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ARTICLE

# Neoliberalism, family law, and the devaluation of care

ANNA HEENAN

School of Law and Politics, Cardiff University, Law Building, Museum Avenue, Cardiff, CF10 3AX, Wales

**Corresponding author**

Anna Heenan, School of Law and Politics, Cardiff University, Law Building, Museum Avenue, Cardiff, CF10 3AX, Wales  
Email: [HeenanA@cardiff.ac.uk](mailto:HeenanA@cardiff.ac.uk)

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## Abstract

There is a conflict at the heart of family law between neoliberal ideas of autonomy, which increasingly influence law and policy, and the lived realities of family law's subjects. Neoliberal norms, which assume individual responsibility, financial independence, and freedom of choice, do not reflect the nature of decision making in intact families or the consequences of those decisions on separation; separation raises multiple intersecting legal issues, including financial and child arrangements, providing an important lens for family law more widely. Drawing on the findings of original empirical research with separated parents, this article explores three key assumptions of individuals in the neoliberal paradigm: that they have equal bargaining power, behave economically rationally, and have freedom of choice. Not only do all three assumptions fail to capture the realities of separating parents' lives, but they actively cause harm in the family law context by devaluing care.

## 1 | INTRODUCTION

There is a conflict at the heart of family law between increasingly influential neoliberal ideas of autonomy<sup>1</sup> and lived realities. The ways in which neoliberalism has shaped family law and its

<sup>1</sup> A. Barlow et al., *Mapping Paths to Family Justice* (2017); A. Diduck, 'Autonomy and Family Justice' (2016) 28 *Child and Family Law Q.* 133; F. Kaganas, 'Justifying the LASPO Act: Authenticity, Necessity, Suitability, Responsibility and Autonomy' (2017) 39 *J. of Social Welfare and Family Law* 168; J. Mant, 'Neoliberalism, Family Law and the Cost of Access to Justice' (2017) 39 *J. of Social Welfare and Family Law* 246.

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conception of the legal subject is explored in the next section. For present purposes, it suffices to note that neoliberal-influenced policies seek to organize political, economic, and social life by reference to market principles<sup>2</sup> and that policies influenced by neoliberalism view citizens through a lens of individual responsibility and autonomy.<sup>3</sup>

Despite their increasing influence, neoliberal norms have been criticized for failing to capture the realities of family life. Intact families are encouraged to be ‘both self-governing and self-sufficient, rather than relying on state support’, and policies are cast in formally equal (and gender-neutral) terms.<sup>4</sup> This interdependence encouraged in intact families conflicts with approaches on separation,<sup>5</sup> when partners are encouraged to become financially independent of one another. Former cohabitants cannot claim maintenance for their own benefit, and while former spouses can, such claims are rare in practice.<sup>6</sup>

Neoliberal norms also ignore ‘the inevitable inequalities and hierarchies of family life that permeate the relationship and the decision-making process’.<sup>7</sup> Such inequalities include differences in caring responsibilities,<sup>8</sup> which are often linked to economic disparities, although such disparities may exist independently, and themselves create power imbalances.<sup>9</sup> A further cause of inequality is domestic abuse.<sup>10</sup> These factors affect family members’ abilities to bargain with one another and their relative positions on separation.<sup>11</sup>

Relatedly, neoliberal norms ignore the impact of gender norms. Despite commonly held views that women have achieved equality,<sup>12</sup> this is not the case.<sup>13</sup> Society expects mothers to be primary carers<sup>14</sup> and these norms influence the division of paid work and caring responsibilities in intact

<sup>2</sup> W. Brown, ‘American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization’ (2006) 34 *Political Theory* 690; W. Larner, ‘Neo-Liberalism: Policy, Ideology, Governmentality’ (2000) 63 *Studies in Political Economy* 5.

<sup>3</sup> Kaganas, op. cit., n. 1; S. Maclean, ‘Individual Autonomy or Social Engagement? Adult Learners in Neoliberal Times’ (2015) 65 *Adult Education Q.* 196.

<sup>4</sup> L. Buckley, ‘Relational Theory and Choice Rhetoric in the Supreme Court of Canada’ (2015) 29 *Cdn. J. of Family Law* 251, at 258.

<sup>5</sup> A. Diduck, ‘Autonomy and Vulnerability in Family Law: The Missing Link’ in *Vulnerability, Care and Family Law*, eds J. Wallbank and J. Herring (2013) 96.

<sup>6</sup> E. Hitchings and J. Miles, *Financial Remedies on Divorce: The Need for Evidence-Based Reform* (2018), at <<https://www.nuffieldfoundation.org/wp-content/uploads/2019/11/briefing20paper20Jun20201820FINAL.pdf>>.

<sup>7</sup> S. Thompson, ‘Feminist Relational Contract Theory: A New Model for Family Property Agreements’ (2018) 45 *J. of Law and Society* 617, at 618.

<sup>8</sup> M. Fineman, *The Autonomy Myth* (2004); Diduck, op. cit., n. 5.

<sup>9</sup> See for example S. Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (2015).

<sup>10</sup> R. Hunter, ‘Doing Violence to Family Law’ (2011) 33 *J. of Social Welfare and Family Law* 343.

<sup>11</sup> Barlow et al., op. cit., n. 1; Thompson, op. cit., n. 9.

<sup>12</sup> A 2015 YouGov survey found that 73 per cent of UK respondents (76 per cent of men and 70 per cent of women) believed that men and women are equal: YouGov, *Global Report: Attitudes to Gender* (2015) 3, at <[https://d25d2506sfb94s.cloudfront.net/cumulus\\_uploads/document/43qhq95qwn/YouGov\\_Gender\\_Results\\_Share\\_Website2.pdf](https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/43qhq95qwn/YouGov_Gender_Results_Share_Website2.pdf)>.

<sup>13</sup> J. Conaghan, ‘Reassessing the Feminist Theoretical Project in Law’ (2000) 27 *J. of Law and Society* 351, at 353.

