage, the age of the parties and duration of the marriage, the parties' respective current and future income and assets, needs and resources as well as financial and (critically) non-financial contributions made and likely to be made to the welfare of the family by each of the parties and conduct it would be inequitable to ignore. The welfare of the children has been made the court's first (but not paramount) consideration and the court has a duty to consider the appropriateness of effecting a clean break between the parties.¹⁹ Other than this, no guidance is given on the relative importance to be given to the different criteria; this was left to the discretion of the court. However, it is the weight to be given to non-financial (or caregiving) contributions to the welfare of the family that has changed beyond all recognition since the Act was introduced in the 1970s. In its original form, section 25 provided a guiding principle that the court should endeavour to place the parties as nearly as possible in the financial position they would have been in had the marriage not broken down. However, this minimal loss principle was soon seen to be impossible to achieve even before the legislation was amended to remove it in 1984, and it was the non-financial contributor whose share came to be valued less in financial terms.

Following the 1970s reforms, the construction of the value of the wife's unpaid caregiving role in judicial discourse was double-edged. Although it might entitle her to a share of the assets (a vast improvement on the previous law in an era where family homes were generally still owned and paid for solely by the husband, with a wife's non-financial and even financial contributions – such as payment for clothing or utility bills – being less tangible), a wife's post-divorce financial needs were reduced by virtue of her ability to perform a caregiving role for herself. As Lord Denning, seeking to justify why a wife should only be entitled to one third of the joint income and capital assets on divorce, explained without any trace of irony in *Wachtel v Wachtel*.²⁰

“The husband will have to go out to work all day and must get some woman to look after the house – either a wife, if he remarries, or a housekeeper, if he does not. The wife will not usually have so much expense. She may go out to work herself, but she will not usually employ a housekeeper. She will do most of the housework herself, perhaps with some help. Or she may remarry, in which case her new husband will provide for her.”

Clearly, housework at this time could only be performed by women and far from being worthy in the family context of increased retrospective financial recognition for caregiving services rendered by wives, men's “inability” to perform these same services unpaid instead acted to diminish a wife's financial award!

¹⁹ ss.25 and 25A Matrimonial Causes Act 1973 as amended by the Matrimonial and Family Proceedings Act 1984.

²⁰ [1973] Fam. 72 (CA).

Again, in another decision in 1973, *Trippas v Trippas*²¹, Lord Denning explained the unpaid nature of a wife's role in a case where the wife claimed a share of the husband's family business on divorce:

“She did not give any active help in it. She did not work in it herself. All she did was what a good wife does do. She gave moral support to her husband by looking after the home. If he was depressed or in difficulty, she would encourage him to keep going. That does not give her a share.”

Thus the law at this time, whilst acknowledging they were of some value, seemed unable to attribute to a wife's unpaid caregiving contributions to a marriage, however critical to the overall wealth of the family, a value of more than one third.²² Financial contributions trumped non-financial contributions in asset redistribution on divorce.

The 1970s reforms were also open to criticism by feminists for having reinforced women's dependence on men. In an age when women's formal equality in the public sphere was being fought hard for, an entitlement to financial support from men could be seen to undermine the greater cause.²³ It was thought that, post-divorce, women and men should become financially independent of each other, a view shared with men's groups such as Campaign for Justice on Divorce. Indeed, the financial plight of divorced men rather than divorced women became the political issue and, following the 1979 general election, the new Conservative administration was swift to introduce reform in the shape of the Matrimonial and Family Proceedings Act 1984, making the welfare of any children the first consideration, restricting a wife's right to life-long maintenance where paid work could be attained, and requiring courts to consider a financial clean break.

In practice, what this came to mean is that needs rather than any aim to redistribute financial assets equally came to dominate the approach under section 25. According to District Judge Roger Bird in 2000, the approach of the courts was to meet the housing needs of the primary carer and the children and then the other reasonable needs of both parties if possible. Once these are met, then in his view “there is no justification for further adjustment by the court”.²⁴ This “reasonable requirements” approach which dominated from the mid-1980s until the decision of the House of Lords in *White v White* in 2001, continued to assign a lower value to caregiving or, in the words of the 1973 Act, to the non-financial contributions to the welfare of the family, than to the financial contributions.

