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Fair Shares: providing evidence to counter the financial remedy myths

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Introduction

While practitioners up and down the country will be familiar with a range of family law misconceptions regularly trotted out by clients such as the common law marriage myth and that an ex-spouse's adultery should limit the assets they get on divorce, a number of the more prevalent financial remedy myths have been more difficult to dispel without clear evidence. The recently published Fair Shares research study¹ provides the first fully representative picture in England and Wales of the financial and property arrangements that people make when they divorce. Our survey data, based on responses from 2,415 participants who had divorced within the past five years, together with data from interviews with 53 divorcees, sheds light on the full range of divorces, providing data to fill a major gap in the knowledge and understanding of what the full range of divorcees do and how they do it. As a consequence, our findings provide an opportunity to dispel some of these more long-standing financial remedy misconceptions that have permeated the media and general discourse surrounding divorce.

Myth 1: The reported case law provides an accurate reflection of financial remedies on divorce in England and Wales

As practitioners are aware, reported case law provides only a partial picture of the divorcing population. Each year in England and Wales, around 100,000 couples get divorced, but of these only around one-third leave the marriage with a court order in relation to finances, with the vast majority of these being made by consent.² However, up until the Fair Shares research, very little was known about the two thirds of couples who do not go to court.

The bulk of the reported case law relating to financial remedies concerns larger money exceptional cases. These cases have little resonance with the mass of divorcing couples who lack substantial wealth. The Fair Shares study found that most divorcees had relatively modest amounts of wealth to divide at the end of their marriage. The median value of divorcees' total asset pool including home and pension was £135,000. Nearly one in five (17 per cent) had no assets to divide, 12 per cent had only debts and 63 per cent had total assets worth under £500,000. A complete contrast to the high net worth individuals which consistently appear in the reported caselaw.

Furthermore, most divorcees had not enjoyed significant wealth during their marriage. Two in five (43 per cent) reported that their net household income was under £2,000 a month when they separated, and only eight per cent had a disposable monthly income of £5,000 or

¹ E Hitchings, C Bryson, G Douglas, S Purdon and J Birchall, *Fair Shares? Sorting out Money and Property on Divorce* (Bristol University, 2023). Available at: <https://www.bristol.ac.uk/law/fair-shares-project/>

² Family Court Statistics Quarterly (Family Court Tables): July to September 2023, Table 13.

more. Furthermore, nearly a third of divorcees (31 per cent) said that they had no savings or assets (other than a pension or matrimonial home) at the point of divorce.

So, the picture of couples' financial position at the point of divorce was quite contrary to the impression given by the reported case law and the media's reporting of divorces. Most divorcees did not enjoy lives of luxury during their marriage and had relatively modest amounts of wealth to divide at the end.

Myth 2: 'Spouses are ... often forced to fund costly legal battles'³

Contrary to popular misconception, or at least, the picture presented by the mass media, resolving financial arrangements on divorce need not, and does not always entail making use of the legal system, or even any legal advice or support. A third (36 per cent) of survey participants told us that they did not have, and did not intend to make, any financial arrangement at all. This did not mean that they had not divided their assets in some way, but rather that they had not felt that they had entered into a formal arrangement.

Furthermore, only around a third (32 per cent) of divorcees made use of lawyers in relation to their financial arrangements. As to be expected, use of legal services was associated with having higher levels of assets; owning rather than renting the matrimonial home; and having a pension. The old days of a reasonably high likelihood of both spouses being represented by a lawyer are, of course, long gone in the wake of the withdrawal of legal aid under LASPO. Our survey found that two in five (41 per cent) divorces involved one or both parties engaging a lawyer in relation to their financial arrangements, but fewer than one in five (18 per cent) involved both parties being represented. Once again, the likelihood of both parties using legal services was associated with the level of assets. Therefore, the spectre of a 'legal battle' between parties and their respective solicitors was not borne out by the research evidence.