<sup>14</sup> British Social Attitudes, *Women and Work* (2019), at <[https://bsa.natcen.ac.uk/media/39297/4\\_bsa36\\_women-and-work.pdf](https://bsa.natcen.ac.uk/media/39297/4_bsa36_women-and-work.pdf)>.

families.<sup>15</sup> This has gendered financial consequences on separation. Women do worse in income terms than men, whether they are former spouses<sup>16</sup> or cohabitants.<sup>17</sup> Although there is some evidence that women receive greater housing wealth on divorce,<sup>18</sup> these data lack information about the division of pensions.<sup>19</sup> Overall, there is a significant gap between the pension provision of men and women.<sup>20</sup> Thus, the limited number of pension-sharing orders made on divorce is likely to benefit men financially.

Lived realities, therefore, conflict with neoliberal norms; family decisions are made collectively, and perhaps reflect power imbalances or gender norms, thereby undermining the idea of individual freedom of choice. Decisions taken in the intact family can, in turn, affect the relative abilities of individual family members to support themselves on separation, undermining the norms of individual responsibility, financial independence, and freedom of choice.

Combining the insights of the literature with original empirical research, consisting of 18 semi-structured interviews with separated parents about their financial and child arrangements, this article offers a new and holistic perspective on the conflict between these dominant neoliberal understandings of autonomy and separating parents' realities. Separation is complex and raises multiple intersecting issues of family law, making it an important lens through which to consider the implications of neoliberal norms for family law more generally. The issues raised may include arrangements for financial matters and children. These issues are legally separate, an approach that practitioner organizations reinforce,<sup>21</sup> but in reality they are connected.

Legally, arrangements for children are made by reference to the welfare principle, which provides that the child's welfare is the court's paramount consideration.<sup>22</sup> Financial matters are dealt with separately, but children's financial needs are an important aspect of this. A statutory formula deals with child support and offers deductions for the amount of time that the child spends with the non-resident (paying) parent. For married couples, children's financial needs are also the court's first consideration when dealing with the division of property on divorce.<sup>23</sup> Former

<sup>15</sup> ONS, 'Women Shoulder the Responsibility of "Unpaid Work"' ONS, 10 November 2016, at <<http://visual.ons.gov.uk/the-value-of-your-unpaid-work/>>; ONS, *Women in the Labour Market: 2013* (2013), at <<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/womeninthelabourmarket/2013-09-25>>; ONS, *Families and the Labour Market, UK: 2019* (2019), at <<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/familiesandthelabourmarketengland/2019>>.

<sup>16</sup> H. Fisher and H. Low, 'Recovery from Divorce: Comparing High and Low Income Couples' (2016) 30 *International J. of Law, Policy and the Family* 338; M. Brewer and A. Nandi, *Partnership Dissolution: How Does It Affect Income, Employment and Well-Being?* (2014), at <<https://www.iser.essex.ac.uk/research/publications/working-papers/iser/2014-30.pdf>>.

<sup>17</sup> Brewer and Nandi, id.

<sup>18</sup> H. Fisher and H. Low, 'Divorce Early or Divorce Late? The Long-Term Financial Consequences' (2018) 26 *Aus. J. of Family Law* 6. Cohabitants cannot make claims against one another in respect of capital or pensions.

<sup>19</sup> Research into the division of pensions on divorce has found that pensions were shared in only 14 per cent of cases: H. Woodward and M. Sefton, *Pensions on Divorce: An Empirical Study* (2014), at <<http://www.nuffieldfoundation.org/pensions-divorce>>.

<sup>20</sup> The gap was estimated at 34.77 per cent in 2016: Publications Office of the European Union, *The 2018 Pension Adequacy Report* (2018), at <<https://publications.europa.eu/en/publication-detail/-/publication/62f83ed2-7821-11e8-ac6a-01aa75ed71a1/language-en>>.

<sup>21</sup> Resolution, *Good Practice Guide to Correspondence* (2019), at <<https://resolution.org.uk/resolutions-good-practice-guides/good-practice-guide-to-correspondence/>>.

<sup>22</sup> Children Act 1989, s. 1.

<sup>23</sup> Matrimonial Causes Act 1973, s. 25(1).

cohabitants can make claims for the support of children under Schedule 1 of the Children Act 1989.

The impact of care on the primary carer's needs is, however, less straightforward. Former cohabitants cannot make financial claims for their own benefit. While it is possible to include a claim for a carer's allowance in a claim under Schedule 1, such claims are limited in scope<sup>24</sup> and rare in practice.<sup>25</sup> The situation is more favourable for former spouses, who can make claims based on their financial needs (including those generated by caring responsibilities).<sup>26</sup> Rarely, it is also possible to make a claim for compensation for relationship-generated disadvantage, such as to reflect the loss of a career.<sup>27</sup> In reality, however, research suggests that these claims do not fully account for the costs of care. For example, studies show that very few former spouses receive spousal maintenance for their own benefit,<sup>28</sup> and that women (who make up the majority of carers) do worse financially on divorce.<sup>29</sup>

While there is good reason to encourage parents not to use their children as bargaining chips in financial matters, care and financial arrangements are connected in ways that neoliberal norms fail to account for. Caring creates what Fineman terms 'derivative dependency'.<sup>30</sup> For example, part-time work has long-term financial consequences,<sup>31</sup> which can limit carers' ability to support themselves financially in the future. This is perhaps compounded by a more recent emphasis on shared care arrangements following separation; if care is to be shared more equally in the future, the justification for ongoing support for a partner might appear weaker. Nevertheless, these arrangements are not a panacea where care has previously been shared unequally, because the long-term effects of part-time work are not easily overcome.