In *Dart v Dart*²⁵ in 1996, the Court of Appeal rejected the notion that there was any principle of equal division even of assets acquired by joint efforts – rather a wife's claim was limited to a ceiling of her “reasonable requirements”, which were calculated in the context of the standard of living during the marriage. As Diduck has argued, this line of case law reflects

²¹ [1973] Fam. 134 (CA).

²² See, e.g. Lord Justice Ormrod's judgment in *Rodewald v Rodewald* [1977] Fam. 192 and see further Cretney, *op.cit.*, p.430.

²³ See Deech, “The Principles of Maintenance” [1977] *Fam Law* 229, A. Diduck and F. Kaganas, *Family Law, Gender and the State*, 2nd ed. (Hart, Oxford, 2006), p.240.

²⁴ Bird, “Ancillary Relief Outcomes” [2000] *Fam Law* 831.

²⁵ [1996] 2 FLR 286.

principles of protection of property and individual liberty, rather than any notion of marriage as an equal partnership.²⁶ At this stage, the Act which had given no guidance as to how much weight was to be given to each of the criteria, had been interpreted to place the needs of the parties at the pinnacle of the court's considerations, rendering it a welfare-based rather than entitlement-based redistribution. However, this was about to change.

In *White v White*,²⁷ the House of Lords interpreted section 25 so as to include an overall aim of fairness which incorporated for the first time a principle of non-discrimination as between breadwinners and homemakers. The division of assets was in each case to be measured against "a yardstick of equality", which should only be departed from where it could be justified. This was certainly a considerable advance on the one third rule and a ceiling of reasonable requirements. Indeed, this can be seen as something of a paradigm shift in the way that the courts construct the value of unpaid caregiving. Lord Nicholls set out the radical new thinking:²⁸

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

As Eekelaar²⁹ observed, this was a move away from the language of a welfare-style dependency construction of a wife's needs towards a new entitlement basis, with entitlement having been earned through unpaid caregiving.

Subsequently, in deciding whether the money-earner has made an exceptional contribution which justifies departure from the yardstick of equality,³⁰ the courts have largely stood firm in rejecting pressure from wealthy husbands. In *Lambert v Lambert*³¹ the husband, an extremely successful businessman, argued disparagingly that his wife's life merely revolved around "the kids and the microwave". However, the Court of Appeal made clear this was a case where non-discrimination must apply and cited with approval the equality approach taken in an earlier High Court decision:

"The husband's role was the more glamorous, interesting and exciting one. The wife's involved the more mundane daily round of the consistent carer. That was the way that the parties to this marriage chose, between themselves, to organise the overall matrimonial division of labour. How can it be said fairly, at the end of the day, that one role was more useful or valuable (let alone special or outstanding) than the other in

²⁶ Diduck, "'Fairness and Justice for All?' The House of Lords in *White v White*" [2001] *Feminist Legal Studies* 173.

²⁷ [2001] 1 AC 596.

²⁸ *ibid.*, at 605.

²⁹ Eekelaar, "Back to basics and forward into the Unknown" [2001] *Fam Law* 30.

³⁰ This was accepted in *Cowan v Cowan* [2001] EWCA 679 where the millionaire husband, the inventor of the draw-string dustbin bag, was adjudged to have made a sufficiently "stellar" contribution.

³¹ [2002] EWCA Civ. 1685.

terms of the overall benefit to the marriage partnership or to the family?”³²

Similarly in the Northern Irish case, *M v M*³³, McLaughlin J’s refusal to discriminate and endorsement of the equal value of caregiving was cited with approval in *Lambert*:

“The husband worked very long hours getting out of bed at 6.00am to be at work by 7.00am. His work did not finish until late in the evening as he carried on his working day by supervising Y limited and the other business premises owned by the company. I accept all of that evidence as true, but to concentrate on that and fail to recognise that, whilst he toiled at work on company business, Mrs M from early in the morning was getting the children ready for school, taking them there, running the home during the day, collecting them after school, cooking and cleaning, nurturing them by ferrying them to social, sporting and recreational activities, supervising homework and tutoring them when required, would be to be guilty of the very kind of discrimination warned against by Lord Nicholls.”³⁴

Thus in long marriages where the assets exceed needs, an equal value was placed on financial and non-financial contributions. However, this was not the case in shorter marriages of less than twenty years, where the financial assets were all brought into the marriage by the husband. In *GW v RW*,³⁵ such a twelve year marriage justified departure from equality:

“I find it to be fundamentally unfair to be required to find that a party who has made domestic contributions during a marriage of 12 years should be awarded the same proportion of the assets as a party who has made the domestic contributions for a period in excess of 20 years.”³⁶

This durational approach to non-financial contributions, whereby they, unlike financial contributions can only be earned over time,³⁷ can be seen to discriminate at least indirectly against women.³⁸ However, the House of Lords has now recognised this for itself and in *Miller v Miller; McFarlane v McFarlane*,³⁹ Lord Nicholls, commenting on “accrual over time” as put forward in *GW v RW*, rejected it:

“This approach would mean that on the breakdown of a short marriage the money earner would have a head start of the

³² *ibid.*, Per Thorpe LJ at para.22 citing Coleridge J in *G v G*, at that time unreported.

³³ [2002] NIJB 47.

³⁴ Per Thorpe LJ in *Lambert v Lambert*, above n.31 at para.23.

³⁵ [2003] EWHC 611.

³⁶ At para. 43, per Mostyn QC.

³⁷ The approach favoured here had been suggested by Eekelaar in “Asset Distribution on Divorce – The Durational Element” (2001) 117 LQR 552.

³⁸ This has been argued principally by Bailey-Harris, “The Paradoxes of Principle and Pragmatism: Ancillary Relief in England and Wales” (2005) 19 IJLPF 229-241.

³⁹ [2006] UKHL 24.

homemaker and child-carer. To confine the *White* approach to the “fruits of a long marital partnership” would be to re-introduce precisely the sort of discrimination the *White* case was intended to negate.⁴⁰

This latest decision has introduced some further recognition of the value of caregiving. For, in addition to divorce settlements needing to address the parties’ needs and apply the yardstick of equality to sharing assets in a non-discriminatory way in order to achieve fairness, it indicates that a third rationale for making a financial provision award on divorce is compensation for “relationship-generated disadvantage”.⁴¹ Whilst overlapping with need, this aims to achieve fairness by compensating for loss suffered by undertaking caregiving within marriage at the expense, say, of a spouse’s labour market value. In the case of *McFarlane*, the wife had given up her career as a successful city solicitor in order to care for the parties’ three children during a nineteen-year marriage, whereas her husband’s career had flourished. This was clearly a case for compensation over and above her needs, the court found, notwithstanding the fact that section 25 of the Matrimonial Causes Act 1973 makes no mention of compensation. *Miller*, in contrast, (heard at the same time) involved a childless marriage of less than two years between a multi-millionaire and a professional woman who gave up her £85,000 per annum job on marriage in order to take on the role of homemaker. The divorce, granted on grounds of the husband’s adultery, allowed Mrs Miller to be awarded £5 million of the husband’s total worth estimated at £32 million. It was accepted here that she had not suffered very much relationship-generated disadvantage, but she had been used to an extremely high standard of living during the marriage and much of the wealth had been generated during that period, albeit by the husband’s efforts. The court nonetheless firmly rejected the earlier approach of placing the parties back into the financial position they were in before the marriage. This latest authority, whilst it has left open the exact extent of assets to be shared in any particular case,⁴² has made the principle of non-discrimination between breadwinner and caregiver very clear. In addition, in lower asset cases, it has also made clear that an equal division of assets might discriminate against the caregiving spouse, where a bigger award may be needed to be made to the weaker economic spouse, who will continue to be the primary carer of the children, to ensure that they and the children’s housing needs are met.⁴³

Thus a caregiving wife on divorce where there are children will get at least half of the family assets. From a policy perspective this has been seen as important, as was acknowledged by Hale LJ (as she then was) in *SRJ v DWJ (Financial Provision)*⁴⁴:

⁴⁰ *ibid.*, at para.19, case references omitted.

⁴¹ See judgment of Baroness Hale at para.140.

⁴² The House of Lords divided assets into matrimonial or family assets such as the home, which had to be shared equally regardless of ownership, and non-matrimonial or non-family assets attributable to the efforts of just one spouse. However, there was disagreement between the judgments of Lord Nicholls and Baroness Hale on how these were defined and the effect any division would have.

⁴³ *Per* Lord Nicholls at paras.12-14.

⁴⁴ [1999] 2 FLR 179 at 182.