This raises a further point, concerning the costs of getting divorced. Six in ten (62 per cent) divorcees incurred legal or mediation costs trying to sort out their finances when they divorced, with our interview data suggesting that this included a range of costs associated with the financial arrangements such as conveyancing fees for selling the matrimonial home or transferring title to one spouse. For many of those incurring costs, the amounts they had to spend were relatively modest. While most discussion of costs concerned those charged by professionals such as solicitors and mediators, some interviewees commented unfavourably on the cost of getting 'the piece of paper' ending their marriage, i.e. the court fee. As one wife said:

'But really, £550 just to stamp a bit of paper? And you know, for some people £550 is a serious amount. A serious amount of money to set them free from that marriage and whatever else.' (Wife 28)⁴

³ <https://www.dailymail.co.uk/news/article-11879683/Government-overhaul-50-year-old-divorce-laws.html>

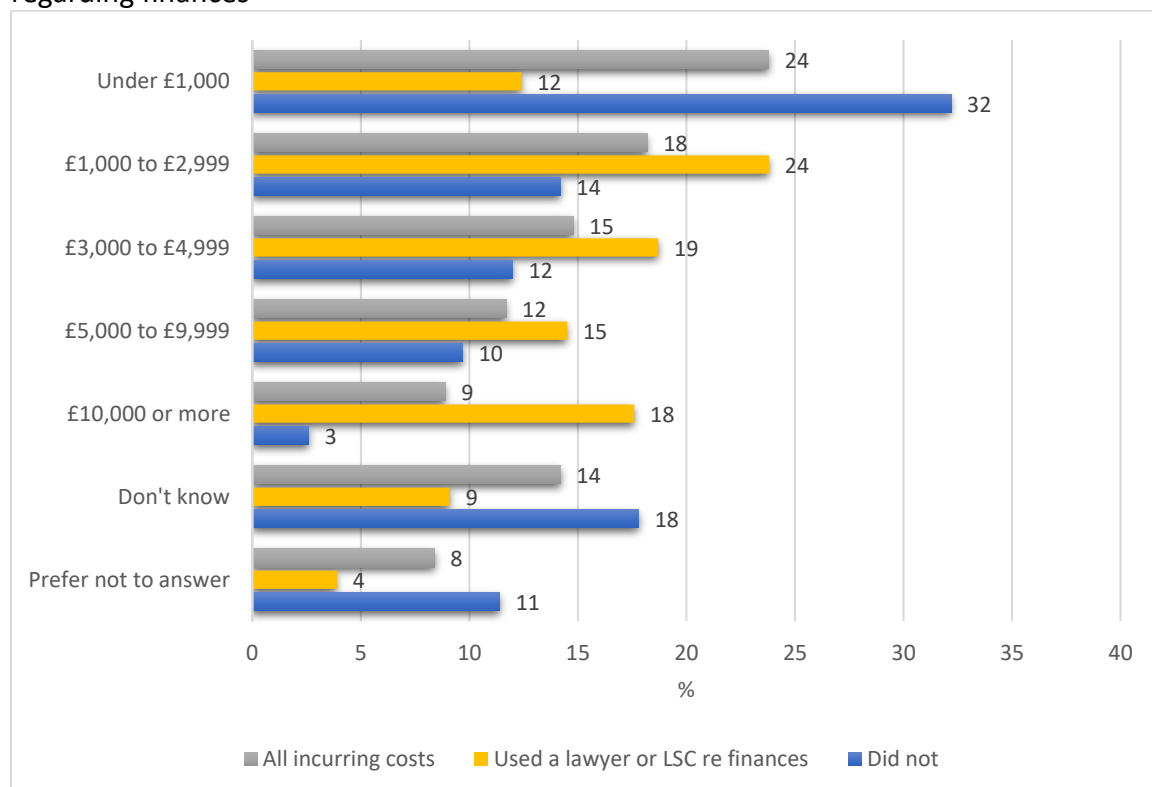
⁴ The court fee has increased since this wife obtained her divorce and is currently £593.

The court fee itself is not an insignificant sum to raise, and for a person who has strong and pressing reasons to end their marriage, such as an abusive spouse, it seems like adding insult to – literal – injury to make them pay substantially for the privilege.

Given the low overall asset levels of households outlined above, it should be noted that funding even small amounts of legal costs may be difficult for many households. Nonetheless, for many of those incurring costs, the amounts they had to spend were relatively modest. A quarter (24 per cent) had to find less than £1,000, with a further one in six (18 per cent) having costs of between £1,000 and £2,999. At the other end of the spectrum, one in eleven (nine per cent) incurred costs of £10,000 or more (Figure 1, below).