This article considers how neoliberal norms shape our understandings of the legal subject on separation. In particular, it focuses on three key assumptions that neoliberalism makes of individuals: that they have equal bargaining power, behave economically rationally, and have freedom of choice. This article reveals contradictions between neoliberal norms and separating parents' lives, which cause harms to those with caring responsibilities and their children. In addition to specific harms caused by each of these assumptions, explored in more detail below, the cumulative effect is to undermine the value of caring. Not only is caring vital to society, but these sorts of relationships are also 'a source of meaning and value to life; a source of joy'.<sup>32</sup> Like romantic love, they are often seen as something to which to aspire.<sup>33</sup>

The article begins by exploring the influence of neoliberal norms of autonomy in family law, outlining and exploring the three key assumptions set out above. The following three sections

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<sup>24</sup> *Re A (A Child)* [2014] EWCA Civ 1577.

<sup>25</sup> Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown – A Consultation Paper* (2006) 2.39, at <[https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/03/cpl179\\_Cohabitation\\_Consultation\\_overview.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/03/cpl179_Cohabitation_Consultation_overview.pdf)>.

<sup>26</sup> *Miller v. Miller; McFarlane v. McFarlane* [2006] UKHL 24.

<sup>27</sup> *Id.*

<sup>28</sup> Hitchings and Miles, *op. cit.*, n. 6.

<sup>29</sup> Fisher and Low, *op. cit.*, n. 16.

<sup>30</sup> Fineman, *op. cit.*, n. 8, p. 35.

<sup>31</sup> M. Costa Dias et al., *The Gender Pay Gap in the UK: Children and Experience in Work* (2018), at <[https://www.ifs.org.uk/uploads/publications/wps/MCD\\_RJ\\_FP\\_GenderPayGap.pdf](https://www.ifs.org.uk/uploads/publications/wps/MCD_RJ_FP_GenderPayGap.pdf)>.

<sup>32</sup> J. Herring, *Caring and the Law* (2013) 11.

<sup>33</sup> R. Grossi, 'Love as a Disadvantage in Law' (2018) 45 *J. of Law and Society* 205, at 206.



use the findings of original empirical research to interrogate each assumption in turn. In each case, this process reveals both how neoliberal assumptions fail to capture the lived realities of separating parents, and how those assumptions are actively harmful to the interests of those with caring responsibilities and their children. The article concludes by reflecting on what these findings mean for family law and policy.

## 2 | NEOLIBERALISM, FAMILY LAW, AND THE AUTONOMOUS LEGAL SUBJECT

Policies influenced by neoliberalism view citizens through the lenses of individual responsibility and autonomy,<sup>34</sup> which are closely connected. Diduck has described autonomy as the ‘friendly face’ of individual responsibility.<sup>35</sup> Neoliberal ideas of autonomy encourage individuals to be financially independent from the state.<sup>36</sup> As Brown explains, neoliberalism views citizens as ‘individual entrepreneurs and consumers whose moral autonomy is measured by their capacity for “self-care” – their ability to provide for their own needs and service their own ambitions’.<sup>37</sup> Thus, individual responsibility, demonstrated by financial independence from the state, is a mark of attaining autonomy.

Neoliberal concepts of autonomy are also premised on freedom of choice.<sup>38</sup> As Lemke explains,

[t]he key feature of the neo-liberal rationality is the congruence it endeavours to achieve between a responsible and moral individual and an economic-rational actor. It aspires to construct prudent subjects whose moral quality is based on the fact that they rationally assess the costs and benefits of a certain act as opposed to other alternative acts. As the choice of options for action is, or so the neo-liberal notion of rationality would have it, the expression of free will on the basis of a self-determined decision, the consequences of the action are borne by the subject alone, who is also solely responsible for them.<sup>39</sup>

Thus, choice is connected to individual responsibility: as individuals are assumed to make free choices, they are responsible for the costs of them.

These neoliberal norms of individual responsibility, financial independence, and freedom of choice permeate family law and its conception of the legal subject. First, they increasingly influence how family law disputes are resolved.<sup>40</sup> Diduck notes ‘the creation of an autonomous system

<sup>34</sup> Kaganas, op. cit., n. 1; Maclean, op. cit., n. 3.

<sup>35</sup> Diduck, op. cit., n. 5, p. 96.

<sup>36</sup> Fineman, op. cit., n. 8; J. Herring, *Relational Autonomy and Family Law* (2014).

<sup>37</sup> Brown, op. cit., n. 2, p. 694.

<sup>38</sup> Fineman, op. cit., n. 8; A. Heenan, ‘Neoliberal Autonomy and Financial Remedy Reform: Lessons from Sweden’ (2020) 3 *Child and Family Law Q.* 263.

<sup>39</sup> T. Lemke, ‘“The Birth of Bio-Politics”’: Michel Foucault’s Lecture at the Collège de France on Neo-Liberal Governmentality’ (2001) 30 *Economy and Society* 190, at 201.

<sup>40</sup> Diduck, op. cit., n. 1; Herring, op. cit., n. 36.

of dispute resolution that is separate from and runs parallel with the formal justice system'.<sup>41</sup> Private ordering has long been encouraged in family law, described by Cretney as

based on the philosophy that individuals should have the right to organise their lives as they wish, free from intervention by the state and by the courts, and that, accordingly, they should have the right to create legal obligations, enforceable by the courts, either in substitution for what the state prescribes as the default option, or to provide for situations in which the state makes no regulatory provision.<sup>42</sup>

This envisages private ordering as a positive alternative to the legal system. Individuals have a 'right' to take ownership of their lives. However, the scope of private ordering has extended in recent years and it is now seen as the default method of resolving disputes. In 2013, legal aid was removed for almost all private family law cases,<sup>43</sup> a policy justified by neoliberal ideas of autonomy and responsibility,<sup>44</sup> but also connected to government spending cuts: reducing the role of the state is also a neoliberal objective.<sup>45</sup> The government proposals for the reforms suggested that 'people should take responsibility for resolving such issues themselves'.<sup>46</sup> The proposals also reflected the idea of choice, referring to family law issues as ones that arise 'from the litigant's own personal choices'.<sup>47</sup> Additionally, these proposals were justified by benefits to the taxpayer, achieved by 'reducing the volume of business that ends up in court'.<sup>48</sup> The government intended that families would resolve their disputes through mediation,<sup>49</sup> a move itself consistent with ideas of autonomy.<sup>50</sup> However, referrals to mediation fell in the aftermath of legal aid reform.<sup>51</sup> Instead, the norm is for individuals to represent themselves in family law cases.<sup>52</sup>

This approach is connected to neoliberal assumptions about individuals and their behaviour. Significantly, individuals are assumed to have equal bargaining power.<sup>53</sup> As Fineman explains, the 'autonomous, independent and self-sufficient individual' is our ideal.<sup>54</sup> Assumptions of equality lead to the expectation that everyone is capable of behaving this way, 'stigmatiz[ing] those who

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<sup>41</sup> Diduck, *op. cit.*, n. 1, p. 134.

