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## FINANCIAL REMEDY OUTCOMES ON DIVORCE IN ENGLAND & WALES: NOT A ‘MEAL TICKET FOR LIFE’

Joanna Miles and Emma Hitchings\*

### **Abstract**

This paper reports data from a recent mixed-methods study of financial settlement on divorce in England & Wales. It aims to contribute to current debates about the prevalence of, and justification for, orders for spousal support (maintenance/periodical payments) following divorce. A central finding from the court file data examined in this study is how spousal support (paid almost exclusively by husbands to wives) is very largely confined to cases involving minor dependent children. The paper situates the discussion of cases that proceed through the legal system (only a minority of all divorces) in the wider context of general population data that show continuing economic disadvantage for women following divorce, largely as a result of their child care responsibilities. It concludes with a plea that discussion of reform in this area be underpinned by a firm grounding in the best available empirical data about the realities of financial provision on divorce, which are not to be found in media-reporting of high-profile, predominantly ‘big money’ cases.

### **Introduction**

The law of financial remedies on divorce raises profound questions about: the nature of the marital obligation and its persistence (if any) after divorce; the respective responsibilities of private individuals and the state to ameliorate – or insure against the risk of – the economic hardships that commonly arise on separation; and the basis, if any, on which property should be shared if marriage ends.<sup>1</sup> These questions arise in a

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<sup>1</sup> See generally, for example, Law Commission (Eng&W) nos. 103 and 112: *The Financial Consequences of Divorce: The Basic Policy – a Discussion Paper* (HMSO, 1980) and *The Financial Consequences of Divorce* (HMSO, 1981); John Eekelaar and Mavis Maclean, *Maintenance after Divorce* (Clarendon Press, 1986); Joanna Miles, ‘Responsibility in Family

context in which many women are still less able than most men to deal alone with the economic shock of divorce: a combination of socio-economic factors and the division of functions within many marriages often leaves wives with lower earning-capacity, lower capital resources and lower pension (superannuation) savings than their husbands, whose standard of living tends to increase on divorce.<sup>2</sup>

This contribution to the special issue reports and reflects on recent research findings from a mixed methods study examining financial settlements on divorce in England & Wales, reached under Part II of the Matrimonial Causes Act 1973 ('MCA 1973'), predominantly in the sort of cases that hit neither the newspaper headlines nor (rarely) the law reports. The aim is to inform current discussion about the state of the law and its possible future direction, a discussion recently stimulated in England & Wales by a Private Member's Bill in the House of Lords and associated media coverage. Such debates must be grounded in the best available empirical evidence so that current legal problems are accurately identified and appropriate solutions devised. The data reported here challenge both the premises on which current parliamentary and media debates in England & Wales are being conducted, and the aptness and potential effect of proposed reforms. There are various ways in which economic disadvantage on divorce might be tackled. But we conclude that reducing the capacity of private law financial law remedies to help share the economic burdens of divorce does not provide a satisfactory response, given the wider socio-economic and fiscal context in which that law must operate.

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Finance and Property Law' in J Bridgeman, H Keating and C Lind (eds), *Regulating Family Responsibilities* (Ashgate, 2008); Law Commission (Eng&W) No. 343, *Matrimonial Property, Needs and Agreements* (TSO, 2014), specifically in relation to needs-based relief, in ch 3.

<sup>2</sup> In terms of changes in equivalised household income: see Fisher and Low (2016) 30 *International Journal of Law, Policy and the Family* 338, especially low-income men. Their analysis was unable to consider each household's net capital asset or pension position. See also contribution to this special issue, which considers financial and housing capital wealth (but not pensions).

### Here we go again...

As with so many family law questions, there is a “Groundhog Day”<sup>3</sup> familiarity to public debate on these matters.

Forty or so years ago, following the enactment of the financial remedies scheme now found in the MCA 1973, the Campaign for Justice in Divorce<sup>4</sup> and others, prominent amongst them Ruth Deech,<sup>5</sup> were agitating for reform. It was argued that the persistence of marital obligation in the now no-fault divorce context<sup>6</sup> unjustly permitted ex-wives to live the parasitical life of alimony drones, enjoying their ‘lifelong meal ticket’<sup>7</sup> in a manner impoverishing of ex-husbands and undignified for the recipients. The Law Commission for England and Wales, making its relatively modest reform recommendations in 1981, expressed concern that its task was handicapped by the fact that there was ‘very little reliable up-to-date information ... about the operation of the existing law’. This made the Commission cautious in its positioning on the issues: ‘[W]e have said only that the law is “widely thought to be capable” of producing unjust and inequitable results; we have not said that it in fact does so.’<sup>8</sup>

Two years following the enactment of reforms based on the 1981 recommendations,<sup>9</sup> John Eekelaar and Mavis Maclean published the findings of their important study,

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<sup>3</sup> See the 1993 US comedy film in which the lead character finds himself living the same day repeatedly.

<sup>4</sup> Campaign for Justice in Divorce, *An Even Better Way Out* (May 1979, self-published).

<sup>5</sup> See, for example, ‘The Principles of Maintenance’ (1977) 7 *Family Law* 229; contrast the response of Katherine O’Donovan, ‘The Principles of Maintenance: an Alternative View’ (1978) 8 *Family Law* 180.

<sup>6</sup> Divorce Reform Act 1969, implemented in 1971; the mixed-economy model of that legislation (now the MCA 1973, Part I) and its practical operation (encouraging reliance on fault) mean that calls for truly no-fault divorce in England & Wales persist: see Liz Trinder et al, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation, 2017): [www.nuffieldfoundation.org/finding-fault-divorce-law-practice-england-and-wales](http://www.nuffieldfoundation.org/finding-fault-divorce-law-practice-england-and-wales).

<sup>7</sup> Deech, above n 5 (1977), p 231.

<sup>8</sup> Law Commission, above n 1 (1981), [8] and [7].

<sup>9</sup> Matrimonial and Family Proceedings Act 1984; for a review of the history and a current statement of the law, see Sonia Harris-Short, Joanna Miles and Rob George, *Family Law: Text, Cases, and Materials* (OUP, 3<sup>rd</sup> edn, 2015), from 7.4.1.

*Maintenance after Divorce*,<sup>10</sup> analysing data pre-dating the reforms. This painted a somewhat different picture from that depicted by the advocates of reform, notably that – thanks to the impact of benefit rules<sup>11</sup> – maintenance paid to female single parent families ‘rarely had any impact on the total household income of that family unless the woman was working full time’<sup>12</sup> – hardly the behaviour of the alimony drone. They found that the amounts of maintenance transferred were very low, and constituted a much lower percentage of payors’ household income than of recipients’. However, small though the sums might be, they ‘could form a significant percentage’ of the payee’s family income. Once child support payments ceased on children’s reaching independence, older mothers’ attempts to return to or increase paid employment were hampered by the fact that ‘their earning capacity had been devastatingly impaired by the interruption of their employment pattern’.<sup>13</sup> Meanwhile, they found that maintenance was much less common where there had been no children, and even then only one of the ‘long-term mothers’ whose children were all independent at the point of separation in the study had had a maintenance order made – but that had lapsed and not been revived once the husband retired.<sup>14</sup>

Forty or so years on, calls for reform have been renewed, with now-Baroness Deech still prominent amongst its advocates. Promoting a Bill in the House of Lords that would very significantly change the law,<sup>15</sup> Baroness Deech makes various charges against the current law.<sup>16</sup> These include: its perpetuation of the indignity of lifelong spousal

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<sup>10</sup> Above n 1.

<sup>11</sup> Under welfare benefit rules, maintenance received was included in means-testing rules, so that state benefits would reduce by every £1 received in maintenance. We consider the current position below.

<sup>12</sup> *Ibid*, 102.

<sup>13</sup> *Ibid*. See further Eekelaar in this special issue for a further summary of that project’s findings.

<sup>14</sup> *Ibid*, 90-1, 101.

<sup>15</sup> See most recently: <https://services.parliament.uk/bills/2017-19/divorcefinancialprovision.html> - *Divorce (Financial Provision) Bill* [HL] 2017-19. The Bill is said to be modelled on Scots law, but several differences between the Family Law (Scotland) Act 1985 and the Bill somewhat undermine analogy and claims of indirect support for the Bill from positive research findings in Scotland; for that research: Jane Mair et al, *Built to Last: The Family Law (Scotland) Act 1985 – 30 years of financial provision on divorce* (CRFR, 2016): <http://eprints.gla.ac.uk/117617/>.

<sup>16</sup> See, for example, her speech introducing an earlier iteration of the Bill: Hansard HL Deb col 1490 (27 June 2014), and coverage in *The Times*, “Meal ticket for life” divorce deals must be stopped, urge law chiefs’, 20 November 2017.

support; the lack of transparency in this highly discretionary, largely judge-made area of family law, making it inaccessible to lay people (an acute problem in our post-legal aid world) and obstructive of settlement; the high costs of litigation in media-reported financial remedy cases; and high awards in ‘big money’ cases that have made London ‘the divorce capital of the world’ so a prime destination for the ‘gold-digger’.

What has been notably absent from parliamentary debate on the Bill thus far is significant reference to what research tells us about the reality of financial provision on divorce for ordinary people in ‘everyday’ cases, or general population data examining long-term outcomes for divorced people, most of whom obtain no court-ordered income, capital or pension provision. Instead, the debates have focused on media-reported atypical cases (as all high-value or otherwise tabloid-worthy cases are) from which misleading stereotypes are generated and then inappropriately generalised.<sup>17</sup>

Whilst any law reform inevitably seeks to promote a particular ideological or (more neutrally) principled view about how the law should be, reform must be informed by the best available empirical data. Absent such evidence-base, reform may fail to achieve its principled objectives and exacerbate existing problems. And so this article now turns to research data, drawing principally on the authors’ own study of financial outcomes on divorce for couples who conclude their financial matters with a court order.<sup>18</sup> Empirical data cast doubt on several of the charges made against the current law, notably as regards the level of legal costs incurred by divorcing couples,<sup>19</sup> and the

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<sup>17</sup> On the pernicious nature of the ‘gold-digger’ trope as deployed in these debates, see Sharon Thompson, ‘In defence of the “gold-digger”’ (2016) 6 *Oñati Socio-Legal Series* 1225: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2887022](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2887022).

<sup>18</sup> See also Hilary Woodward with Mark Sefton, *Pensions on Divorce*, (Cardiff University, 2014): <http://www.nuffieldfoundation.org/pensions-divorce>, whose study focused on pensions but collected data more generally about financial orders on divorce.

<sup>19</sup> Contrast the comparatively modest – though recently increased – average legal fee cost for divorce and separation from non-marital relationships (£2,679 per person, a cost category incurred by 54% of those surveyed) identified by Aviva’s UK-wide *Family Finances Report – Winter 2018*, [www.aviva.com/content/dam/aviva-corporate/documents/newsroom/pdfs/Aviva-Family-Finance-Report-The-hidden-cost-of-divorce-and-separation.pdf](http://www.aviva.com/content/dam/aviva-corporate/documents/newsroom/pdfs/Aviva-Family-Finance-Report-The-hidden-cost-of-divorce-and-separation.pdf). The costs data available on the court files in our survey is poor: we have no costs data at all (as it is not required) for the pure consent order cases, and the data for contested cases are commonly patchy and in any event do not reflect the final bills. The interim sums that were noted on file were generally modest, both in raw terms and as a proportion of the assets at stake.

suggestion that it is the substantive law itself that foments dispute.<sup>20</sup> But we focus in this article on the principal charge on the indictment: that lifelong spousal support is prevalent, unjustified and ‘undignified’ for recipients.