“It is not only in [the child’s] interests but in the community’s interests that parents, whether mothers or fathers and spouses, whether husbands or wives, should have a real choice between concentrating on breadwinning and concentrating on home-making and child-rearing, and do not feel forced, for fear of what might happen should their marriage break down much later in life, to abandon looking after the home and the family to other people for the sake of maintaining a career.”

However, ironically, this may also mean that a wife who works throughout the marriage and does the majority of caregiving may not have suffered “relationship generated disadvantage” and consequently be awarded a lesser share of the assets on divorce than a homemaker spouse. Might this, then, provide a disincentive for women to retain their place in the public sphere of work during marriage? Does it open the door wider to “gold-diggers”? Generally the new era in financial provision cases has been welcomed as addressing the reality of the situation of many women but it can be criticised for doing this in a way which reinforces the patriarchal financial dependence of childcarers upon breadwinning men.⁴⁵ At the same time, other commentators have interpreted developments more positively as embodying a welcome egalitarian discourse of partnership.⁴⁶

However, such a discourse is nowhere yet apparent within unmarried cohabiting partnerships.

III. Unpaid Caregiving in Cohabiting Relationships

Whilst a divorcing home-maker spouse where the major assets including the home are in the name of the other spouse will usually receive at least half of the assets, a home-maker cohabitant in a similar position must prove an interest under a constructive trust to retain any share of the home.⁴⁷ This, as Valerie Burns in *Burns v Burns*⁴⁸ found to her cost, is often a difficult and always an unpredictable prospect for the economically weaker cohabitant. On the other hand, a woman who is the main breadwinner, has contributed most financially to purchase of the home and is also the primary caregiver may, following a recent House of Lords decision, fare better as a cohabitant than a divorcing wife.⁴⁹ The critical difference here is that in the cohabitation context, property law applies and caregiving does not, of itself,

⁴⁵ See, e.g. Diduck, *op.cit.*

⁴⁶ Bottomley and Wong, “Shared Households: A New Paradigm for Thinking about the Reform of Domestic Property Relations” in *Feminist Perspectives on Family Law*, (Diduck, and O’Donovan eds. 2006).

⁴⁷ Once again, the law described here reflects the position in England and Wales and Northern Ireland as Scots law takes a different approach and has used the law of unjust enrichment in disputes between cohabitants, as in *McKenzie v Nutter* 2007 SLT (Sh Ct) 17.

⁴⁸ [1984] 1 All ER 244.

⁴⁹ See *Stack v Dowden* [2007] UKHL 17 where such a scenario led the court to award the woman and mother of four children 65% of the family home vested in joint names but without declarations of the beneficial interests. Her former cohabitant and father of the children who had undertaken work on their properties and made some uncertain financial contributions, had not always worked but had not taken on the role of primary carer for the children was restricted to 35 per cent, which he might have improved upon had they been married.

give rise to ownership in this jurisdiction. Whilst the courts have been more receptive to arguments which enable the court to take the couple's whole course of dealing into account alongside direct contributions to the purchase,⁵⁰ a development which can lead to a conclusion that the property is beneficially owned by both partners despite the legal title being vested in only one of them, where there has been no direct contribution⁵¹ such as some payment towards the mortgage or improvements or other evidence of implied common intention to share ownership of the home (such as a provable promise to share ownership⁵² or an excuse made to avoid formal shared ownership⁵³), there will be no constructive or resulting trust.⁵⁴ Whilst transfer of property orders can be made for the benefit of a child under 18 (Schedule 1 Children Act 1989), unless the primary carer is a joint owner or can prove an interest under a resulting or constructive trust, the best outcome is likely to be the right to occupy the home until the children finish full time education with no transfer of capital whatsoever. To transfer any interest in the home to the primary caring parent was described in a case where a cohabiting mother had raised five children as an inappropriate "indirect windfall" and the home after the youngest child had finished full-time education was to revert to the father, as the mother had no right to maintenance for herself.⁵⁵ In this context, there is certainly no pursuit of fairness and given developments in the divorce context which have taken on an egalitarian discourse of partnership, it seems that outside this family law context, unpaid caregiving still has little or no value. Periodical payment orders from income for the benefit of the child may now have an element built in for the primary carer⁵⁶ where income is extremely high and lifts a parent above the child support threshold.