<sup>42</sup> S. Cretney, 'Private Ordering and Divorce: How Far Can We Go?' (2003) 33 *Family Law* 399, at 399.

<sup>43</sup> There are limited exceptions, such as in cases of corroborated domestic abuse.

<sup>44</sup> Kaganas, *op. cit.*, n. 1.

<sup>45</sup> Larner, *op. cit.*, n. 2.

<sup>46</sup> Ministry of Justice, *Proposals for Reform of Legal Aid in England and Wales* (2010) para. 4.210, at <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228970/7967.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228970/7967.pdf)>.

<sup>47</sup> *Id.*, para. 4.19.

<sup>48</sup> *Id.*, para. 4.72.

<sup>49</sup> A. Barlow, 'Rising to the Post-LASPO Challenge: How Should Mediation Respond?' (2017) 39 *J. of Social Welfare and Family Law* 203.

<sup>50</sup> *Id.*; Herring, *op. cit.*, n. 36, p. 6.

<sup>51</sup> Barlow, *op. cit.*, n. 49; Ministry of Justice, *Legal Aid Statistics England and Wales Bulletin January to March 2020* (2020) Figure 10, at <<https://www.gov.uk/government/publications/legal-aid-statistics-january-to-march-2020>>.

<sup>52</sup> J. Mant, 'Placing Litigants in Person at the Centre of the Post-LASPO Family Court Process' (2020) 32 *Child and Family Law Q.* 421; Ministry of Justice, 'Family Court Statistics Quarterly: April to June 2020' *Gov.uk*, 24 September 2020, at <<https://www.gov.uk/government/publications/family-court-statistics-quarterly-april-to-june-2020/family-court-statistics-quarterly-april-to-june-2020>>.

<sup>53</sup> Thompson, *op. cit.*, n. 9.

<sup>54</sup> Fineman, *op. cit.*, n. 8, p. 34.

do not'.<sup>55</sup> If individuals have equal bargaining power, private negotiations are unproblematic. In the context of pre-nuptial agreements, for example, Thompson notes the perception that they are between 'two, independent, gender-neutral individuals, both seeking to safeguard their property and finances'.<sup>56</sup> However, as outlined in the introduction, this assumption fails to take account of power imbalances between family members.

The next section provides real-world examples of what these power imbalances mean for separating parents. Significantly, my data suggest that power imbalances may make financial independence more appealing to the person less able to achieve it. Thus, the neoliberal norm of equal bargaining power may be harmful both in disguising unequal bargaining positions and in venerating outcomes that are financially detrimental to those with caring responsibilities. This has important implications for the increasing emphasis on private ordering in family law.<sup>57</sup>

In addition to their influence on procedure, neoliberal norms of autonomy have influenced the development of substantive family law. Perhaps most obviously, the increasing weight placed upon pre-nuptial agreements<sup>58</sup> was explained by the majority of the Supreme Court in *Radmacher v. Granatino* using the language of autonomy:

The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best.<sup>59</sup>

This understanding of autonomy appears to be influenced by the neoliberal norm of freedom of choice: the court is encouraged to respect the couple's decision. However, *Radmacher* draws no distinction between the individual members of a couple: their choice is taken to be a joint one. Thus, this substantive principle of autonomy is connected to the assumption of equal bargaining power discussed above.<sup>60</sup>

The assumption of freedom of choice is closely connected to a third assumption of neoliberal individuals: that they behave economically rationally.<sup>61</sup> As Harman explains,

[n]eoliberal *Homo economicus* is a free and autonomous 'atom' of self-interest who is fully responsible for navigating the social realm using rational choice and cost-benefit calculation *to the express exclusion* of all other values and interests. Those who fail to thrive under such social conditions have no one and nothing to blame but themselves.<sup>62</sup>

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<sup>55</sup> Id.

<sup>56</sup> Thompson, op. cit., n. 9, p. 6.

<sup>57</sup> It is also relevant to associated drives towards mediation. However, given the breadth of the literature on that topic, it is beyond the scope of this article to consider the implications for mediation.

<sup>58</sup> Pre-nuptial agreements are also, of course, a form of private ordering: Thompson, op. cit., n. 9.

<sup>59</sup> *Radmacher v. Granatino* [2010] UKSC 42 [78].

<sup>60</sup> For further analysis of what this decision means for understandings of autonomy, see Thompson, op. cit., n. 9.

<sup>61</sup> Barlow et al, op. cit., n. 1, p. 159; Brown, op. cit., n. 2, p. 694; Lemke, op. cit., n. 39, pp. 197–198; Thompson, op. cit., n. 9.

<sup>62</sup> T. Harman, 'Neoliberalism, Governmentality, and Ethics' (2009) 6 *Foucault Studies* 37, at 38, emphasis in original.



Harman describes individualist behaviour that conflicts with the norms of intact families discussed in the introduction. Nevertheless, this assumption that individuals have freedom of choice, and therefore ought to be held accountable for the financial costs of their decisions, is evident in family law. For example, in arguing for law reform to limit financial claims on divorce, Deech suggests that caring for children is a choice and that the law should encourage those who care to push for ‘better working conditions and more respect’.<sup>63</sup> Similar assumptions, although not explicitly articulated, underpin the increasing drive towards a financial clean break<sup>64</sup> on divorce.<sup>65</sup> The emphasis on both spouses becoming financially independent as soon as possible after divorce is consistent with ideas of individual responsibility and financial independence, both of which are valorized by neoliberal policies. Implicitly, this may also signal an assumption that joint decisions about dividing paid work and care are freely made choices, for which the carer should bear the consequences.