### **The research study and its context**

The data discussed in this paper come from a mixed-methods study of financial settlements on divorce, drawing on three data sources, the first two collected in 2012-13, the third in 2016:

- (i) nearly 400 court files, from four courts around England situated in socio-economically diverse areas;<sup>21</sup>
- (ii) interviews with 32 family solicitors and mediators experienced in money cases and working in the areas in which those courts are situated;<sup>22</sup> and
- (iii) two focus group discussions conducted with 14 District Judges (the primary first instance judges for these cases) drawn from all across England.<sup>23</sup>

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<sup>20</sup> Dispute is principally generated by non-legal factors, e.g. distrust around disclosure, disagreement re valuation of assets, other factual disputes relevant to the application of the law in the particular case, sheer personal hostility (some of it probably stoked by our current divorce law – see Trinder et al, above n 6), or one side’s non-participation in the entire process necessitating an adjudication: see Emma Hitchings, Joanna Miles and Hilary Woodward, *Assembling the Jigsaw Puzzle on Divorce*, ch 4 (University of Bristol, 2013): [www.bristol.ac.uk/media-library/sites/law/migrated/documents/assemblingthejigsawpuzzle.pdf](http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/assemblingthejigsawpuzzle.pdf); John Eekelaar, Mavis Maclean and Sarah Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, 2000), and Maclean and Eekelaar, *Family Law Advocacy: How Barristers Help the Victims of Family Failure* (Hart Publishing, 2009).

<sup>21</sup> The files covered two periods in 2010/11 and 2011/12. They predate same-sex marriage and we excluded civil partnership files so the sample only deals with opposite-sex couples. For details of sampling strategy, see appendix A to authors’ earlier research report (Hitchings, Miles and Woodward, *Assembling the Jigsaw Puzzle* (University of Bristol, 2013)), available at [www.nuffieldfoundation.org/final-settlements-financial-disputes-following-divorce](http://www.nuffieldfoundation.org/final-settlements-financial-disputes-following-divorce). As we explain there, we could not obtain a nationally representative sample of cases. Rather, we sought to obtain a dataset stratified by court and time, providing data from a reasonable spread of different court sizes/types and geographical locations to generate descriptive statistics regarding the caseloads found there.

<sup>22</sup> Pseudonyms for interviewees given as source of quotations below indicate whether the interviewee was a solicitor (‘S1’ etc), solicitor mediator (‘SM2’ etc) or mediator (‘M1’ etc). For details of sampling strategy for practitioner interviews, see appendix A to authors’ earlier research report, *ibid*.

The landscape has shifted somewhat since we undertook our data collection. The first two elements predated the implementation of reforms that largely withdrew legal aid from this area, save for use in support of mediation.<sup>24</sup> That change precipitated an increase in litigants in person across family law,<sup>25</sup> which has prompted the publication of Family Justice Council guidance designed to help parties without legal advice to navigate this difficult area.<sup>26</sup> Shortly before the judicial focus groups were conducted, all divorce work (including applications for financial orders made by consent), had been brought within a small number of Regional Divorce Centres, and the President of the Family Division recently announced the piloting of a new Financial Remedies Court, in which specialist judges would deal with all money matters on divorce.<sup>27</sup>

One striking feature of financial remedies orders in English law is that around two-thirds of divorcing couples obtain no order at all.<sup>28</sup> So the population of divorcing couples that one can examine through justice system-related data sources is a discrete sub-set of the whole divorcing population. Of those who do use the courts, the vast majority –

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<sup>23</sup> Participants were recruited on the day at an event attended by judges from all over the jurisdiction. Judges willing to participate in the research were asked to complete a consent form, including information about their court's location. The two focus groups were then convened to enable a geographical spread of volunteers in each group, covering the Northern and Midlands judicial circuits (five judges), London (five) and elsewhere in the South of England (four); there was no judge from Wales. Only one offer of participation was declined owing to sufficient numbers from that geographical area.

<sup>24</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012.

<sup>25</sup> See *Family Court Statistics Quarterly*: [www.gov.uk/government/collections/family-court-statistics-quarterly](http://www.gov.uk/government/collections/family-court-statistics-quarterly)

<sup>26</sup> See [www.judiciary.gov.uk/wp-content/uploads/2013/04/guidance-on-financial-needs-on-divorce-june-2016-2.pdf](http://www.judiciary.gov.uk/wp-content/uploads/2013/04/guidance-on-financial-needs-on-divorce-june-2016-2.pdf) and [www.advicenow.org.uk/guides/survival-guide-sorting-out-your-finances-when-you-get-divorced](http://www.advicenow.org.uk/guides/survival-guide-sorting-out-your-finances-when-you-get-divorced).

<sup>27</sup> Adopting proposals first made by Edward Hess and Joanna Miles, 'The recognition of money work as a specialty in the family courts by the creation of a national network of Financial Remedies Units', (2016) 46 *Family Law* 133.

<sup>28</sup> *Family Court Statistics Quarterly. Family court tables: July to September 2017* (MoJ, 2017) Table 13: [www.gov.uk/government/collections/family-court-statistics-quarterly](http://www.gov.uk/government/collections/family-court-statistics-quarterly). The range of financial remedy orders available, listed in ss 23-25B, MCA 1973, encompasses 'financial provision orders' (i.e. periodical payment and lump sum orders). 'property adjustment orders' (permitting various types of orders in relation to capital issues), associated orders for sale and orders for pension sharing. The (rarely used) pension attachment order (see ss 25B-C) is a variant of the financial provision order. On couples who do not pursue financial remedies through the courts, see Emma Hitchings, 'Official, Operative and Outsider Justice: the ties that (may not) bind in family financial disputes' [2017] 29(4) *Child and Family Law Quarterly* 359.

around 70 per cent across the jurisdiction – apply to the court purely to obtain a ‘consent order’, i.e. an order enshrining an agreement reached by the parties through some out-of-court mechanism (whether informal or solicitor-led negotiation, mediation, or some other route). This is the only way under English law in which privately-ordered outcomes can acquire finality.<sup>29</sup> Of the remaining c.30 per cent who commence contested proceedings, around 25 per cent settle and obtain a consent order, leaving just five per cent of the *financial order* population who obtain an adjudicated outcome – a much smaller proportion of the divorcing population as a whole.<sup>30</sup>

The legal framework for financial orders created by Part II of the MCA 1973 differs from the Australian scheme principally in having just one checklist of factors that applies to all types of orders: there is no distinction between spousal support and property-related orders. Case law prescribes an objective of ‘fairness’, underpinned by three principles: sharing, needs and compensation. But, save in those unusual cases where the available assets exceed the parties’ combined needs, the courts’ focus is on meeting the parties’ needs, which will readily justify a departure from equal sharing of capital.<sup>31</sup> First consideration must be given to the welfare of any minor children of the family, and the court is required to *consider whether* a ‘clean break’ outcome, i.e. one with no spousal periodical payments, should be made.<sup>32</sup> Child maintenance is generally a matter for the statutory Child Maintenance Service, rather than the courts, though couples are strongly incentivised to reach informal private agreements about child support, rather than to use the Service; the courts can enshrine those agreements by consent in any order made under the MCA 1973.<sup>33</sup>

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<sup>29</sup> *Hyman v Hyman* [1929] AC 601; MCA 1973, s 33A.

<sup>30</sup> For discussion of the dynamics of settlement in all these cases, see Hitchings et al above n 21.

<sup>31</sup> See *White v White* [2001] AC 596, *Miller, McFarlane* [2006] UKHL 24.

<sup>32</sup> See generally MCA 1973, ss 25-25A.

<sup>33</sup> Child Support Act 1991, s 8. For textbook coverage of English law in relation to the MCA 1973 and child maintenance, see Harris-Short et al above, n 9, chs 6 and 7.

## **What the data tell us about the reality of court-ordered financial outcomes on divorce**

### ***The clean break is prevalent***

#### *Headline data*

All of our data sources indicate that the clean break culture in England and Wales is prevalent. In the court file data, we identified 64 out of 399 cases (16 per cent) with an order for spousal periodical payments,<sup>34</sup> and just a further two cases<sup>35</sup> in which the parties' applications for spousal support had not been dismissed, the rest making an immediate clean break. *All* claims (income and capital) were dismissed in 65 cases,<sup>36</sup> the remainder involving one or more types of order in relation to capital or pension assets. We explore the cases involving spousal support below.

Whilst spousal support most obviously precludes or delays a clean break, certain types of capital order also tie parties together:

- *Mesher* and *Martin* orders,<sup>37</sup> under which the FMH (former matrimonial home) is settled on trust for occupation by one spouse (commonly with the children) to the exclusion of the other until some defined point when sale will be triggered and the capital value shared in proportions prescribed by the order; outright transfer to one spouse subject to a charge in favour of the other realisable at a set future point has similar effect; and
- pension attachment orders, under which the pension-holder's pension trustees are ordered, once the pension becomes payable, to direct prescribed payments

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<sup>34</sup> We also refer to these as 'spousal support'.

<sup>35</sup> These were adjudicated cases involving a more or less non-participative spouse, in which it was clear, or appeared, that the judge deliberately left the matter open for possible future determination.

<sup>36</sup> 21 of these cases were clean breaks "of nothing", i.e. cases in which the parties had zero capital and pension assets, and seven further cases very nearly so.

<sup>37</sup> These are forms of property adjustment order (described in the text), so-named after the first reported cases in which each was deployed: *Mesher v Mesher* [1980] 1 All ER 126; *Martin v Martin* [1978] Fam 12. The sale trigger for *Mesher*s tends to be associated with the life-stage of a child of the family; the trigger for *Martin*s with a development in the occupying spouse's life.

to the other spouse. Unlike other asset classes, pension assets can only be shared directly, whether via this type of order or pension sharing orders (which carve out part of the pension-holder's fund for immediate transfer to the other spouse), by way of court order, not informally.

But here too, the orders in the court files reinforced the 'clean break'. The most common outcome for the FMH (in over 40 per cent of cases) was outright transfer to one spouse (usually subject to mortgage), followed by sale and division of the net proceeds of sale – over 30 per cent.<sup>38</sup> By contrast, we identified just six *Meshers*, three *Martins* and seven orders for transfer subject to a charge.<sup>39</sup> This surprised us. *Meshers* appear to offer a flexible solution maximising both use value and capital value of this central asset. But they are unpopular because they preclude the clean break. So, as these comments during one focus group suggest, if the parties' housing situation can be dealt with some other way it will be:

*Judge 6: My area, [if the wife were to receive 70% of the value of the house] you wouldn't need a Mesher. If you give her 70, [she] would be able to accommodate.*

*Judge 2: I mean, experiences may differ, but my experience is that wives are often seeking to avoid the Mesher and wanting to keep the property. [Several: Yeah] Whether that's right for them or not. And husbands are very opposed to the notion of putting off the opportunity to get back on the housing ladder, which it often brings with it.*

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<sup>38</sup> These figures include both ordered outcomes, and outcomes achieved without a court order that were recorded on file, typically in recitals or other supporting documentation. In 37 of the 399 cases the FMH was, or appeared to have been, rented. For details of all orders made and all destinations of the FMH, see Tables A1 and A2 in the Appendix. For general divorced population data re post-divorce housing tenure, see Hayley Fisher and Hamish Low, 'Recovery from divorce: comparing high and low income couples' (2016) 30 *International Journal of Law, Policy and the Family* 338, fig 4 and associated discussion.

<sup>39</sup> In an eighth case, the FMH had already been transferred to one spouse, and the court then ordered a charge in favour of the other to secure a lump sum order in favour of the other. Two of the *Meshers* involved an immediate clean break in relation to income, three a deferred clean break and one spousal support for a fixed term. The *Martin* orders and all but one of the transfers with charge (involving a minor child) were also immediate clean break cases.