In *Re P (Child: Financial Provision)*⁵⁷ the new approach to claims in the high income context under Schedule 1 Children Act 1989 is revealed:

"The mother's entitlement to an allowance as the primary carer should be checked but not diminished by the absence of any direct claim in law. The court should recognise the responsibility, and often sacrifice, of the unmarried parent (generally the mother) who was to be the primary carer of the child. The carer should have control of a budget that reflects her position and that of the father, both social and financial."

⁵⁰ See *Midland Bank v Cooke* [1995] 4 All ER 562, *Drake v Whip* [1996] 1 FLR 826, *Le Foe v Le Foe* [2001] 2 FLR 970 *Oxley v Hiscock* [2004] EWCA Civ. 546, *Fam Law* 569, *Cox v Jones* [2004] EWHC 1486 (Ch) [2004] *Fam Law* 698

⁵¹ See *Lloyds Bank PLC v Rossett* [1991] 1 AC 107.

⁵² See, e.g. *Hammond v Mitchell* [1991] 1 WLR 1127.

⁵³ See, e.g. *Grant v Edwards* [1986] Ch 638.

⁵⁴ In the recent case of *Stack v Dowden*, above n.49, Lord Walker expressed the view *obiter* that doubt may be cast on whether the stringent requirements as to what can and cannot constitute a direct contribution as set out by Lord Bridge in *Lloyds Bank v Rossett* (above n.51) is still good law (at para.26). However, this was not addressed in the leading judgment given by Baroness Hale.

⁵⁵ See *T v S (Financial Provision for Children)* [1994] 2 FLR 883.

⁵⁶ See *Re P* [2003] EWCA Civ. 837 and *H v M* [2006] *Fam Law* 927.

⁵⁷ *ibid.*

Thus there is increased awareness of the value of unpaid caregiving which is still constrained within a legal framework which lacks the discretion of the divorce context. There is still no right to maintenance as between adult former cohabitants, however disadvantaged the primary carer may have been in the labour market as a result of the relationship.

The Law Commission are currently consulting on proposals to compensate cohabitants for economic disadvantage suffered on relationship breakdown or death.⁵⁸ It is likely to recommend a presumptive approach to regulating informal cohabitation outside marriage or civil partnership which does not mirror that available on divorce or partnership dissolution at least for cohabitants with children of the relationship. The Law Commission were asked to address the financial hardship suffered by cohabitants when relationships break down or when a partner dies. This has not been interpreted as a brief to promote equality between those who cohabit and those who marry. The reasons for this are discussed at length in the Consultation Paper,⁵⁹ but it is clear that it is not felt appropriate to impose the same rights and obligations on informally cohabiting couples who have not actively signed up for marriage or civil partnership. Whilst it is recognised that this might be unfair in cases such as Mrs Burns, it is considered important not to undermine either the autonomy of those deliberately choosing not to marry or, indeed, marriage itself:

“The law does not generally help those who voluntarily put themselves in a position where they suffer financial hardship unless there was a clear agreement, intention or some other recognised trigger justifying the provision of a remedy.”⁶⁰

However, financial hardship where generated by the cohabitation relationship should, it is proposed, warrant a legal remedy. Under the proposals a former cohabitant’s claim may be based on “contributions and sacrifices”⁶¹. They should be able to make a claim against their partner wherever it can be shown that:

- (1) the respondent had been enabled to retain some economic benefit (in terms of a gain in capital, income, or earning capacity) at the point of separation; and
- (2) that gain has been caused at least in part by contributions made by the applicant.⁶²

Alternatively a claim may be founded where a partner can show relationship-generated economic disadvantage, where this has arisen from decisions and choices jointly made.⁶³ The classic example given is a mother who gives up work to look after the children of the relationship. However, the approach proposed is not to compensate for disadvantage suffered during the relationship but rather, to repair the disadvantage the applicant will

⁵⁸ Law Commission for England and Wales, *Cohabitation: The Financial Consequences of Relationship Breakdown – A Consultation Paper*, 2006. London, The Stationery Office.

⁵⁹ *ibid.*, para.2.42 *et seq* (Overview).

⁶⁰ *ibid.*, (Overview) para.2.44.

⁶¹ *ibid.*, para.3.85 (Overview).

⁶² *ibid.*, para.6.134.