Although higher costs were, as one would expect, correlated with the use of legal support, a good proportion of those using legal support still had relatively modest costs. By way of illustration, Figure 1 shows how the costs compared for those who did or did not use a lawyer or Legal Services Company (LSC) during the process of sorting out their finances. Just over a third (36 per cent) of those using a lawyer incurred costs of under £3,000. However, at the other end of the scale, just under a third (32 per cent) of those using a lawyer incurred costs of £5,000 or more, double the percentage (12 per cent) of those who did not use legal support.⁵

Figure 1: Legal and mediation costs incurred in relation to finances, by use of legal support regarding finances



Base: all divorcees incurring legal and mediation costs (1,656); all those incurring costs who used a lawyer or LSC for finances (802); all those incurring costs who did not use a lawyer or LSC for finances (854)

⁵ Differences in figure and text due to rounding to the nearest whole percentage point.

When we look at the costs incurred by divorcees with different levels of asset value, as one would expect, those with more to gain in reaching a good arrangement were more likely to have spent more trying to obtain it. For instance, one in five divorcees with assets between £500,000 and £999,999 (20 per cent) or over £1 million (18 per cent) spent over £10,000 in costs compared to two per cent of those with nothing or only debts to divide and five per cent of those with assets worth under £100,000.

It is not surprising to find that those who had reached an arrangement had spent more in the process, on average, than those who said they had gone their separate ways or had little to divide. For instance, two in five divorcees who said they had no money or assets to divide (41 per cent) or that they went their separate ways (39 per cent) spent under £1,000, and rarely spent over £5,000 (two per cent of those with nothing to divide and five per cent of those going their separate ways). Conversely, 17 per cent of those who had reached a full financial settlement had spent £10,000 or more in the process of doing so.

Yet nonetheless, cost was a major factor in deterring participants from using lawyers either at all or for aspects of the divorce, with 42 per cent not using them at all and 48 per cent for only part of the process. By contrast, the fear that doing without legal support would put a party in a weak position vis á vis their ex was a strong driver to make use of it. A concern that a spouse would not feel comfortable negotiating, or able to discuss matters with their ex, by themselves, was an important reason for making use of a lawyer, and this was expressed significantly more often by women than men.

It seems therefore that, for many couples, the cost of sorting out their financial arrangements is relatively modest, and while of course, very substantial sums can be spent on pursuing legal proceedings through expensive lawyers, lawyers' costs are *not* inevitably high, although the fear of incurring legal costs acts as a significant deterrent from using lawyers.

Myth 3: Everything is split 50/50

As practitioners are aware, the Matrimonial Causes Act 1973 does not lay down a principle of equal sharing of the marital assets on divorce, although it has been accepted by the courts that if this can be done *while meeting both parties' needs* (and those of their children), it is a desirable goal.⁶ Previous research suggests that, rather than rigidly applying a 50/50 split, couples focus on their needs first and particularly those of their children.⁷ This can result in an *unequal* split of the value of the main asset most couples have – the former marital home.

Our findings support previous research. Only 28 per cent of divorcees reported receiving around half (between 40 and 59 per cent) of the total asset pool. The majority shared out

⁶ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

⁷ Hitchings and Miles, *Financial Remedies on Divorce: The Need for Evidence-Based Reform* (2018). Available at:

<https://www.nuffieldfoundation.org/sites/default/files/files/briefing%20paper%20Jun%202018%20FINAL.pdf>

their assets unequally, reflecting need, individual circumstances and differing motivations amongst divorcees, such as wanting a 'clean break'. There was no significant difference between men and women in the *value* of the shares received, but difference in their underlying financial security lay in the *nature* of the assets they were receiving. Focusing on the two main assets only – the home and any pensions that each spouse had – it was generally the case that women received more by way of the value of the home, and men by way of the combined pension wealth.

What did differ between genders, were the factors tending towards them receiving the larger share in any unequal division. For men, being less entangled in the marriage, such as having no children, or being younger, married for a shorter time, and having fewer assets, pointed towards doing better than their ex-spouse. For women, the reverse pattern was exhibited, though more weakly.⁸ However, having a larger pension at the point of divorce was associated with receiving a larger share of the combined asset pool for both women and men, underlining the potential of pensions to make a significant difference to an individual's financial position post-divorce.

Since most divorcees came out of the marriage in a worse financial position than they enjoyed during it, a key question that arises is how far did they manage to make up this loss in the years after the divorce? As the participants in our study had divorced up to five years before taking part, we were able to capture data on how they had got on since their divorce and is considered in response to the next myth – that wives come out better on divorce than men.

Myth 4: Wives come out better on divorce

It has been suggested that 'London is the divorce capital of the world' for wealthy ex-wives as they are treated more 'generously' here than in other jurisdictions. But even at the lower asset level, the myth persists that wives emerge out of divorce in a more favourable economic position.