As for pensions, we identified just one pension attachment order but 72 pension sharing orders. This finding was unsurprising:<sup>40</sup> pension attachment orders are regarded as inferior to pension sharing, owing to the risks that arise for the beneficiary from the ongoing link with the pension-holder, e.g. in the event of the latter dying. However, by far the most common situation in cases where one or both parties had a shareable pension<sup>41</sup> – in 247 out of 323 such cases – was no pension order at all, leaving each spouse to whatever pension resources they had. This raises important questions – explored in-depth by Woodward with Sefton’s study of pensions on divorce – about the use of ‘offsetting’ arrangements made to reflect the parties’ pension assets within the overall settlement by way of the distribution of other capital.<sup>42</sup> Woodward’s findings raise cause for concern about the adequacy of many such arrangements, and so about the overall fairness of those settlements.

*The clean break focus – what is driving it, and is it always fair?*

The clean break culture is strongly driven by many couples’ preferences:

*[M]arried couples almost always want a clean break of some form or another – even if it’s a clean break as to capital and income. (M1)*

*Well, you do always have to advise about this, but clients like clean breaks. They don’t want to have any more bother with the other party, and even if a clean break isn’t - you know, the safeguarding aspect of it, the nominal in case something should go wrong, they don’t want the link and I don’t think they’ve got the stomach for going back to court again if something does go wrong. (SM27)*

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<sup>40</sup> HMCTS statistics suggest that there has been a recent spike in pension attachment orders, but anecdotal evidence from practitioners (lawyers and pensions experts who often provide reports for these cases) indicates that they have observed no such increase, so the statistics on this are something of a mystery.

<sup>41</sup> We identified 323 “pension cases”, involving pensions other than the basic state pension (not shareable): both spouses had such pensions in 196 cases, the wife only in 32 and the husband only in 92; in three further cases (included in this count), we suspected from evidence on file that the husband had a pension but the position was unclear, in one of which the wife clearly had a pension.

<sup>42</sup> Above n 18 (hereafter ‘Woodward’).

The preference for clean breaks and 'self-sufficiency' was also clear from some judges' responses to the case study (involving a primary carer wife of three children) presented to the focus groups:

*Judge 11: [I]n my court we would always consider, always consider in every case whether a clean break is appropriate. That's the starting point.*

*Judge 14: Well I think it probably is because I ... I'm encouraging her towards self-sufficiency because I think that's the principle we've got to adopt. So I'm saying to her that the transition from married to separated life is not a permanent meal ticket and you've really got to expect to try and achieve self-sufficiency as soon as you practically can and I like to get them on the road to that. I feel that keeping the matrimonial home and charge it back doesn't achieve that objective.*

But our interviews identified cases in which the clean break norm produced outcomes that appeared to have left some wives badly under-protected. This example, discussed by a solicitor interviewee, involved a husband (the interviewee's client) earning a low six-figure income and a wife out of paid employment while she cared for four young children. The case concluded with a clean break in which she obtained a little over 50% of the non-pension capital, allowing her to re-house mortgage-free, child maintenance paid at the usual rate, but no pension share or periodical payments in her favour:

*What they agreed was a very good deal for him, actually in my view. I did say to him, if I was acting for the wife, I wouldn't be advising this. She's got a clean break which, with 4 small children and no income, I thought wouldn't even get past the court, and I said to him and warned him, 'you know, your danger is this isn't going to get past'. It did. She did get a significant proportion of the capital upfront to be able to re-house herself. I think, from her position, she wanted to get out of the matrimonial home and get herself a new property. ... I thought it [the outcome] worked very well for him because he got the deal he wanted. The wife might not think so. [Interviewer: In a few years' time?] Absolutely, when her money's run out and she's got no income and 4 small children. ... (S14)*

This outcome is typical of those found by earlier researchers<sup>43</sup> who flagged the ‘present bias’ of many wives (as mothers),<sup>44</sup> which prompts them to focus on immediate needs (particularly of their children) to the neglect of their own longer-term requirements. The solicitor in this case was not hopeful for the wife’s long-term prospects.

*I think they settled primarily because the wife was very, very keen to get out of the house. She had found a property that she wanted and, as my client described her to me, she sees something, she wants it, and that’s just ... she’s on that road, she’s put the offer in and she was very keen to get a resolution. I think he used that to his advantage to get something favourable. I personally think when the money runs out, she’ll sit and think, ‘oh my god, now what do I do?’ (S14)*

The judges also noted the ‘present bias’ phenomenon, along with its converse: husbands’ attachment to their pensions:<sup>45</sup>

*Judge 9: Yeah, I mean my experience in a case like [the one presented for discussion in the focus group], the wives will always be going for the house and the husbands will be hanging on to their pensions for dear life and so the sort of ... the common scenario is still wife trying to keep the house, whether she can afford it or not and very often you’re getting wives saying you know borrowing money off their parents –*

*Judge 14: Yeah.*

*Judge 9: To buy the husband out. They are desperate to hang on to the house. Women in my experience don’t pay so much attention to their pensions or what they’re going to do later on in life. Statistically in a case like this, their late 40s and maybe I’m being incredibly sexist, but you know ten years down the line she’s likely to have got a new partner who’s probably got a pension so she’s not*

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<sup>43</sup> E.g. Sue Arthur et al, *Settling Up: making financial arrangements after separation* (NatCen, 2002); Alison Perry et al, *How parents cope financially on marriage breakdown* (Joseph Rowntree Foundation, 2000).

<sup>44</sup> Chartered Insurance Institute, *Risk, exposure and resilience to risk in Britain today: Women’s Risks in Life – an interim report* (2017), [www.cii.co.uk/consumer/risks-in-life/](http://www.cii.co.uk/consumer/risks-in-life/), at 68.

<sup>45</sup> Above n 18.

*so bothered about it. She's interested in keep hanging on to that house now for the kids. .... That's my experience and it doesn't matter what you say to women about pensions, they want to hang on to what they've got now.*

*Judge 8: They want the nest.*

The reference to repartnering here reflects Fisher and Low's finding, from their analysis of general population survey data, that wives' post-divorce recovery is typically driven not by increased labour market supply or income-transfers from the ex-husband, but rather from new partners or (at least while children were dependent) state support.<sup>46</sup> We can say little about repartnering from the court file data as they deal only with the time when the orders are sought, not the longer term. But we found examples of new partners helping to meet accommodation needs. And, in line with another finding of Fisher and Low – that men repartner more quickly after divorce than women – we found a higher proportion of husbands in the court file sample (25 per cent, 97 out of 383) than wives (16 per cent, 61 wives out of 387) indicating an existing or intended new relationship. Of those, five wives and 14 husbands were intending to or had already remarried, while 56 wives and 83 husbands were cohabiting or intending to do so.<sup>47</sup> By statute, remarriage of the recipient of spousal support will automatically terminate any spousal support order,<sup>48</sup> and orders are commonly drafted such that a given period of non-marital cohabitation with a third party will have the same effect.

As also suggested in the focus group discussion, support from other family members (especially parents) – including expected inheritances – might also be important to enable clean breaks. There were examples of this in both court file sample and interviews. In one case, the offer of family help was needed to assuage a judge's concerns about approving a clean break:

*The husband flatly refused to go with the judge's recommendation that the order should be amended [to include a nominal order for spousal support]. So it then*

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<sup>46</sup> Hayley Fisher and Hamish Low, 'Who Wins, Who Loses and Who Recovers from Divorce?', in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets* (Hart Publishing, 2009) and 'Financial implications of relationship breakdown: does marriage matter?' (2015) 13 *Review of Economics of the Household* 735.

<sup>47</sup> See also Woodward with Sefton's findings, n 18 above, 2.2.5.

<sup>48</sup> MCA 1973, s 28(1).

*took longer because we had to then get more evidence of her critical life insurance cover with her employment, a commitment from her parents that if anything went wrong and she had to give up work to look after the child, then they would support her. So we did all of this, just to make sure the order got through. (S23)*

But while some judges need persuading, others seem prepared to approve surprising clean breaks. Certainly, challenges to proposals for clean break consent orders were rare in the court file sample: we identified only eight applications that were queried pre-approval for reasons indicating judicial unease at a clean break. Where orders were finalised at an approval hearing rather than by correspondence, we could not see what additional information might have been provided orally to persuade the judge. But in only one of the eight cases did we identify modification of the proposed order responding to that judge's concern: by a slight change in the capital division, rather than by provision of spousal periodical payments. Of course, in examining judges' practices in these cases, it is important to appreciate the relatively limited information on the basis of which judges are invited to approve orders, and the very limited time available per case. If, as one focus group judge reported, one is required to scrutinise 50 draft orders per day, opportunity for serious scrutiny is clearly impossible.

It may be that judges' concern for party autonomy wins the day, and that judges feel that they have discharged their judicial obligation to ensure a fair outcome by raising the question and requiring parties to justify their preferred approach. The husband's solicitor from the four-children case discussed above said this of the court hearing in the case:

*The wife was trying to see what the court would say, and our view was, 'no, you've got a binding agreement, you've agreed this, you've had legal advice, you've had disclosure', and I think on those bases the court said, 'well, there you go' - because she'd had all the information, she'd had the disclosure, she'd had the legal advice – it's not our issue whether that legal advice was right or wrong. (S14)*

Meanwhile, however, it seems clear from our interview data that parties' psychological strength in negotiations will often shape outcomes. The solicitor in this case clearly felt that the husband's steely determination had driven the outcome:

*He was an alpha male and she [worked part-time] and looked after the children. I think she probably just saw her role ... I think she was just grateful actually to have met some of her aims. And even despite me very positively talking about what she could achieve and hope to achieve, I don't think she really thought it was worth the effort...[S]o I think it's very much the husband's determination not to concede anything very easily and wore her down. Ultimately she got the outcome she wanted but it was also the outcome he wanted to give her. So I never lost sight of that fact. (S25)*

So, a clean break does not necessarily indicate that the economically weaker party can be fully self-supporting. She may only be able to avoid reliance on the ex-husband by relying instead on others, or she may have no obvious adequate alternative means of support at all. Whether, *pace* Deech, such outcomes may be regarded as 'dignified' for the women concerned is debatable.

### ***The minority cases: spousal periodical payments***

As our headline data from the court files suggest, spousal support orders are evidently far from the norm. Official court statistics on the frequency of different types of financial order made on divorce are problematic as they have since 2006 reported spousal and child periodical payment orders in one figure for "periodical payments".<sup>49</sup> Court file survey data enable us to distinguish between them. We and Woodward<sup>50</sup> found more cases with child than spousal orders (see Table 1 below). Adding those cases where we found *positive*<sup>51</sup> evidence of child maintenance transfers between households *outside* the court order (e.g. under a calculation made by the statutory agency or

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<sup>49</sup> Personal correspondence between authors and HMCTS statisticians. For the last year of separate figures, see 2005 data: 15,468 child periodical payments, 4,721 spousal orders. By contrast, in 2006, a total figure of just 16,728 was reported. See generally [www.gov.uk/government/collections/family-court-statistics-quarterly](http://www.gov.uk/government/collections/family-court-statistics-quarterly)

<sup>50</sup> Above n 18.