The next section challenges the assumptions of economic rationality and freedom of choice as applied to separating parents. As regards the former, my data suggest that decision making is more complex than economic rationality assumes. While there was evidence of economically rational decision making, this tended to be by breadwinners. Former primary carers were more likely to be influenced by children’s needs, and this could lead to them making decisions that were financially detrimental to themselves. However, like the power imbalances described above, this is disguised in a neoliberal framework.

As regards freedom of choice, I suggest below that choices around care are influenced by gendered parenting norms. Parents’ choices are also interconnected and influenced by relationship roles. First, work history shapes future opportunities. Thus, even if care is shared more equally post-separation, prior work experience may limit carers’ abilities to support themselves financially. Relatedly, my data suggest that even where children spend equal time with both parents after separation, the care performed by each parent may differ, with different financial consequences. Finally, post-separation child arrangements are influenced by what went before. This means that continued care by the former primary carer is assumed. Only breadwinners have a choice about whether to be involved. If they do not want to be, the carer cannot compel a more equitable sharing of care, and if the parents are not married, there is little financial redress for this.

### 3 | CHALLENGING THE NEOLIBERAL CONCEPTION OF SEPARATING PARENTS

Having outlined three neoliberal assumptions about individuals that underpin family law (they have equal bargaining power, are economically rational, and have freedom of choice), this section explores each assumption in greater depth and, drawing on my empirical findings, explains why they are harmful for carers and children.

These empirical findings come from semi-structured interviews conducted in 2016 and 2017 with 18 separated parents: 11 former spouses (five mothers and six fathers), six former cohabitants (four mothers and two fathers), and one mother who had not been in a relationship with her

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<sup>63</sup> R. Deech, ‘Financial Provision Reform’ (2018) *Family Law* 1251, at 1251.

<sup>64</sup> A clean break means that there are no ongoing financial claims between partners. It is not possible to have a clean break as regards obligations to children.

<sup>65</sup> Hitchings and Miles, *op. cit.*, n. 6.

child's father.<sup>66</sup> Participants were asked about their financial and child arrangements on separation. Interviews were recorded and transcribed, and pseudonyms assigned.

Given the small number of participants, rather than aiming for a representative sample, the objective was to capture a range of circumstances illustrating how the conflict between the goal of financial independence on separation and the financial effects of caring responsibilities might be experienced by different families. The sample, therefore, included parents with a broad range of pre- and post-separation care arrangements<sup>67</sup> and financial circumstances.<sup>68</sup> The data were analysed using reflective thematic analysis.<sup>69</sup> The findings, and their implications for these neoliberal assumptions, are considered below.

### 3.1 | A bargain between two equally autonomous individuals

Ruth: I just think, oh my God, it's like ... 2017 not in the like Victorian times. ... [I]f you're a woman and you can work, go out and work. You don't, you shouldn't rely – ... I'd be devastated if I had to rely on a man ... to keep me when I'm not even with them. ... I just think, yeah, you need to just get out and work. 'Cause I mean especially now, I think at this point in time, obviously rightly or wrongly, tax credits help massively, especially for me – I wouldn't be able to work without them.

Ruth's words are grounded in neoliberal assumptions: that men and women are equal and that everyone should aspire to financial independence on separation. Indeed, her suggestion that women should get a job echoes Deech's arguments for reform of financial remedies law: 'If divorced women can only recover their previous standard of living when they re-partner, then we have not moved on from the Victorian idea of a woman always needing a man, and never being autonomous.'<sup>70</sup>

<sup>66</sup> Two of these parents had been married to one another. The rest were unrelated. All couples were heterosexual. One of the factors that this research considered was cultural norms of parenthood. These cannot be assumed to be the same for same-sex couples.

<sup>67</sup> Five parents described having shared care arrangements, although the time spent with each parent and the rigidity of those arrangements differed. Seven parents (six mothers and one father) described themselves as the parent with whom the child lived. In six of these cases, their former partners had relatively limited contact with their children (and four would have liked their former partners to have more contact). Of the non-resident parents, there were four fathers with varying degrees of contact with their children and one mother who had no contact with her children at all. Finally, one mother had never been in a relationship with her child's father.

<sup>68</sup> From the financial information provided by participants, it appears that debt was a real issue for one mother. For four participants (two mothers and two fathers), the assets were negligible. For two others (one mother and one father), there was some capital but not enough to purchase property. For the remaining participants, there appeared to be sufficient capital for both partners to purchase property, although among those participants overall wealth and employment patterns varied considerably.

<sup>69</sup> The University of Auckland, 'Thematic Analysis: A Reflexive Approach' *The University of Auckland*, n.d., at <<https://www.psych.auckland.ac.nz/en/about/our-research/research-groups/thematic-analysis.html>>.

<sup>70</sup> Deech, op. cit., n. 63, pp. 1251–1252. For a more detailed discussion of these proposed reforms and some of the objections to them, see for example Heenan, op. cit., n. 38; Hitchings and Miles, op. cit., n. 6; S. Thompson, *Submission of Written Evidence on Divorce (Financial Provision) Bill 2017–2019* (2018), at <<http://orca.cf.ac.uk/111244/>>.

Despite her narrative of equality, there were significant inequalities of bargaining power between Ruth and her ex-husband. First, Ruth mentioned domestic abuse. Abusive relationships create power imbalances,<sup>71</sup> and research suggests that they may lead to survivors settling for less than the amount to which they are entitled.<sup>72</sup> Following separation, Ruth's four children lived almost solely with her. She left her marriage with only enough for a deposit on a rental flat,<sup>73</sup> and made no claim against her ex-husband's pension. Despite her vehement objections to financial dependence, Ruth's interview makes clear that she was not economically self-sufficient: she could not work unless the state provided tax credits.