⁶³ *ibid.*, para.6.154.

experience in the future as a result of sacrifices made during the relationship.⁶⁴ How exactly this is to be calculated without a crystal ball remains to be seen.⁶⁵ Nonetheless, the actual caregiving within cohabitation relationships remains unpaid at the point of separation, although compensation may be available to redress the caregiver's labour market value. Periodical maintenance, if available at all, is also to be limited to a short period, with parties both being expected to take up paid work. Whilst this meets some of the feminist criticisms of the way the law of financial provision on divorce encourages married women's dependence on men in the divorce context, it is clearly placing a lower value on caregiving by functionally similar cohabiting mothers, which is difficult to justify given the social acceptance of cohabitation as a parenting and partnering form.⁶⁶ Furthermore, the already working cohabiting mother may suffer additional loss if her relationship-generated disadvantage only appears after the relationship has ended due to childcare difficulties as a single parent family, which did not exist during the relationship. Whilst it is hoped that the proposed scheme would entitle a claim, it is not proposed to provide a very big window for claims⁶⁷ and unpaid caregiving performed in the place of full-time paid work in this context then becomes the burden of the state.

IV: Unpaid Caregiving by Lone Parents

With the possible exception of the lauded but little-remunerated full-time carers of elderly or disabled relatives, it is in the lone parent context that the law seems to give full-time unpaid caregiving its lowest value. This is despite the fact that from a child's perspective, surely here the primary carer is doubly important? However, where the state rather than a former partner is the paymaster, a completely different gloss is given to caregiving under New Labour's communitarian approach.

This is most apparent in the New Deal for Lone Parents. Since 30th April 2001 all lone parents with a youngest child aged five years and three months or who make a first claim for Income Support or a repeat claim after a period in work, have been required to attend a work-focused meeting with a Personal Adviser, as a condition of receiving benefit. They can claim a refund of their travel costs, if they have to travel to the Jobcentre, and any registered childcare costs they have incurred. All lone parents who are entitled to income support on or after the 5th April 2004 have to have an interview with a personal adviser regardless of the age of their youngest child unless exempt. If they fail to attend for interview, a benefit penalty is imposed.⁶⁸ However, at the current time, lone parents are not obliged to look

⁶⁴ *ibid.*, para.6.163.

⁶⁵ For a fuller discussion of these difficulties, see Probert, "Cohabitation: Contributions and Sacrifices" [2006] *Fam Law* 1060.

⁶⁶ See A. Barlow, S. Duncan, G. James and A. Park, *Cohabitation Marriage and the Law, Social Change and Legal Reform in the 21st Century* (Hart, Oxford, 2005), chap.2.

⁶⁷ It is proposed that claims should normally be brought within one year of separation or of the birth of a child of the relationship if later. See above, n.58, ("Overview") para.7.6.

⁶⁸ This is up to a maximum of 25 per cent of the adult's income support allowance for six months.

for work as a condition of receiving benefit until their youngest child reaches the age of 16.

The lone parent employment rate in 2006 in Great Britain stands at 56.5 per cent, an increase of 11.8 percentage points since 1997 and an all-time high.⁶⁹ Undoubtedly this has been driven by the New Deal for Lone Parents which has helped 483,000 lone parents into employment, of which 293,000 have entered into sustained employment. The number on benefits has also been reduced by around a quarter of a million since 1997, to 783,000.⁷⁰ However, since 2004, this employment rate has only increased by 0.5 per cent and thus, despite the claimed success of the New Deal for Lone Parents, the recent Freud Report⁷¹ has proposed that this group should be targeted further to achieve an employment target of 70 per cent by 2010, a tactic perhaps reminiscent of a much harsher American approach.⁷² It is now proposed that once their youngest child is 12, the much stigmatised lone parent be required to seek work.⁷³ The driving force behind this is stated to be a reduction in and eventual eradication of child poverty as “tackling worklessness among lone parents is key to tackling poverty”.⁷⁴ The Government estimates that around 47 per cent of children living with a workless lone parent are in relative income poverty and an integral part of the solution to this is paid work, especially given that eight out of ten lone parents state that they want to work. As Lisa Harker has explained:

“There is wide recognition that relying solely on benefit and tax credit increases to reduce child poverty would be undesirable since, for many families, an income through paid employment offers a more effective and sustainable route out of poverty.”⁷⁵

Thus paid work is the mantra of New Labour’s quest for social cohesion and eradication of child poverty, without any examination of the quality of unpaid caregiving that might be lost in this process. Research shows that some lone parents actively choose poverty in order to care better, as they see it, for their children in the face of economically rational incentives to choose work.⁷⁶ Other research indicates that many women would still choose to give up work to care for children or other dependants even if quality care was

⁶⁹ D. Freud, *Reducing dependency, increasing opportunity: options for the future of welfare to work: An independent report to the Department for Work and Pensions*, 2007, Leeds: Department for Work and Pensions, p.37.