<sup>51</sup> We cannot say that child maintenance was not being paid in all of the cases for which we did not have this positive evidence: see next note.

informally agreed payments), we identified child maintenance payments in 149 cases, two-thirds of the 225 cases involving any minor child of the family.<sup>52</sup>

**Table 1: numbers and proportions of court file case samples, with periodical payments orders ('pps') for spouse or for child, comparing authors' study with other recent study**

	Hitchings/Miles	Woodward <sup>53</sup>
<b>Sample sizes:</b>		
<i>Total sample size in each study ('all cases')</i>	399	369
<i>N of cases with minor children of family ('child cases')</i>	225	183
- <i>As % of all cases</i>	- 56%	- 50%
<b>Periodical payment orders within each sample:</b>		
<i>N of cases with pps for spouse</i>	64	46
- <i>As % of all cases in sample</i>	- 16%	- 12%
<i>N of cases with pps for child</i>	83 <sup>54</sup>	60
- <i>As % of all child cases in sample</i>	- 37%	- 33%

Spousal support was more commonly ordered following contested proceedings: while nearly 12 per cent of orders originating with a consent order application included spousal support (31 cases), 24 per cent of contested but settled cases (28) did so, and just 3 out of 19 adjudicated cases.<sup>55</sup>

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<sup>52</sup> For further detail about child maintenance in the court file data (and the difficulties of extracting reliable data about child maintenance from them), see unpublished working paper 'Child maintenance: the arrangements of a financially-engaged population of divorcing parents', forthcoming.

<sup>53</sup> Woodward with Sefton, above n 18.

<sup>54</sup> Excluding orders for school fees.

<sup>55</sup> To these should be added the cases with no periodical payment order but no (apparent) dismissal of the claims, and two cases where it is unclear whether the outcome was adjudicated, but periodical payments were ordered. Breaking the data down by reference to type of order (see further below): 14 out of 22 joint lives orders were made in contested but settled cases, six in pure consent order cases; fixed but extendable terms were split evenly between those case types; but most of the non-extendable term orders were made in pure

*Establishing the context: a brief profile of the court file sample*

In order to put the minority of cases in the court file survey involving spousal support orders in context, we offer a brief profile of the court file population.

The four courts in the study were selected to achieve a spread of different socio-economic circumstances, but we cannot claim that the sample achieved is representative of the whole jurisdiction.<sup>56</sup> Table 2 shows the economic / occupational status of those spouses whom we felt able to classify based on occupations described by the petitioner spouse on the divorce petition.<sup>57</sup> As discussed in the Appendix, our coding seeks to achieve a *rough* approximation to the most simplified version of the official socio-economic classification tool.<sup>58</sup>

There was considerable variation between the four courts: in two courts, the largest group of husbands whose occupations could be classified had routine/manual classifications, while higher occupations formed the largest group in the other two, one having a notably high representation from that group.<sup>59</sup> But even excluding that court, the percentage of husbands in the “higher” category in the three other courts exceeded the general divorced population average. This may be expected on the basis that higher occupation households are likely to be wealthier, with more significant financial issues to deal with on divorce.

Notably, just under a fifth of wives in the sample whose status could be classified were economically inactive (homemakers, retired or students), compared with just seven per

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consent order cases (18 out of 28), with eight made in contested but settled proceedings. Spousal support of all three types featured amongst the six adjudicated cases and two possibly adjudicated cases.

<sup>56</sup> See n 21 above.

<sup>57</sup> We have no data regarding their economic/occupational status by the time of the final order.

<sup>58</sup> The NS-SEC – National Statistics Socio-economic classification tool: [www.ons.gov.uk/methodology/classificationsandstandards/otherclassifications/thenationalstatisticsocioeconomicclassificationnssecbasedonsoc2010](http://www.ons.gov.uk/methodology/classificationsandstandards/otherclassifications/thenationalstatisticsocioeconomicclassificationnssecbasedonsoc2010). For loose comparison of our data with general population data and brief note on methodology, see Table A3 in the Appendix.

<sup>59</sup> “Higher” occupations include employers in large organisations, or professional/managerial roles; “intermediate” occupations include employers in small organisations, own-account workers and positions in clerical, sales, service and intermediate technical occupations that do not involve general planning or supervisory powers; “routine/manual” covers the remainder. For full classification information, see the NS-SEC tool, above.

cent of husbands, all retired. Nearly two-thirds of housewives (63.3%, 31 women) were married to husbands of higher-level occupation, with single digit numbers married to intermediate, routine/manual, unemployed and retired husbands.<sup>60</sup>

**Table 2: Economic and occupational status of spouses in the court file sample at date of petition**

	Husbands		Wives	
	N	%	N	%
<b><i>Economically active</i></b>				
higher	160	40.1	114	28.6
intermediate	50	12.5	83	20.8
routine/manual	81	20.3	69	17.3
unemployed	29	7.3	36	9.0
unclassifiable <sup>61</sup>	48	12	20	5
<b>Total active</b>	<b>368</b>	<b>92.2</b>	<b>322</b>	<b>80.7</b>
<b><i>Economically inactive</i></b>				
homemaker	0	0	56	14.0
retired	28	7	15	3.8
student	0	0	3	<1
<b>Total inactive</b>	<b>28</b>	<b>7</b>	<b>74</b>	<b>18.5</b>
unknown if active	<b>3</b>	<1	3	<1
<b>All classifiable</b>	<b>348</b>	<b>87.2</b>	<b>376</b>	<b>94.2</b>
<i>All unclassifiable</i>	51	12.8	23	5.8
Total	399	100.0	399	100.0

<sup>60</sup> Seven were married to husbands whose occupations could not reliably be classified. Woodward made similar findings, though adopting a slightly different approach in coding occupational status: see n 18, p 17, and Appendix below.

<sup>61</sup> With the exception of just six individuals (three husbands, three wives), we were able to identify spouses whose occupation was not classifiable as being economically active.

These occupational data are reflected in the spousal support case data in a way one might expect. Of the 64 cases in which spousal support was ordered (see table 1 above):

- the husband was the sole payer of spousal support in 62; the other two cases – both dual-earner, higher-occupation couples with young children – involved some degree of mutuality.<sup>62</sup>
- 52 involved husbands in higher-level occupations;
- 21 involved payments to wives classified as housewives on the petition (well over a third of all 56 housewife cases);
- 42 involved payments to wives who could be identified as being economically active in some way (13 per cent of such cases).<sup>63</sup>

So as a proportion of their class, housewives (at petition) were key recipients of spousal periodical payments, but nearly two-thirds even of that group had a clean break.

For those cases in relation to which the data is available, Tables 3a shows the variation between courts in wealth-levels for all cases, and then Table 3b for the cases in which spousal periodical payments were ordered, based on our estimates (where broadly calculable, in the face of many difficulties) of the total values of capital assets, pension funds and combined incomes at stake.<sup>64</sup> There is clearly considerable variation in the wealth-levels dealt with by the four courts.

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<sup>62</sup> In one case, both spouses owed each other a nominal obligation, *inter alia*, until the younger child reached a given age or educational stage (potentially extendable beyond that); the other involved a substantive order against H on a fixed but extendable term (which would end, *inter alia*, when the younger child reached a given age), whilst W had a nominal, non-extendable obligation towards H to last while he was liable to make payments to her.

<sup>63</sup> In the 64<sup>th</sup> case, the wife's economic/occupational status was unknown.

<sup>64</sup> This was a complicated exercise, particularly as regards incomes, owing to concerns about double-counting arising from the way in which spouses are asked to report incomes on court forms: payors of support must declare as part of their income money that has in fact been transferred by them to the other spouse, which recipient spouses are required to *include* in their income figure. There are also several cases where we know or can reasonably conclude that data are missing or incomplete. As a result, table 3a is based on non-pension data for 382 out of 399 cases; pension data for 262 out of the 323 cases in which we identified a relevant (non-state) pension; and income data for 316 out of 399 cases. An unpublished working paper

**Table 3a: combined wealth by category, <sup>65</sup> for all cases, by court<sup>66</sup> for all cases, and for all spousal pp cases in the sample**

		<i>£Non-pension</i>	<i>£Pension</i>	<i>£Income</i>
<b>All courts, all cases</b>	<i>mean</i>	<b>583,035</b>	<b>192,834</b>	<b>55,807</b>
	<i>median</i>	<b>117,080</b>	<b>72,437</b>	<b>37,746</b>
<b>Court A</b>	<i>mean</i>	209,090	185,913	47,715
	<i>median</i>	113,326	59,875	37,080
<b>Court B</b>	<i>mean</i>	112,023	112,737	32,949
	<i>median</i>	63,304	44,500	31,475
<b>Court C</b>	<i>mean</i>	174,019	119,438	37,508
	<i>median</i>	72,166	61,146	33,468
<b>Court D</b>	<i>mean</i>	1,863,976	331,817	119,828
	<i>median</i>	549,443	127,737	87,018
<b>All spousal pp cases<sup>67</sup></b>	<i>mean</i>	721,970	260,113	84,299
	<i>median</i>	293,300	112,502	78,642

describes the methodology and assumptions we used to estimate parties' individual and combined wealth and their positions following the order's execution.

<sup>65</sup> For comparison with general population and regional income and property data, see figures cited by Douglas in this special issue.

<sup>66</sup> The figures for each column for each court are calculated from the following numbers of cases for which the data were judged to be reliably available: Court A – non-pension, 97 out of 100; pension, 66 out of 87 pension cases; income, 87 out of 100; Court B – non-pension, 97/100; pension, 67/79; income, 82/100; Court C – non-pension, 94/99; pension 57/75; income, 83/99; Court D – non-pension, 94/100; pension, 72/82; income, 64/100.

<sup>67</sup> While there are 64 spousal pp cases in the sample, the data in these rows are calculated from the following numbers of cases for which we felt the data could be estimated: 60 out of 64 re non-pension assets, 50/56 pension cases, and 44/64 re income. The mean and median wealth figures for these spousal pps cases are inflated by one very high capital value case (>£10M), without which the means would be c.£560K, £237K, and £82K and medians £281K, £103K, £79K: this has least impact on the income figure, perhaps the most relevant here.

**Table 3b: number of orders for spousal pps made in each court, with mean and median combined incomes for those cases**

	<i>Spousal pps</i>		<i>£Income combined – spousal pp cases<sup>68</sup></i>	<i>£Income combined – all cases</i>
<b>All cases</b>		<i>mean</i>		<b>55,807</b>
		<i>median</i>		<b>37,746</b>
<b>Court A</b>	16	<i>mean</i>	64,189	47,715
		<i>median</i>	56,000	37,080
<b>Court B</b>	3	<i>mean</i>	44,741	32,949
		<i>median</i>	47,928	31,475
<b>Court C</b>	8	<i>mean</i>	55,570	37,508
		<i>median</i>	37,812	33,468
<b>Court D</b>	37	<i>mean</i>	117,090	119,828
		<i>median</i>	97,917	87,018
<b>All spousal pp cases</b>	64	<i>mean</i>	85,063	
		<i>median</i>	77,072	

As Tables 3a and 3b show, cases involving spousal support were on average amongst the higher-income cases, reflecting the higher-level occupations of husband payors. In Court A, the spousal support cases were also wealthier in terms of capital/pension assets, and Court D’s spousal support cases were at or above the median for all cases in those courts on all measures.<sup>69</sup> The difference in wealth-level therefore correlates with the variation in courts’ use of clean breaks: Court D had the lowest percentage of

<sup>68</sup> Figures in this column are based on spousal pp cases in each court for which we had valid income data: 15 out of 16 in Court A, 3 of 3 in Court B, 7 of 8 in Court C, 20 of 37 in Court D. If all spousal pp cases are included (i.e. including cases with incomplete income data), the income figures in spousal pp cases for Courts C and D go down (but are still higher – in D, by reference to the median case – than for all cases in those courts), while those in Court A go up slightly.

<sup>69</sup> While the capital/pension values at stake in spousal pp cases in Courts B and C were on average lower than for all cases in those courts, the number of spousal pp cases in both courts was small, making averages somewhat meaningless; Court C’s spousal pp cases included several nominal orders for periodical payments in low-capital/pension value cases.

clean breaks (at 61 per cent), and so most spousal support orders, and had the wealthiest client base;<sup>70</sup> by contrast, Court B had 97 per cent clean breaks and the least wealthy client base.