However, despite the legal position which recognises the non-financial contributions of spouses through home-making and caring, we found that at the time of the survey, women, and in particular mothers with dependent children, were, on average, worse off financially than men, the exception being younger women under 50 who had not had children with their ex-spouse. Not only were mothers more likely than fathers to be working part-time rather than full-time, but more mothers than fathers with dependent children were in receipt of Universal Credit and Child Tax Credit. In addition, for divorcees aged over 50, and without children, women's incomes were significantly lower than men's. Women in this group were also more likely to be claiming both means tested and disability benefits. Given the older demographic of this group, with around only half in paid work, the incomes of both women and men were understandably lower than those of other divorcees due to the proportion in retirement, but it is noticeable how women's income levels were particularly low. This can be contrasted with women and men under 50 without children, who, on the

⁸ For example, women with dependent children were somewhat more likely than those without to receive more than 50 per cent of the assets, but the differences did not reach statistical significance.

same objective measures such as whether they were in paid work, the level of household income and benefit receipt, had similar living standards to each other at the time of the survey.

We know from large scale studies that re-partnering is a way of restoring one's financial position after divorce and can be particularly important for women.⁹ But the greater benefit that men acquire from re-partnering was also apparent: men enjoyed a gender premium in re-partnering, being more likely to move into or remain in the higher income bands than women.

The overall inferior position of women emerging from the everyday divorce is hardly a new finding. What our study has done is to provide further depth and detail to what was already known. We have shown that the arrangements couples make may look roughly 'fair' and 'equal' to many of them, in terms of how assets are allocated in percentage terms or according to ideas of ownership, but the reality is that, by husbands keeping their (greater) pension wealth, they emerge in a stronger position than women. Women are waiving their future financial security in return for current housing stability, particularly if they are still caring for children. That leaves wives, other than those who are younger and do not have children, in an inferior position from which to start their journey to financial independence, and this legacy can be long-lasting.

Myth 5: Husbands are a 'meal ticket for life' for the wife on divorce

A strong objection to the current law is that it allows for an ex-wife to be supported for the rest of her life by her former husband (or vice versa). This, it is said, casts ex-wives as dependants who cannot look after themselves, and prevents husbands from 'moving on' after their divorce. The claim that the current law provides ex-wives with a 'meal-ticket for life' in the form of ongoing spousal periodical payments has been used as a rationale to suggest reforms to the law which would limit the period over which spousal maintenance could be paid.

However, our findings show that only a relatively small minority of divorcees (22 per cent) had a spousal maintenance arrangement at the point of divorce, and when it was paid, it was usually only for a specified period of time. In a quarter of cases, this was until a child reached a certain age or until the receiving spouse earned more money. It was also associated with a degree of vulnerability on the part of the receiving spouse; for example, where spousal maintenance was paid, it was more likely to be paid to the woman, and the arrangement was often connected with having (or having had) children and having an illness or disability. Therefore, it was associated with the recipient having a particular need that could not readily be overcome by the recipient themselves. Being older was not, perhaps surprisingly, a factor making the receipt of spousal maintenance more likely. Furthermore, many couples favoured a clean financial break. Around 40 per cent of both men and women considered having no ongoing financial ties their top objective.

⁹ See Fisher and Low, 'Divorce early or divorce late? The long-term financial consequences' (2018) 32 AJFL 6.

Therefore, in any review of the law, it is important to recognise how spousal periodical payments are being used by the majority - which is not as a 'meal ticket for life' - but instead, as a vital part of the recipient's income usually in the aftermath of divorce as they adjust to 'independence'.

Concluding thoughts

The legislation governing how couples should sort out their financial affairs on marriage breakdown mainly dates back to the 1970s (the Matrimonial Causes Act 1973) and there have been increasing calls for the law to be reformed.¹⁰

We suggest that reform in some form is needed, particularly to address the potential importance of pension wealth as part of the divorcees' entire asset pool and how it could be made easier for pensions to be fully factored into the financial arrangements that couples make. But we also suggest that relying on the kinds of divorce cases reported in the popular press and used by several of those calling for change is misconceived. These cases overwhelmingly involve the very rich and are far removed from the reality of divorce for most couples. This misleading picture along with the correction of ongoing financial remedy myths, needs to be addressed if any reform is to speak to the needs of the majority.

¹⁰ See <https://hansard.parliament.uk/lords/2023-03-08/debates/3AB3D708-24E5-4FF2-8481-05EFA27E2593/DivorceFinancialProvision>