The introduction suggested that an important dimension of autonomy in the family justice system is the aspiration that individuals should be financially independent.<sup>74</sup> A strictly neoliberal interpretation of this aspiration conflicts with Ruth's apparent interpretation: neoliberalism envisages a limited role for the state,<sup>75</sup> whereas Ruth's conception focuses on independence from her ex-partner and accepts dependence on the state to achieve it. Even though Ruth's conception conflicts with neoliberal understandings of the state's role, it aligns with trends towards clean breaks in family law,<sup>76</sup> which takes benefits into account in calculating the income of the claimant, and therefore their need for maintenance. The possible reasons for Ruth's approach are considered below.

A second dimension to the power imbalance between Ruth and her ex-husband was the economic disparity between them.<sup>77</sup> Ruth explained that during her marriage her ex-husband 'went off and spent [money] ... on just nothing basically. Just nothing at all. He'd go out for sort of ... something to eat. Like it was ... lunchtime or whatever.' However, the financial imbalance between them made it hard for her to say no:

I should have probably said no to him but it's different, isn't it, ... when you're with somebody and obviously they're earning more money. I mean I was earning money but they're earning more money it's sort of sometimes you feel like you can't say no to them.

A similar dynamic was evident in the account of Louise, a cohabitant primary carer mother:

So, um, we did sort of throw money into the pot I suppose. And we paid the rent and ... food and what have you. Um, but we had silly things go on like he would suddenly go out and buy a golf club. One golf club for £100. But then the next week, he would look at the shopping list and go mental at me because I'd spent three pounds on a bottle of shampoo and [say], you know, 'What's wrong with Asda's own or ... ?' So it was ... a bit one sided financially really.

<sup>71</sup> See for example Hunter, op. cit., n. 10; Rights of Women, *Women's Access to Justice: A Research Report* (2011), at <[https://rightsofwomen.org.uk/wp-content/uploads/2014/10/Womens\\_access\\_to\\_Justice-a\\_research\\_report-2011.pdf](https://rightsofwomen.org.uk/wp-content/uploads/2014/10/Womens_access_to_Justice-a_research_report-2011.pdf)>.

<sup>72</sup> Barlow et al., op. cit., n. 1.

<sup>73</sup> Ruth's interview suggested that she had little capital beyond this.

<sup>74</sup> Diduck, op. cit., n. 5; Fineman, op. cit., n. 8.

<sup>75</sup> Larner, op. cit., n. 2.

<sup>76</sup> Hitchings and Miles, op. cit., n. 6.

<sup>77</sup> This economic disparity appeared to be connected to caring responsibilities: Ruth was the primary carer both during marriage and after separation.

Another such mother, Alison, described her position after her children were born in similar terms:

- Alison: And then ... I used to have to, ugh, ask for money all the time. Terrible.
- Interviewer: Mm. What was ... his approach to that? Was he ... so, was it that you disliked asking for money or was he ... resistant to paying money? ... [W]hy did you feel like that?
- Alison: Um, I think it was probably ... [a] bit of both because, even now, I mean I don't like asking for help, ... I like standing on my own two feet and all of the rest of it.
- Interviewer: Yeah.
- Alison: ... also there was the kind of like ... 'Well, you've been to the Co-op three times today ... - what's that all about?' 'Cause obviously he could see it on our joint account 'cause that was my real only money was coming out of the joint account. And ... I used to try and make my money last as much as possible. But [sighs] yeah, no, nightmare. Nightmare ...

The potential for economic disparities to create power imbalances has been noted in the contexts of mediation<sup>78</sup> and pre-nuptial agreements.<sup>79</sup> Research also suggests that a greater financial contribution is associated with power in intact relationships<sup>80</sup> and that power imbalances may be replicated in financial settlements on separation.<sup>81</sup> It is difficult to assess whether this made a difference to the outcomes for these mothers. None of their cases seemed to involve significant assets, although, as discussed above, Ruth made no claim against her ex-spouse's pension, which she could have done. As cohabitants, Louise and Alison had limited legal claims against their ex-partners. Alison was, however, able to stay in the former family home with her partner paying the mortgage. This was vital as she was the primary carer of four children, one of whom was disabled.<sup>82</sup> Nevertheless, all three mothers had difficulties obtaining child maintenance from their ex-partners. Ruth went to the Child Support Agency after her ex-husband stopped paying; Louise did not pursue an increase in child maintenance as her ex-partner threatened to stop seeing the children if she did; and Alison received no regular payments, instead asking for contributions for 'definite things rather than anything he could say, "Oh, that's for you"'.

The norm of equal bargaining power may, therefore, cause harm by failing to account for, and indeed by exacerbating, power imbalances, and creating a climate that de-legitimizes financial claims related to caring. State support may counter this, and was vital to all three participants. Louise had a newborn child and a toddler when she and her partner split up, so relied on 'some kind of benefit'. Alison explained:

I get child benefit, child tax credit, and I get some extra payments for [child] because of [their] disability. So ... with what I earn, and sometimes, like at the moment, I've

<sup>78</sup> J. Kelly, 'Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention' (1995) 13 *Mediation Q.* 85.

<sup>79</sup> Thompson, *op. cit.*, n. 9.

<sup>80</sup> J. Pahl, *Money & Marriage* (1989). For a discussion of the link between wealth and power in the negotiation of pre-nuptial agreements, see also Thompson, *op. cit.*, n. 9, p. 81.

<sup>81</sup> K. Wright, 'The Role of Solicitors in Divorce: A Note of Caution' (2007) 19 *Child and Family Law Q.* 481.

<sup>82</sup> Under Schedule 1 of the Children Act 1989, Alison could make a claim for the needs of her disabled child. Without detailed financial information about her case, it is difficult to compare her actual arrangements to her legal entitlement.

got a load of work on which is brilliant, and I'll get working tax credits as well. And if it wasn't for that, I couldn't live ...