These data add to the evidence about apparent geographical variation in financial remedy case outcomes across England & Wales, but suggest that a good part of the difference may be attributable to the resources available in cases before the different courts, given prevalent socio-economic circumstances amongst their client base.<sup>71</sup> This issue arose in the judicial focus groups, where participants in both groups considered that there was a predisposition against clean breaks and towards periodical payments over a longer time-frame in one region. But the judges also felt, as our court file data suggest, that regional variation in income levels and local housing costs necessarily impact on what the judges *can* do, wherever their ideological preferences might lie:

*Judge 7: [T]he idea that there's a north/south divide on this is actually less important than the idea that there's an "amount of money" divide. ... With [Region 3] housing costs that doesn't take you very far. And you're much more likely to allow the maintenance to run on much longer in that sort of case, than whereas if you're presumably in [location 5A], where you're in a different world. And there's a good deal of myth making about, you know, everybody's fact-specific; everybody's looking at the facts that they particularly deal with, and we in [Region 3] ... are dealing with a lot of cases where fact-specific reasons, you need to have... delay a clean break.*

This judge neatly captured the point:

*Judge 2: It's macro issues because the things that divide us, I think, are number one: house prices – those in [Region 3] the options are constrained by the house pricing. If you're in [location 5A] it's a very different situation.*

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<sup>70</sup> It was also the court with the highest proportion of both cases that were contested but settled with a consent order and adjudicated – see discussion in the text to n 55 above of periodical payments being most frequent in the former category of case.

<sup>71</sup> See Law Commission (2014), above n 1, from para 2.45, and see further the authors' unpublished working paper, 'Rules versus discretion in financial remedies on divorce', forthcoming.

*Joint lives or term order?*

If spousal periodical payments are unusual, joint lives orders – the so-called “meal tickets for life” – are rare, and – in all but two cases in this study – spousal periodical payments of any sort were made following marriage that had produced children. We classed an order as “joint lives” where the order would end only on remarriage (or, in some cases, a new cohabiting relationship), death of either party or further order. Where the order included some other terminal event(s) that would (all being well) pre-date either party’s death, we classed the order as subject to a term fixed by the likely first of those events.<sup>72</sup> Where it was possible to calculate when that event would occur, we then estimated the likely duration of the order (in years) by reference to that date: see next sub-heading.

**Table 4: types of spousal periodical payment order, all cases and of those cases where any minor child of the family at date of financial order**

	N (all cases)	% of all cases	N (child cases)	% of child cases
immediate clean break	333	83.5	168	74.6
deferred clean break: s28(1A) <sup>73</sup>	28	7	24	10.6
ongoing provision, extendable fixed term	14	3.5	12	5.3
joint lives	22	5.5	19	8.4
no order, but pps not dismissed	2	0.5	2	0.8
<i>Total</i>	399	100	225	100

As Table 4 shows, spousal support cases were dominated by cases in which there was at least one minor child of the family present at the date of the financial order, And the vast majority of cases with spousal support without a *minor* child nevertheless had children of the family.

<sup>72</sup> Contrast Woodward’s coding, discussed at Woodward with Sefton (2014), n 18 above, at 23.

<sup>73</sup> Order fixing a term for the periodical payments order, beyond which it cannot be extended.

In 19 of the 22 joint lives order cases, there was at least one minor child of family at the date of the financial order – over 8 per cent of all 225 cases involving such children. The remaining three joint lives cases all featured one or more adult children of the family, whose presence in the household during the marriage might at some stage have set back the wife's earning capacity. The husbands all had higher-level occupations.

Of the 14 cases with spousal support orders for a fixed but extendable term, 12 involved minor children of the family, and the other two were long marriages with adult children of the family, higher-level occupation husbands and spouses in their 50s; both wives were working and the orders were for nominal or relatively nominal sums.

Of the cases where periodical payments were made for a fixed, non-extendable period, most involved minor children of the family: 24 cases out of 28. Of the remaining four, two (both pure consent order applications) involved housewives married to higher-level occupation husbands with adult children of the family; one wife was planning to return to work, the other involved parties in their 60s with periodical payments to last (at the latest) until the husband reached 70.

The last two deferred clean break cases were the only spousal periodical payment cases in the whole court file sample that involved no children<sup>74</sup> of any age. The first was a short marriage during which the wife had given up a good job to join the husband and claimed that visa troubles had then impeded her ability to work – the short-term periodical payments ordered by consent after contested proceedings were designed to bridge her into employment. The second was a marriage of over twenty years involving a housewife aged over 60 at divorce, part of whose periodical payments would bridge her to the start of the pension being shared under the consent order for which the parties applied.<sup>75</sup> This bridging function of short-term maintenance was also identified in the focus groups:

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<sup>74</sup> i.e. no children at all or no children whom we could class as children of the family: there were 84 such “no child” cases in the sample; in one of these cases, a child of the family had died (at what age unknown).

<sup>75</sup> The other (less valuable) element of spousal pps, which might in theory continue for another 11 years or so (at most), concerned mortgage payments by the younger H over the home bought for W in which H had a majority interest.

*Judge 7: I've been generally speaking, terminating on the husband's retirement, depending on the wife's retirement in some cases, for a long time. And I would have thought that the number of cases where I make joint lives as opposed to termination on retirement is very small.*

In choosing the form of periodical payment order, our focus group discussions indicate judges are aware that there are both symbolic and practical issues at stake. In considering the version of the case study involving three young children,<sup>76</sup> the focus group judges expressed some difference of opinion on whether any periodical payments should be joint lives or for a fixed (potentially extendable) term. Some practitioners have suggested that term orders for maintenance are 'often made on flimsy evidence' about wives' potential earning capacity, but rarely appealed because of the costs of doing so and the hope (which may prove unfounded) that time will prove the security of a joint lives order to be unnecessary after all.<sup>77</sup> Interestingly, the second judge speaking here considered, perhaps counter-intuitively, that joint lives orders might be preferred on the basis that they are easier to terminate early on a variation application than one made for a prescribed term:

*Judge 11: If ... I wouldn't do a joint lives order even if the children are in the second scenario as young as they are because I think that's giving the wrong message to achieve. We ought to consider a clean break and one way is to actually try and say to her "do something to make yourself self-sufficient" and having a term order saying until perhaps the youngest child is 16, I would end it there and not allow the extension of that.*

*Judge 13: See the problem I've got with that is that 16 starts to presume that that's when it's gonna run until. I take the view that the only difference between a joint lives order and a term order is who's got the burden to apply to seek the variation and I would be saying in a case where the [children are younger], the burden should be on the paying party to come back and say "hang on guys the youngest child is now 8 [...]". If you do a term order until 16, it's harder for him to*

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<sup>76</sup> The ages of the children were reduced from teens to ten years younger in the second version.

<sup>77</sup> Jonathan Tod and Talitha Brookman, "'Murphy's law': are term orders appropriate?" (2015) 45 *Family Law* 69.

*[apply for a variation before that point and] say “hey the youngest child is aged 8, she should now be self-sufficient” and that’s where I worry about the term one ...*

#### *The duration and content of spousal periodical payment orders*

A strong association with the presence of children is evident from analysis of the duration of spousal support orders not expressed to last simply for joint lives etc. 31 of the 42 non-joint lives orders for spousal support were tied to some specified age or educational attainment of the (usually youngest) child. Seventeen of those child-related orders were only nominal (see below) and so designed just to provide a safety net lest something went awry. The minority, not associated with children, were (in so far as this could be discerned) often related to one or other spouse’s retirement (by which point a mortgage might be paid off or a pension become accessible) or completion of another aspect of the deal (e.g. a lump sum payment completing). The mean duration of orders calculated by us on this basis was 8.63, with a median of 9 years, ranging from under one year to an outlier of 26 years (related to a wife’s likely retirement date).

Over a third of the cases (22 out of the 64) were nominal orders – i.e. orders providing for only a token amount to be paid each year:<sup>78</sup> two of the 20 joint life orders, half of the 14 extendable terms, and 15 of the 28 non-extendable terms. Similarly, five of the joint lives orders would become nominal once a point in the youngest child’s life or the husband’s retirement was reached.

The use of nominal orders was discussed in one of the focus groups. Several judges were wary about such orders:

*Judge 10: Try not to. It’s a hold over. It’s a psychological impact on –*

*Judge 9: Never come across one ever. Not unless it’s completely unfair.*

*Judge 12: It’s got to be unusual circumstance that I ... otherwise all you’re doing is finking the question, unless you got a real reason to do it you’re just finking it*

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<sup>78</sup> Our cut off for “nominal” for the purposes of this analysis was £50pa. The significance of making a nominal order – rather than dismissing the claim outright – is that it preserves the court’s jurisdiction to vary the order up to a significant level should the payee’s circumstances deteriorate, e.g. because a child of the family develops special needs that inhibit the payee’s labour market participation.

*quite honestly. You're saying I really want to make a clean break but I haven't got the guts to do it, therefore I'm gonna funk it and put five pence a year in.*

But the interview data, like the court files, yielded examples of their use, particularly as a safety net for primary carers:

*It was just a token amount of spousal support because we wanted to keep the door open just in case there would be a problem with her but she had been in secure employment for 20 years and his argument was that it would remain in place and she also had a very healthy pension, so it essentially was independent.' (S24)*

Judges who had encountered them were aware that requests for nominal orders might well reflect some sort of trade-off in the parties' negotiations for the consent order application:

*Judge 11: I do find that the nominal maintenance, is there [in consent order applications]. ... It's still there, where there are young children. ... And you usually find that both parties have had legal advice and there's been obviously negotiations and there's been trade-offs. So it's - I don't interfere because I can see the capital split is fine and if there is that nominal maintenance I leave it there because there's been some horse-trading that you are not aware of. ... [N]ominal is usually up until the youngest child finishes secondary education. So the nominal PPs are usually for a couple of years or so, not for 10, 15 years. They're usually for a very short period.*

### ***Spousal support – but it's actually (nearly) all about the impact of children***

Drawing all these threads together, to us the most striking finding from the court file data is how the *spousal* support payments were actually (almost) all about *children*:<sup>79</sup>

- as table 4 and related text show, these orders were almost confined to cases involving children of the family, whether dependent or grown-up;

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<sup>79</sup> This is not a new finding: Eekelaar and Maclean made the same finding in their study in the 1980s: n 1.

- they were made mostly in cases involving at least one child of the family still under the age of 18 at the point of financial order – though around three-quarters even of those cases had an immediate clean break (see table 4);
- the duration of those payments would commonly be linked to the youngest child achieving a milestone.
- the seven cases in which spousal support was ordered where the children of the family were all independent involved long (>20year) marriages, during which we may fairly suppose that the wife had been the primary carer; that there are only seven such cases (out of a pool of 90 cases with all-adult children of the family – so less than 10 per cent of those cases) is on its face concerning: at least some of these other women might be struggling economically by contrast with their ex-husbands if their earning capacity had been compromised by their child-care responsibilities during the marriage;<sup>80</sup> and
- there were only two periodical payment orders in no-child cases.

As one would expect, there was also a link with children's living arrangements: at least 41 of the 64 spousal support cases (64 per cent) involved payments to primary carer wives (and 5 further cases where that was probable).<sup>81</sup> We coded five cases as 'shared' care, in two the children were resident with the father (probably so in another case), and two other cases involved split care and some other residence arrangement.

That spousal support is very largely a function of children was also evident in the judicial focus group discussion. This exchange explored the no-child situation:

*Facilitator: Where there are no children in a case, what principles are governing?*

*Judge 10: Equality.*

*Judge 14: Self-sufficiency, transition to self-sufficiency within a reasonable period.*

*Judge 13: I agree....*

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<sup>80</sup> These wives would, of course, no longer receive any of the state support associated with having children in the household. Their position in our sample requires further analysis.