⁷⁰ *ibid.*

⁷¹ *ibid.* This follows up aspects flagged in Department for Work and Pensions *Five year strategy: Opportunity and Security throughout Life*, 2005, London: TSO and *New Deal for Welfare: empowering people to work*, Department for Work and Pensions, CM 6730, 2006, London: TSO.

⁷² See Miller, “The art of persuasion? The British deal for lone parents” in *The Welfare we Want: the British Challenge for American Reform* (Walker, and Wiseman, (eds. 2005) pp.115-142.

⁷³ Freud, *op. cit.*, n.59.

⁷⁴ *ibid.*, at p.37.

⁷⁵ Lisa Harker *Delivering on Child Poverty: what would it take? A report for the Department for Work and Pensions*, November 2006, cited in the Freud Report, *op. cit.*

⁷⁶ S. Duncan and R. Edwards, *Lone Mothers, Paid Work and Gendered Moral Rationalities* (Macmillan, London, 1999).

available and affordable to them.⁷⁷ Aside from what the promised family-friendly employment policies will amount to in practice for this age group, one is left to wonder how constructively teenagers whose lone primary carer is at work when they return from school will amuse themselves away from any watchful parental eye. Perhaps caregiving has more to offer social cohesion than is currently appreciated.

IV: Conclusion

The push to create mother worker citizens as evidenced in the New Deal for Lone Parents confirms that the welfare state's view of unpaid caregiving by lone parents has moved in the opposite direction to that of the new emerging family law discourse in British case law and Spanish legislation. As American, Daniel Moynihan, aptly commented back in 1973:

“If American society recognized home making and child rearing as productive work to be included in the national economic accounts . . . the receipt of welfare might not imply dependency. But we don't. It may be hoped the women's movement of the present time will change this. But as of the time I write, it had not.”⁷⁸

Even by 2007, we have not come very far in terms of recognition of its value by the public purse. Just how progressive the greater value attributed to caregiving in the divorce context will prove to be remains to be seen. It might reinforce the dependency of men on women as the social norm within marriage, slowing down the move away from a patriarchal marriage model. It is also possible that economically rational men will avoid marriage, thus occasioning more cohabitation and lone parenthood in which caregiving is valued less. Another avoidance tactic might be to lobby for enforceable pre-marital agreements, although this would at least allow both spouses to negotiate around its value.

Yet another way forward is that caregiving will become less gendered within dual earner families and more generally.⁷⁹ In this way, caregiving might become a less of a social threat within the social welfare discourse if it is shared with men. Already, recent studies show that a third of all parental childcare is now undertaken by men and where mothers work, one third cite fathers as the main child carer while they are at work.⁸⁰ Some fathers even sacrifice their own career ambitions in order to spend more time with their children at a certain point in their lives.⁸¹ However, there may be no immediate change here. Homemaking does not hold great appeal to men and

⁷⁷ W. Hatten, L. Vinter and E. Williams, *Dads on Dads. Needs and expectations at home and at work*, EOC Research Discussion Series (EOC, Manchester, 2002).

⁷⁸ D. P. Moynihan, *The Politics of a Guaranteed Income* (Random House, 1973), p.17.

⁷⁹ Research by Scott *et al* seems to indicate this is a slower process than women's increased participation in the labour market. See Scott, *op.cit*.

⁸⁰ M. O'Brien and I. Shemilt, *Working Fathers, Equal Opportunities. Commission Discussion Series*. (EOC, Manchester, 2003).