Meanwhile, benefits were the only source of income for another participant, Sophie. Nevertheless, even claiming benefits took time: '[W]hen he left, I didn't even have money for – there was a gap between when the benefits came in and he left and that was quite scary. Not, you know, having enough money to literally feed children.' However, such state support conflicts with policies of austerity, themselves underpinned by neoliberal ideas.<sup>83</sup>

Having argued that the assumption of equality of bargaining power is harmful, it is worth considering why it was so important to participants like Ruth to be economically independent from ex-partners. The explanation may lie in the power imbalance itself. Andrew was a stay-at-home father during his marriage while his wife worked full time. Following separation, shared care was agreed. His wife subsequently claimed child benefit for one child, ending her child support liability. Although this was 'pocket change' to her, it made a big difference to him. He described his outlook at the time as "'Sod ya, I'm gonna get through this in spite of you'". The extract from Alison's interview above likewise indicates reluctance to ask for help financially, and Louise explained:

I s'pose probably for the last few years – probably five, six years – I've just never asked for anything. Never. ... If I haven't been able to afford it, they don't have it. But I wouldn't, I just will not ask him for anything.

Thus, financial independence may be a matter of pride grounded in uneven bargaining dynamics. My findings are reinforced by Treloar's research into high-conflict divorces, which found that '[w]hen collecting child support proved difficult, most mothers gave up on that avenue and struggled on, therefore exercising a form of agency'.<sup>84</sup> Deciding to be financially independent more broadly may, therefore, be a way of gaining control, even if it creates economic vulnerability. This phenomenon may also be linked to a desire to 'reconstitute the self'.<sup>85</sup> In research looking at child arrangements on divorce, Smart and Neale observed: 'In order to reconstitute the self on divorce, therefore, it was necessary for many women to disconnect themselves and cease to be bound up with their former partners.'<sup>86</sup> This resonates with my findings. While Smart and Neale's research focused on child arrangements, rather than on finances, they found that primary carers in their study 'had to construct a boundary against the husband while remaining connected to the father'.<sup>87</sup> For my participants, refusing to be financially dependent on their ex-partners was a way to distance themselves and develop a new post-separation identity.

The fallacy of this first assumption of equal bargaining power challenges drives towards private ordering by suggesting a need for checks and balances on negotiations. Ruth's experiences illustrate that power imbalances may dominate, even where there is a legal entitlement. This

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<sup>83</sup> S. Kirwan et al., 'Reassembling Citizenship in Austere Times' in *Assembling Neoliberalism: Expertise, Practices, Subjects*, eds V. Higgins and W. Larner (2017) 109.

<sup>84</sup> R. Treloar, 'High-Conflict Divorce Involving Children: Parents' Meaning-Making and Agency' (2018) 40 *J. of Social Welfare and Family Law* 340, at 346.

<sup>85</sup> C. Smart and B. Neale, *Family Fragments?* (1999) 141.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*



resonates with literature on the importance of mediators identifying and addressing domestic abuse.<sup>88</sup>

My findings also illustrate the very particular way in which economic independence seems to be interpreted in the family law context: independence from a partner is the main goal, sometimes entailing dependence on the state. Thus, the state is a vital source of financial support for some separating parents and their children, conflicting with the more general policy landscape of austerity, which, informed by neoliberal ideas, envisages a smaller state.<sup>89</sup>

Neoliberal norms around equality of bargaining power may, therefore, create financial harm, limiting the financial support available to carers on separation by failing to account for the realities of their lives. Norms of financial independence on separation<sup>90</sup> create the framework in which parents bargain. Bargaining inequalities arising from, for instance, domestic abuse or economic imbalances further limit the ability of some carers to claim their entitlements. Finally, where such inequalities exist, making the decision not to claim may be a form of agency. Thus, neoliberal norms of autonomy can limit carers' claims against their ex-partners, a situation compounded by the erosion of the state's financial safety net.

### 3.2 | Economic rationality

The goal of financial independence on separation is closely linked to a second assumption of autonomous individuals: that they are economically rational.<sup>91</sup> Lemke explains:

Neo-liberal thought has a central point of reference and support, namely *homo-economicus*. By encoding the social domain as a form of the economic domain, cost-benefit calculations and market criteria can be applied to decision-making processes within the family, married life, professional life, etc.<sup>92</sup>

This idea of decision making as centred on cost-benefit calculations does not reflect decision making in intact families, which is grounded in ideals of solidarity<sup>93</sup> or interdependence.<sup>94</sup>

Previous research has challenged the idea of economic rationality in decision making about 'moral economies'<sup>95</sup> and has suggested that 'gendered moral rationalities', rather than economic

<sup>88</sup> See for example P. Morris, 'Mediation, the Legal Aid, Sentencing and Punishment of Offenders Act of 2012 and the Mediation Information Assessment Meeting' (2013) 35 *J. of Social Welfare and Family Law* 445; Barlow et al., op. cit., n. 1; M. Hester et al., *Family Court Welfare and Voluntary Sector Mediation in Relation to Domestic Violence* (1997), at <<https://www.jrf.org.uk/report/family-court-welfare-and-voluntary-sector-mediation-relation-domestic-violence>>; Kelly, op. cit., n. 78.

<sup>89</sup> Kirwan et al., op. cit., n. 83.

<sup>90</sup> For cohabiting parents, there are few financial claims available. For married parents, this norm arises from the drive towards clean break settlements: Hitchings and Miles, op. cit., n. 6.

<sup>91</sup> Barlow et al., op. cit., n. 1, p. 159; Lemke, op. cit., n. 39, pp. 197–198; Harman, op. cit., n. 62, p. 38.

<sup>92</sup> Lemke, id., p. 200.

<sup>93</sup> A. Barlow, 'Solidarity, Autonomy and Equality: Mixed Messages for the Family?' (2015) 27 *Child and Family Law Q.* 223.