<sup>81</sup> See Appendix for discussion of our coding of children's post-financial order residence in the court file sample, and Table A4 showing the data for the full sample.

*Judge 12: One to two years max if you are going to have PPs*

*Judge 14: A couple of years.*

*Judge 13: A little bit longer*

*Judge 14: Maybe three, especially if there's some re-training ...*

*Judge 10: It may be a little bit more than two years if there's going to be some re-training, some courses etc, but there's got to be some constructive form of training.*

Conversely, whilst the self-sufficiency norm was clearly thought relevant in no-child cases, the judges were alive to the problems that wives still looking after children after divorce might have in being able to become financially independent.<sup>82</sup>

*Judge 11: I'm a working mother and I see that I can do it and yes you do put in place childcare arrangements, you ... if you can afford to. I've been lucky I have been able to, so you can actually do it, but will this lady [in the case study] be able to do it, that's the question. She's not me and I'm not her. Would she be able to do it with three young children, no support from the husband because they're getting divorced and we would have to consider how realistically she will be able to do that and if we do look at her situation and children are aged seven, four and two it's going to be very difficult for us to push her to self-sufficiency.*

They were also conscious that wives' own efforts to improve their economic position through paid employment would, over time, interact with the withdrawal of benefits and tax credits once the children left their household in a way that would leave them no better off overall, and possibly worse off, after the benefits-loss:

*Judge 4: And her income at the moment, she is reliant fairly heavily on what she gets from the child support from him.*

*Judge 7: But she's likely to be able to increase her earnings over time.*

*Judge 4: Yeah.*

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<sup>82</sup> As appellate authority requires them to be: e.g. *C v C* [1997] 2 FLR 26.

*Judge 7: I mean this is... Okay, that may only cancel out the [Judge 1: working tax credit] working tax credit, but she should at least be able to go to the stage where the children are off her hands, she should be working full-time. So there's a crossover there.*

*Judge 5: Yeah, but she's not going to increase her earnings, is she? She's just going to be able to compensate for the loss of benefits that occurs as her children leave home.*

*Judge 1: Yes.*

*Judge 6: If that.*

Linking back to the broader issue of geographical variation, the focus group discussion also touched on how different local living costs and incomes might also affect the respective use of child maintenance and spousal support. In areas where housing and other living costs are lower, child support payments to the primary carer's household might be adequate (along with other sources of income, including benefits and tax credits) to meet that household's needs, so that spousal support is just not required to help make ends meet:

*Judge 7: The thing is this: that child support is going to be enough for most people up to a certain level. And it's only when you get above that level that you really start looking at spousal seriously. I think one of the reasons for regional variation here is exactly that. The myth is that everybody up north terminates spousal support immediately. And if it's true, it's because they get enough from child maintenance not to need spousal support.*

By contrast, in areas of the country where living (especially housing) costs are higher, primary carers of children, past and present, may simply need more support from their former spouse in order to sustain an acceptable standard of living.<sup>83</sup> Of course, in either situation, the putative payor's resources will limit what can be done for the other spouse through these private law remedies.

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<sup>83</sup> It is important here to bear in mind that the concept of 'needs' is subjective, related to the standard of living enjoyed during the marriage.

### **Imagining a different world: are we there yet?**

General population data, some of which we discuss in this section, suggest that a significant number of those who experience divorce are inadequately protected from economic hardship by the current law and policy environment.<sup>84</sup> Our preliminary analysis of the ‘snapshot’ outcomes for spouses in the court file sample in our study also suggests that even some with the benefit of a court order may remain economically disadvantaged, compared to their ex-spouse, despite that order.<sup>85</sup> There are, in particular, cases involving primary carer mothers and wives of now-adult children who were probably their primary carer during the marriage who appear – on the face of the data collected – to have been under-provided for by the order. Some of those cases involved wives who were litigants in person or who had made allegations of domestic abuse, raising concerns about imbalance of power generating inadequate settlements driven by non-legal norms (see Hunter, this volume, on this broader issue).

One could respond to the problem of enduring economic disadvantage for women post-divorce in several ways. As we noted in the introduction, the issue raises fundamental questions about the respective responsibilities of the individuals concerned and wider society (via the state) to provide insurance against the economic impact of divorce. But, as in the late 1970s and 1980s, it is not obvious that the answer lies in either one or other of private or public law, and certainly not in restricting the availability of private law remedies. As Carol Smart wrote in 1982: ‘If the law really is unjust to husbands, and there is no consensus of opinion on this, it hardly seems sensible to provide a remedy that would only make things harder for the majority of wives and mothers’.<sup>86</sup> But equally, she concluded:

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<sup>84</sup> See also Fisher & Low and Eekelaar in this special issue.

<sup>85</sup> Ongoing work on the data from this study: unpublished working paper presented at Anglo-Australian financial remedies seminar, Cambridge Sept 2017 and short papers presented at International Society of Family Law conference, Amsterdam July 2017 and Society of Legal Scholars conference, Dublin Sept 2017. Further work is required on these data, particularly to calculate the parties’ equalised household income given estimated household size, and to extend the analysis to cases with independent children.

<sup>86</sup> ‘Justice and Divorce: The Way Forward?’ (1982) 12 *Family Law* 135, 137.

Nor does it seem sensible to tinker with the detail of private law which can only shift the burden of divorce back and forth between the individual husband and wife. The way forward must be a coherent social policy on the family which avoids the problems associated with turning women and mothers into their husbands' dependants or, where that is unavoidable, provides a reasonable State pension to women who have, through necessity, lost or failed to gain the ability to earn a reasonable standard of living because of their responsibilities to children.<sup>87</sup>

Ruth Deech was right when she wrote in 1982 that 'Maintenance is not a palliative for low pay'. But not all would share her view that paid employment for all is the solution to economic disadvantage on divorce.<sup>88</sup> A focus on paid employment denies individuals (of whatever gender) and couples the right to determine for themselves – as a team – what lifestyle and economic strategy is right for them and their family. As Lady Hale has said:

It is not only in [the applicant wife's] interests but in the community's interests that parents, whether mothers or fathers, and spouses, whether wives or husbands, should have a real choice between concentrating on breadwinning or 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.<sup>89</sup>

But *even if* one held an ideological preference for dual-worker marriage and so wished to restrict private law remedies in order to reflect and encourage it, the critical point for family law reforms such as those advocated by Deech is that England & Wales continues to have a highly gendered workforce and gendered uptake of parental leave.

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<sup>87</sup> Ibid. See also Eekelaar and Maclean, above n 1, 143ff, on the principle of state obligation, but the doubtfulness that such a solution could be found 'in light of experience, and current political and economic trends', with the result that a better-grounded private law remedy is seen as the preferable option.

<sup>88</sup> 'Financial Relief: The Retreat from Precedent and Principle' (1982) 98 *Law Quarterly Review* 621, 641-2.

<sup>89</sup> *SRJ v DWJ (Financial Provision)* [1999] 3 FCR 153, 160, Hale LJ (as she then was).

The table of contents of the most recent official statistics on families and the English labour market tells a consistent story:<sup>90</sup>

- while mothers' employment rates have increased by nearly 12% in the last twenty years, with nearly 74% of mothers in some employment,<sup>91</sup> mothers under the age of 50 are still less likely to be employed than women of that age without dependent children; the opposite is true of men;
- mothers whose youngest child is aged 3-4yrs have the lowest employment rate, and are the most likely to work part-time, while fathers have a very high employment rate, whatever their children's age;<sup>92</sup>
- mothers with children aged 1-12yrs are most likely to be part-time rather than full-time employed;
- the most common organisation of the family economy is that adopted by 1.8 million couple families: father works full-time, mother works part-time;
- the likelihood of both parents working full-time decreases the more children they have; and
- under half of single mothers with children under 2yrs are in paid employment, with most such mothers moving to part-time work when their children are in primary school, and the proportion in full-time work increasing through secondary education.<sup>93</sup>

Importantly, it seems that many mothers *want* this arrangement, at least for the time being:

- over 90% of mothers working part-time do not want to work full-time;

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<sup>90</sup> Office for National Statistics, *Families and the labour market, England: 2017*: [www.ons.gov.uk/releases/familiesandthelabourmarketengland2017](http://www.ons.gov.uk/releases/familiesandthelabourmarketengland2017), from which the following points in the text are taken.

<sup>91</sup> *Ibid*, 4.

<sup>92</sup> *Ibid*, 8.

<sup>93</sup> *Ibid*, 17.

- 65% of mothers seeking work would like to work just part-time; and three-quarters of mothers currently economically “inactive” because they are looking after the family or home are neither seeking work nor want a job;
- but three-quarters of economically inactive and unemployed mothers “definitely or probably” intend to go back to work in future.

Meanwhile, while increasing numbers of fathers say that they want to get more involved with childcare, cultural and psychological obstacles remain a barrier to their adapting their labour market participation in order to share domestic tasks more equitably with their partners.<sup>94</sup> These men are now having to ‘consider the same compromises women have had to for decades’, and facing a ‘fatherhood penalty’.<sup>95</sup>

However, the scale of the continuing ‘motherhood penalty’ (in terms of reduced income, earning capacity and savings/pension accumulation) and its impact on and after divorce remains clear, identified in industry reports<sup>96</sup> and analyses of general population survey data (notably by Fisher and Low, this volume and elsewhere; see Eekelaar’s and Douglas’s overviews of the wider evidence base, also in this volume<sup>97</sup>). And the gender pay gap,<sup>98</sup> although narrowing on average, remains significant at 20 per cent, and widens and persists following the arrival of children. By the time the first child reaches age 20, women’s hourly wages are around a third less than men’s. A significant proportion of that gap (particularly for graduates) is attributable to the greater

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<sup>94</sup> Equality and Human Rights Commission (2009). *Working better: fathers, family and work—contemporary perspectives. Research summary 41.*

[www.equalityhumanrights.com/en/publication-download/research-summary-41-working-better-fathers-family-and-work-contemporary](http://www.equalityhumanrights.com/en/publication-download/research-summary-41-working-better-fathers-family-and-work-contemporary); Mark Rice-Oxley, ‘The masculine mystique’ – why men can’t ditch the baggage of being a bloke’ *The Guardian* 21 November 2017, [www.theguardian.com/money/2017/nov/21/the-masculine-mystique-why-men-cant-ditch-the-baggage-of-being-a-bloke?CMP=Share\\_iOSApp\\_Other](http://www.theguardian.com/money/2017/nov/21/the-masculine-mystique-why-men-cant-ditch-the-baggage-of-being-a-bloke?CMP=Share_iOSApp_Other).

<sup>95</sup> Working Families, *Modern Families Index 2017*, [www.workingfamilies.org.uk/publications/2017-modern-families-index-full-report/](http://www.workingfamilies.org.uk/publications/2017-modern-families-index-full-report/).

<sup>96</sup> E.g. Chartered Insurance Institute, above, n 44.

<sup>97</sup> In relation to ex-wives’ disadvantage in pensions, see Debora Price, ‘Pension Accumulation and Gendered Household Structures: What are the Implications of Changes in Family Formation for Future Financial Inequality’ in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets* (Hart Publishing, 2009).

<sup>98</sup> This is receiving considerable attention in the UK owing to the legal obligation that was imposed on larger employers to declare gender pay gap data by spring 2018: see [www.gov.uk/guidance/gender-pay-gap-reporting-overview](http://www.gov.uk/guidance/gender-pay-gap-reporting-overview).

prevalence of women – as primary child-carers – amongst part-time employees and so their lesser overall labour market experience.<sup>99</sup> It is therefore unsurprising that Fisher and Low should have found that wives who later divorced had during the marriage on average contributed just 36% of the matrimonial household's income,<sup>100</sup> and that both the impact of divorce and their recovery from it is on average considerably worse for wives than husbands.<sup>101</sup> Indeed, on average, the position of husbands (certainly in terms of equivalised household income) improves following divorce.<sup>102</sup>

So even if equal labour market participation by all spouses – either full-time (with affordable, accessible childcare) or part-time (with alternating parental childcare) – were the goal, we certainly are not there yet.