⁸¹ S. Dex, *Families and Work in the Twenty-First Century* (Joseph Rowntree Foundation, York, 2003).

childcare is still principally undertaken by women, as Scott's research findings indicate:

“One of the puzzles that the ESRC Research Network on Gender Inequalities in Production and Reproduction was set up to answer is whether the “paradigm shift” in gender relations that has accompanied the demise of the male breadwinner family will result in more or less equality. New research from the Network shows that while there has been immense shifts in women's lives, in the way family and work responsibilities are combined, the evidence does not support great optimism about the future involvement of men in family chores and care.”⁸²

Whilst the egalitarian partnership discourse now embodied in divorce law has reappraised the social value of what women do unpaid in raising children and looking after the home, this high economic value for such domestic labour is confined to one area of law and to a narrow band of families where assets exceed needs. It also seems apparent that the equality approach contained within the new family law discourse is double-edged and may be shortlived. Where men do share housework and caregiving during the relationship, on relationship breakdown this could both bolster the equality argument for shared parenting by fathers and reduce the family assets available for redistribution to each party, as there will be two rather than one primary carers and two sets of housing needs to address. This also raises issues around the choice to undertake unpaid care giving within families. As has been seen in the Law Commission's proposals for reform of cohabitation law, only a joint decision that one parent should undertake child care will be sufficient to justify a claim for compensation for economic disadvantage consequently suffered. This seems to provide a very easy way for the breadwinner to avoid any such payment, returning caregiving to a negative financial value.

More positively, Gershuny and Bittman's cross-national longitudinal study highlights the notion of “lagged adaptation”. Women respond to increased labour force participation speedily by reducing their daily hours of home chores, while men's adaptation takes longer and is (not just anecdotally it seems) less reliable. However, they did find that the relative share of men's and women's domestic tasks becomes more equal over time.⁸³

To end this discussion of the tensions within the schizophrenic legal constructions of caregiving, perhaps we need to be reminded how caregiving could be constructed as an ideal in Martha Fineman's suggested redefinition of family law. She proposes the replacement of the patriarchal family with the caregiving family, explaining:

“In my newly redefined category of family, I would place inevitable dependants along with their caregivers. The caregiving family would be a protected space, entitled to special preferred treatment by the state. . . I proposed

⁸² Scott, *op.cit.*

⁸³ Gershuny and Bittman, “Exit, Voice and Suffering: Do Couples Adapt to Changing Employment Patterns?” (2005) 67 *Journal of Marriage and Family*, pp.656-665.

Mother/Child as the substitute core of the basic family paradigm. Our laws and policies would be compelled to focus on the needs of this unit. Mother/child would provide the structural and ideological basis for the transfer of current societal subsidies (both material and ideological) away from the sexual family to nurturing units. . . Two additional theoretical caveats are necessary. First, I believe that men can and should be mothers. . . Second, the child in my dyad stands for all forms of inevitable dependency – the dependency of the ill, the elderly, the disabled, as well as actual children.”⁸⁴

Whilst fulfilment of this ideal in terms of the role it envisages for the state seems at best a remote possibility in the British context, a more neutral view of the value of caregiving disentangled from the history of the gendered roles within the patriarchal family may soon be glimpsed in litigation surrounding financial relief on the dissolution of same-sex civil partnerships.⁸⁵ Despite urgings that the law should acknowledge the differences between same and different-sex relationships rather than assume the same power dynamic exists,⁸⁶ civil partnerships and their dissolution have for good or ill been created in the image of marriage and divorce. However, this may in turn shed light on the role of law in valuing caregiving on relationship breakdown and help unpack what it is exactly that is being “rewarded” or compensated for on civil partnership dissolution and thus divorce. For if, as research seems to indicate,⁸⁷ same-sex couples tend to adopt a more egalitarian approach to the division of breadwinning and caregiving even where there are children, the gendered power imbalance in heterosexual relationships may be easier to identify, expose and, in the longer term, address both from a family law and welfare law perspective so as to more consistently recognise the high value of caregiving to society as a whole, detaching it from the stigma of economic dependency on a husband or on the State.

⁸⁴ M. Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies*, (Routledge, London, 1995) pp.231-235.

⁸⁵ An interesting analogy is the recent litigation surrounding the disputed terms of a “shared parenting” order following the breakdown of a lesbian relationship in which two children had been born to one partner. This prompted a clearer examination in the Court of Appeal and then House of Lords of the respective importance of biological and social or psychological parents to a child. See *Re G (children) (FC)* [2006] UKHL 43.

⁸⁶ See Auchmuty, “When equality is not equity: homosexual inclusion in undue influence law” (2003) 11 *Feminist Legal Studies* 163-190.

⁸⁷ See Dunne, “Opting into motherhood: lesbians blurring the boundaries and transforming the meaning of parenthood and kinship” (2000) 14(1) *Journal of Gender and Society* 11-35.