A rounded 'solution' to the problem of economic hardship and inequality on divorce therefore comes in two parts. First, in the form of financial remedies on divorce that fairly share both the fruits and the burdens created by the parties' relationship.<sup>103</sup> This does not require the economically stronger party to be other spouse's insurer against all life's vicissitudes,<sup>104</sup> particularly those arising post-divorce, but does justify both capital and income provision aimed at redressing the economic imbalance between the parties that arises from the impact on them of their respective contributions to the welfare of the family. In appropriate cases, that will involve potentially lifelong provision, or at least spousal support up to the point at which pensions/superannuation take over to provide each party with adequate later-life income. Such an outcome might be particularly apt for older spouses whose children are independent by divorce but where

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<sup>99</sup> Monica Costa Dias, Robert Joyce and Francesca Parodi, *Wage progression and the gender wage gap: the causal impact of hours of work*, (The Institute of Fiscal Studies, 2018), [www.ifs.org.uk/publications/10358](http://www.ifs.org.uk/publications/10358)

<sup>100</sup> Hayley Fisher and Hamish Low, 'Who Wins, Who Loses and Who Recovers from Divorce?', in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets* (Hart Publishing, 2009), table 1.

<sup>101</sup> *Ibid*, 'Recovery from divorce: comparing high and low income couples' (2016) 30 *International Journal of Law, Policy and the Family* 338, and contribution to this volume.

<sup>102</sup> *Ibid* (2016). The analysis in that paper could not take account of capital wealth or pension provision; the former is now covered by Fisher and Low's latest analysis, in this special issue.

<sup>103</sup> For strong articulation of the case for compensatory spousal support, see the decision of the Supreme Court of Canada in *Moge v Moge* [1992] 3 SCR 813; more generally, see the principles expounded by the House of Lords in *Miller, McFarlane* [2006] UKHL 24.

<sup>104</sup> Cf *North v North* [2007] EWCA Civ 760, and issues raised by *Mills v Mills* [2017] EWCA Civ 129, due to be heard on appeal to the Supreme Court in summer 2018.

the spouses during their marriage had elected (or were forced by circumstances to adopt) role specialisation that entailed long-term absence from, or only partial engagement in, the labour market by the primary carer, who now has little or no time to recover her position. However, *alongside* this family law provision (which cannot be a panacea in all cases, given the finite resources available and low numbers accessing family court orders), much more concerted, systematic intervention in other legal and policy fields is needed to help individuals better mitigate against the risk of economic hardship on divorce. For example, through improved workplace/employment rights and gender pay equality, affordable childcare and parental leave entitlements and better enforcement of and cultural support for the exercise of legal entitlements in the workplace. In particular, men, as well as women, must feel able to invoke rights to request flexible working patterns<sup>105</sup> or parental leave,<sup>106</sup> or to shift to part-time employment. Only then will couples be truly free to make their *own* choices about how they run their relationships.

Where couples achieve a more equal division of paid work and unpaid domestic work *during* their relationships,<sup>107</sup> especially once children arrive, they are more likely to be left in equivalent economic positions at divorce. That would, in turn, make more fully shared post-separation parenting more feasible – as a natural (albeit modified) continuation of the style of parenting during the marriage. And that would reduce the case for substantial economic adjustment between the parties, especially by way of spousal support, as each party would – in theory – remain equally free to continue in the paid employment that each had been free to develop during the marriage. However, where – despite a real levelling of employment opportunities – spouses choose (or, for whatever reason, feel that they have to adopt) a specialised allocation of paid and unpaid work, whichever spouse did less paid work may continue to require ongoing support from the other. That remedy – and that relationship choice – should

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<sup>105</sup> See Office for National Statistics (2010), *Social Trends 40*, table 4.11.

<sup>106</sup> The government in Feb 2018 launched a publicity drive to promote shared parental leave, in the face of data suggesting that take-up might be as low as 2%: [www.bbc.co.uk/news/business-43026312](http://www.bbc.co.uk/news/business-43026312).

<sup>107</sup> See ONS (2016), *Women shoulder the responsibility of 'unpaid work'*, [www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/womenshouldertheresponsibilityofunpaidwork/2016-11-10](http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/womenshouldertheresponsibilityofunpaidwork/2016-11-10).

not be removed or restricted by an ideological insistence that all adults be self-supporting through paid work.

We must, at the very least, guard against a reduction in private family law obligations on divorce *before* better workplace and domestic equality have been achieved (putting aside unlikely prospects of improved state support). That would only further impoverish an already vulnerable group, who would then simply rely more on the (increasingly limited) public purse. One member of the judicial focus groups reflected on what they viewed as the problem of women “stuck in the middle” of social and legal change, having made certain choices in their relationship:

*Judge 9: I think one of the problems we've got at the moment is ... women haven't quite caught up with where the law is, if you see what I mean. I think there is this sort of change, you know we get away from this sort of meal ticket for life idea and that women should be self-sufficient in that women now can work and we have equal rights and all the rest of it and yet you know, they're still in that situation where there's a sort of women and their sort of 40s to 60s bracket, which have been brought up, they've given up their jobs, they've never given any thought to their pensions. They're assuming they're going to stay married together despite the current 42% divorce rate and I think they're stuck in the middle. ... [A]s I said I've always worked full time myself and you know I've got my own pension, I'm self-sufficient but I do have sympathy for the women ... it's a joint [emphasis in original, discussing the case study] decision [for her to give up work] and he's supposed to take responsibility ...*

*Judge 8: Joint decision, I agree.*

### **Look to the state? Only with a catch...**

To complete the picture, we need briefly to address the other potential ‘insurer’: the State. The UK State in the age of austerity has revised the terms of its deal. In what may be looked back on as a golden era (starting in the early 2000s), spousal support receipts were excluded from income assessable for means-testing for tax credits – available as in-work benefits boosting the household income of employed

individuals.<sup>108</sup> Child support receipts were also excluded from means-testing for both tax credits and, from 2010, out-of-work benefits. Tax credits thus formed a vital component of many wives' post-divorce household income, supplemented in full by child support receipts and – albeit in fewer cases – spousal support. However, the government is currently replacing all existing benefits and credits with new Universal Credit ('UC'). Whilst child maintenance remains non-assessable for all means-tests, under UC rules any spousal support received will now simply reduce UC receipts from the State £ for £.<sup>109</sup>

Given the limited number of spousal support orders currently made, the number of women affected by this change may be small – but the change will nevertheless have a significant impact on members of that group who have in the last 15 years made ends meet thanks to tax credits. Several practitioners have drawn attention to the rule-change and expressed concern about its impact on post-divorce household incomes of this client-group.<sup>110</sup>

It remains to be seen how the impact of this rule change might be mitigated in practice. For example, parties might agree (as they are, in theory, free to do) larger sums by way of child support than they are required by law to pay, thus maintaining the ex-wife's household income level without increasing the overall burden on ex-husbands.<sup>111</sup> This

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<sup>108</sup> The subject of tax credits is complex. Australian readers wishing to follow up this issue would best begin with the government's online information: [www.gov.uk/browse/benefits/tax-credits](http://www.gov.uk/browse/benefits/tax-credits). The most helpful textbook treatment is published by the Child Poverty Action Group by way of yearly *Handbooks*: see [www.shop.cpag.org.uk/copy-of-welfare-benefits-and-tax-credits-handbook-201718](http://www.shop.cpag.org.uk/copy-of-welfare-benefits-and-tax-credits-handbook-201718)

<sup>109</sup> Changes to the capital rules will further limit entitlements in a way that may affect divorce settlements: UC awards are reduced by savings above £6,000 and eliminated by savings over £16,000. We have been unable to locate any considered discussion of these issues in policy documents or debates. DWP Briefing Note 9, <https://revenuebenefits.org.uk/universal-credit/policy/dwp-briefing-notes/>, deals with the general point without reference to spousal support, given only passing mention by the Minister at Hansard HL Deb vol 730, col 448 (10 October 2011).

<sup>110</sup> E.g. <https://flip.co.uk/giving-universal-credit-where-its-due-in-divorce/>.

<sup>111</sup> Cf survey data indicating public support for much more generously calculated child support awards than the current UK formula produces: Ira Ellman, Steve McKay, Joanna Miles and Caroline Bryson, 'Child Support Judgments: Comparing Public Policy To The Public's Policy' (2012) 28 *International Journal of Law, Policy and the Family* 274 and briefing paper: [www.nuffieldfoundation.org/public-views-child-support](http://www.nuffieldfoundation.org/public-views-child-support).

'solution' was mooted in one of the judicial focus groups as a way of alleviating potential income hardship:

*Judge 2: I remember a time when you just got in a poverty trap and a very real difficulty of achieving solutions; and then tax credits came along and they really have oiled the wheel and made real solutions. Now I'm not sure about the changes and how they're going to evolve, but I'm wondering whether that's going to actually change in the other direction.*

*Judge 7: Universal credit and the disregard of spousal payments is going to make a difference.*

*Judge 2: So we're going to be back to a time when we may be considering concepts of poverty trap, and trying to stretch it further than we can.*

*Judge 7: Well, we'll try and load as much as we can on child maintenance.*

*Judge 2: Yep.*

*Judge 7: Within the limits of what you can get away with. But yes, it will make a difference, and I don't see what we can do about it, but we'll have to face it when we can.*

However, such mitigation can only be engineered by the judges where they have jurisdiction to make orders for child maintenance (generally, only by consent<sup>112</sup>) and in any event will not survive the children's independence, at which point child-based remedies – and child-related state support – expire. This may exacerbate the risk of later life poverty for former wives, particularly those who have failed to secure an adequate retirement income through pension sharing or properly valued offsetting.<sup>113</sup>

## **Concluding thoughts**

Our primary purpose in writing this piece has been to reassert the importance of evidence-based policy- and law-making. Rhetoric ornamented with the anecdote of eye-catching media stories is no substitute for careful attention to the best available,

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<sup>112</sup> See Child Support Act 1991, s 8.

<sup>113</sup> As noted above, the data suggest that this is too rarely achieved: see above n 18.

systematically collected research data that seeks to identify and understand the lived realities of 'everyday' couples who have experienced divorce.

There are always limitations to what any one data source can tell us. Evidence collected from courts and family justice professionals necessarily gives only part of the picture – a snapshot of the position as those couples left court with their orders or left the solicitor's or mediator's office for the last time; it cannot inform on longer-term outcomes. And even that snapshot may be fuzzy: one of our principal reflections on the court file data (particularly those collected from the form on which a judge invited to approve a consent order must rely) was that the data frequently seemed to be ambiguous and to some extent incomplete. If that was problematic for us as researchers, it must have made the judges' responsibility to determine whether the proposal outcome is fair more challenging. Moreover, as we have noted, court data deal only with that minority of couples who obtain court orders. The fact that two-thirds of divorcing couples obtain no financial order means that the insurance offered by private family law may not currently be reaching its full potential market. We know little directly about what is happening to that group, save that longitudinal general population data indicate that the long-term economic situation of many individuals in those cases – specifically many women – is not good.

For all those difficulties, the data in this study indicate that the 'meal ticket for life' award is rare. Even where such an order is made, it will generally terminate on repartnering (always so on remarriage, commonly so on significant cohabitation), which the general population data show to be the far more significant route to economic recovery for wives post-divorce. That is not to say that spousal periodical payments generally, joint lives orders in particular, have no place as a mechanism for sharing the economic disadvantage arising from marriage and exposed on divorce. They appear to be especially significant for parties in areas with high housing costs. The fact that most spousal support orders are made by consent (albeit commonly after contested proceedings have been initiated) suggests that the couples involved are to some extent content with that solution. The option of spousal periodical payments may also provide an important bargaining tool to help secure fairer clean break capital settlements.

Importantly, and echoing findings made over thirty years ago by Eekelaar and Maclean,<sup>114</sup> our findings suggest a close link between spousal periodical payments orders and the presence of minor children of the family – but these orders were made in only a minority even of those cases in our sample. It seems to us that the greater problem is not over-generosity to ex-wives, but the enduring, disproportionate economic impact of divorce (predominantly) on women. To provide remedies on divorce that respond to that disadvantage seems to us not to be ‘undignified’. Rather, it positively acknowledges the reality of the economic sacrifices incurred by these women for the sake of raising children. As the Court of Appeal recently acknowledged, in response to counsel’s concerns about the potential impact of media campaigning against ‘meal ticket for life’ divorces: ‘long-term maintenance can be required as part of a fair outcome and ... I understand why [counsel] suggests that the expression “meal ticket for life” can be used as an unfair trope’.<sup>115</sup> Making such orders protects women’s dignity by seeking more fairly to distribute between the parties the full economic impacts, positive and negative, of their marital partnership.

Rather than solving problems that do not exist – or that will persist whatever the substantive law may provide<sup>116</sup> – reformers should direct their energies towards solving economic disadvantage for many women on divorce, using all tools available – and that includes ensuring access to justice under private family law.

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<sup>114</sup> Above n 1.

<sup>115</sup> *Waggott v Waggott* [2018] EWCA Civ 727, at [156], per Moylan LJ.

<sup>116</sup> Above n 20

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## APPENDIX

**Table A1: Frequencies of types of final order for benefit of spouse**

<i>Type of order (for benefit of spouse, only)</i>	<i>Number</i>	<i>% of total sample with order (N=399)</i>
Dismiss all claims	65	16.5
Spousal periodical payments	64	16
Lump sum	167	42
<i>FMH orders</i>		
Outright transfer	129	32
Sale <sup>117</sup>	86	22
Meshor	6	1.5
Martin	3	<1
Transfer with charge back	7	1.8
Tenancy transfer	2	<1
<i>Other key types of order</i>		
Order re other property	86	22
Pension sharing	72	18
Pension attachment	1	<1

<sup>117</sup> Plus associated lump sum orders distributing net proceeds of sale – those orders are not included in the count for lump sum orders above in the table. There was also a case, not counted here, where the adult children of the family were in occupation of the FMH, and the court made a contingent order for sale triggerable if either party gave notice, in which case house to be sold and proceeds equally shared; and 17 other cases with a contingent order for sale triggered if some other part of the deal failed, in some cases with all net proceeds going to the spouse to whom the property had (in the first instance) been transferred.

**Table A2: All destinations of the FMH, whether by order or not**

<i>All destinations of FMH</i>	<i>Number</i>	<i>% of total sample (N=399)</i>
Outright transfer	162	41
Sale	126	32
Retained by owner	41	10
Transfer with charge back	8	2
<i>Meshor</i>	6	1.5
Owned by third party	6	1.5
<i>Martin</i>	3	<1
Intervening bankruptcy	1	<1
Tenancy retained by one	20	5
Tenancy surrendered <sup>118</sup>	15	3.8
Tenancy transfer	2	<1
Unclear / no info	8	2

### **Occupation status classification, compared with general population**

Analysing occupation data as reported on divorce petitions is difficult owing to the limited description generally provided, which hampers proper use of the official occupation classification system.<sup>119</sup> We can produce only a rough approximation of the most simplified NS-SEC classification tool, in which professional and managerial

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<sup>118</sup> This includes 11 cases where we infer that was the outcome, given the information on file about the home's tenure or from which tenure could be inferred (e.g. both spouses now renting in new property with zero capital and no borrowing declared).

<sup>119</sup> See ONS (2010), *Standard Occupational Classification 2010, Volume 3: The National Statistics Socio-economic Classification (Rebased on the SOC 2010) User Manual* (Palgrave Macmillan) and associated materials available at [www.ons.gov.uk/ons/guide-method/classifications/current-standard-classifications/soc2010/index.html](http://www.ons.gov.uk/ons/guide-method/classifications/current-standard-classifications/soc2010/index.html)

(higher and lower) occupations are combined in one “higher” class [1], followed by an “intermediate” class [2] (consisting of intermediate occupations, small employers and own account workers) and a “routine/manual” class for the rest [3]. Judgement calls had to be made about whether some individuals could be safely classified at all on the basis of the information provided, sometimes looking beyond the occupation description itself to information elsewhere on file (e.g. reported income level). Wherever it appeared that the relevant classification would be the same whatever the precise occupation, we coded the case. In a few further cases, the relevant box on the petition had been left blank or said “unknown”.

There is one further important respect in which our coding necessarily differs from the NS-SEC scheme. Where individuals were described on the petition as unemployed, retired or homemakers, the NS-SEC would classify by reference to the last main occupation, save for the long-term unemployed or “never worked”. But we rarely had any indication of what the last employment of such individuals was or for how long they had been out of the workforce. So we classed all such cases<sup>120</sup> as “unemployed”, “retired”, “homemakers” and “students”, the last three collectively producing an “economically inactive” group, to be contrasted with the “economically active”, whether or not presently employed. Our “economically inactive” category does not correspond with the NS-SEC “never worked, unemployed and nec” category.

Given the rough and ready nature of our coding and its only loose approximation to the NS-SEC, like Woodward we express caution about reliance on the data we report here. But they give a rough impression of the spread of occupations in the sample, permitting *broad* comparison with the general, still-married and divorced populations. The population data we use for comparison is taken from a recent sweep of the Labour Force Survey, not the same time period as our divorce files.<sup>121</sup> Since around 30 per cent of the petitions in the court file sample have a date more than three years earlier

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<sup>120</sup> Cf Woodward, above n 18, who used the NS-SEC classification where the data was available: see p 197. Our ‘unclassifiable’ class is importantly different from hers, which includes all those not classified under NS-SEC-approximated classes, including homemakers etc, whereas our class only covers those whose occupation or other economic (in)activity could not be identified

<sup>121</sup> Thanks to Professor Steve McKay for generating the data from the Labour Force Survey (Jan-Mar 2015) reported in Table A3.

than the point of data collection, some considerably more than three years earlier, it would not be possible to provide a convenient contemporaneous comparator.

The first three columns of Table A3 below report the LFS data, the last columns the data for those spouses in the court file survey for whom occupation data was available, coded as described above, i.e.:

- excluding the unclassifiable cases, and
- counting only *currently working* individuals whose occupations could be classified, of the retired, unemployed etc, who are counted in the first three rows of LFS data.

**Table A3: Socio-economic classification of spouses in court file sample compared with general population data (England and Wales, LFS 2015)**

**a: men/husbands**

<b>Simplified Code</b>	<b>Married, living with spouse</b>	<b>Divorced</b>	<b>General population - male</b>	<b>Husbands in court file sample (N)</b>
1: higher	39.4%	29.4%	32.5%	46% (160)
2: intermediate	19.1%	19.8%	17%	14.4% (50)
3: routine/manual	21.8%	26.8%	23.6%	23.3% (81)
Never worked etc	19.2%	22.7%	25.2%	No equivalent data

**b: women/wives**

<b>Simplified Code</b>	<b>Married, living with spouse</b>	<b>Divorced</b>	<b>General population - female</b>	<b>Wives in court file sample (N)</b>
1: higher	31.3%	28.9%	26.7%	30.3% (114)
2: intermediate	21%	20.9%	18.3%	22.1% (83)
3: routine/manual	18.8%	24.9%	20.5%	18.4% (69)
Never worked etc	29%	25.3%	34.5%	No equivalent data

For more detailed general divorced population data regarding occupational status and pay, see Fisher and Low (2016), table 1.<sup>122</sup>

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<sup>122</sup> (2016), above n 38.

## Children’s post-divorce living arrangements

We collated the data regarding children’s residence from various sources on file, including Forms E and D81 (supporting information forms for financial applications), very occasional evidence of Children Act 1989 orders, and the content of the financial orders/recitals etc, in order to make our best judgement about the children’s living arrangements.<sup>123</sup> We were usually able to code cases definitively, but there are a few cases where our categorisation is based only on what we felt we could say was ‘probably’ the situation, with just a couple of cases we were simply unable to code. The results are recorded in Table A4 below.

**Table A4: children’s living arrangements at date of financial order**

<i>Child’s residence</i>	<b>N</b>	<b>%</b>
With wife	167	67
Probably with wife	20	8
- <i>all wife cases</i>	- 188	- 75
With husband	18	7
Probably with husband	2	1
- <i>all husband cases</i>	- 20	- 8
“Shared”	28	11
Split between parents	8	3
Other <sup>124</sup>	4	1
Unclear or unknown	3	1

We had no specific protocol for classifying cases as ‘shared’ care, e.g. on the basis of the number of nights staying contact – while we had that information on some Forms D8A, that data would not be reliable for the position at the end of the case.<sup>125</sup> This

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<sup>123</sup> In some cases, this involved adjudicating ourselves on the child’s probable location where the spouses’ accounts were conflicting to some extent: e.g. two cases where W simply said children were with her: in one case, H gave both addresses for the children, but also said children were ‘mostly with W’; in the other, H also gave both addresses but only in his case ‘during school holidays’.

<sup>124</sup> E.g. with their other parent (who was not the other spouse) or a relative.

<sup>125</sup> Cf the detailed data systematically available to researchers investigating child arrangement order under the Children Act 1989: e.g. Annika Newnham and Maebh Harding ‘Sharing as

coding therefore needs to be handled with care. It certainly does not necessarily indicate 50/50 sharing of the child's time. It includes cases where the parties' responses on D81 indicated, one way or another,<sup>126</sup> that the children would be living with both spouses, though in some of those cases evidence on file indicated that the majority of time would in fact be with one spouse, with more or less extensive staying contact with the other. So there are doubtless cases coded as the children residing with one spouse only where there was in fact as much staying contact with the other parent as that enjoyed in some of the 'shared' cases.<sup>127</sup> It seems likely that at least some instances (including some court orders and cases settled using collaborative law), the designation of 'shared' residence had been deliberately deployed to avoid any implication of one parent's role being inferior. In 'split' cases, the various children of the family were living with different parents.<sup>128</sup> We coded the residence of children of the family aged over 18 who were recorded as living with one or other parent, but excluded all cases where (i) all of the children were clearly independent or their residence was otherwise not recorded (though some of those might still have been living at home: 69 – 17% of the total cases involving children of any age)<sup>129</sup> and (ii) all cases where the children identified in the case were not of the family (8 cases). This yielded data for 250 cases with dependent or otherwise live-at-home children of the family.

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caring? Contact and residence disputes between parents' (2016) 28 *Child and Family Law Quarterly* 175. Form D8A is no longer required in all divorces.

<sup>126</sup> E.g. both spouse's addresses given for child; clear that shared residence order made.

<sup>127</sup> Conversely, in one case there was a shared residence order, but both parties completed D81 to indicate residence with the wife, so we coded on that basis.

<sup>128</sup> This coding does not cover instances where one or more children were with a third party whilst others lived with one spouse; nor does it cover instances where one or more children were living independently whilst others remained living with one or both spouses – they are coded on the basis of the latter children's arrangements.

<sup>129</sup> This includes four cases where it was unclear whether the children referred to in the case were children of the family. In some of the 69 cases, there was evidence of children at university, who might have returned home to one or other spouse during vacations, but for whom we had no direct evidence of that practice. The few cases where there was express evidence that this occurred were coded accordingly as being resident with that spouse rather than as 'independent'.