<sup>94</sup> A. Heenan, 'Causal and Temporal Connections in Financial Remedy Cases: The Meaning of Marriage' (2018) 30 *Child and Family Law Q.* 75.

<sup>95</sup> 'Moral economies' refers to 'how partnerships should be formed, sustained and dissolved; how parenting should be carried out; how this might be combined with paid work; and who does what sort of paid and unpaid work': A. Barlow and S. Duncan, 'Supporting Families? New Labour's Communitarianism and the "Rationality Mistake": Part I' (2000) 22 *J. of Social Welfare and Family Law* 23, at 24.

rationality, shape lone mothers' decisions around paid work.<sup>96</sup> My research looks at decision making on separation, and suggests that economic rationality captures only one sub-set of bargaining behaviours: that most commonly exhibited by breadwinners. Moreover, and more importantly, it is suggested that this sort of economic rationality may be problematic when it comes to post-separation child arrangements.

Turning first to the question of how people bargain, in my study, the approach of former breadwinners best reflected the ideal of economic rationality. Gareth increased his child maintenance payments to his second wife to try to maintain arrangements that worked for him:

I pay my second wife more money for one [child] than I do my first wife for the two. For a ... few reasons but one of them is that I worry that if I don't, then she'll move to [another part of the country] which will really mess my life up.

Likewise, Kenneth told me: 'What I didn't want to end up with was being legged over on the children because I'd chiselled on the finances, sort of thing, or if she wasn't happy with the finances.' Neil's discussion was even more explicit: 'I'm giving up money and ... for that money I am buying access to my children.' When I asked whether this meant that he was more generous financially than he might otherwise have been, he responded:

No, I think that's probably true. I hadn't really thought about it in those terms, hence the sort of reflective pause before I answered but ... yes, I think ... that is probably true. ... [H]ad that linkage not been there, then I would probably have coughed up less.

By contrast, former primary carers more commonly sacrificed financial entitlements for less quantifiable benefits, such as ongoing relationships. Louise sacrificed an increase in child support as her former partner said that he would never see their children again if she claimed it. Emily and Elizabeth (formerly married mothers who were primary carers of their children during their relationships with shared care afterwards) took similar approaches, although this did not leave them in precarious positions like Louise. Emily explained:

[S]ome people sort of say well, you know, take him to the cleaners. ... I don't think there's any point in doing that because ... it would have meant that he wouldn't have been able to have somewhere that the children could go and be safe, and have room and be happy. ... I think it would have massively affected our ongoing relationship, really badly. ... [W]e had probably 17, 18 years, ahead of us, where we've got to do this together, for the kids.

Former breadwinners' decisions did involve financial concessions and can be understood as a response to what Smart and Neale refer to as 'situational power': the power deriving from a parent's position as the children's primary carer.<sup>97</sup> For Gareth, his second wife being primary carer meant a potential loss of control over where his child lived, making it more difficult to spend

<sup>96</sup> 'Gendered moral rationalities' refers to 'social, collective relations and understandings about motherhood and paid work': S. Duncan and R. Edwards, 'Lone Mothers and Paid Work: Rational Economic Man or Gendered Moral Rationalities?' (1997) 3 *Feminist Economics* 29, at 56.

<sup>97</sup> Smart and Neale, *op. cit.*, n. 85, p. 146.

time with them. However, there are important differences between such bargaining and Louise's sacrifice. Louise could ill afford to turn down increased child support. Furthermore, she did not seek a benefit to herself but to avoid detriment to her children. This echoes Barlow and colleagues' findings that while some men 'were clear that treating their former wife fairly was "the right thing to do" we found no evidence of men sacrificing financial entitlements to the extent that some women did'.<sup>98</sup> This may also be grounded in the dynamics of intact relationships: research suggests that women tend to put their own needs last when money is tight.<sup>99</sup>

Louise's concessions also highlight a dimension often overlooked in discussions of care post-separation: care is embedded in relationships and not a set of discrete activities. Tronto considers the experience of care recipients to be central to understandings of care: '[I]t provides the only way to know that caring needs have actually been met.'<sup>100</sup> Several participants explained the varying nature of their children's needs, highlighting that care is nuanced and responsive. Antonia commented that her children had asked her to cut back on work when she divorced: 'I think they needed ... more reassurance.' Sophie recognized that her children had different relationships with their father because of their different ages at separation. Gareth also explained the complexity of meeting his children's needs:

So ... each of my kids are different. So sometimes I will ... have just [oldest]. So [oldest] and [second child] have completely different personalities and sometimes [second child] just needs some time with [their] mum. Sometimes [oldest] just needs some time with [their] mum. ... [I]t's not just, 'Right, here's the kids, here's their coats, bring them back on Sunday'. ... [W]e do change it around a bit and actually the dynamics between [oldest] and [youngest] and [second child] and [youngest] and the three of them are such that you do tend to ... shift things around, pay attention to what they're saying. ... [A]nd also ... the kids tend to play their parents in completely different ways, ... so a lot of [oldest's] behavioural issues aren't behavioural issues when [they are] with me, and a lot of [second child's] behavioural issues with me aren't behavioural issues [with mum]. So ... as much as we have ... cross words to say to each other, ... we have to keep talking about all of this stuff 'cause otherwise we can have phantom problems with the children.

However, Gareth's approach to financial matters (outlined above) was more like the economically rational approach envisaged by neoliberal norms of autonomy. This may reflect the gender differences that Treloar noted in approaches to financial matters: 'Mothers saw financial responsibility in relational terms – as an aspect of care for children – and often referred to the best interests of children.'<sup>101</sup> By contrast, '[f]athers ... tended to see financial autonomy as an aspect of individual identity. They saw money as individual and linked to their status as men (more than as fathers) and sought a rebalancing of financial responsibilities and child care.'<sup>102</sup> This sort of approach can be seen in my research in statements around child support. Former primary carers often felt that

<sup>98</sup> Barlow et al., op. cit., n. 1, p. 164.

<sup>99</sup> C. Nyman, 'Gender Equality in "the Most Equal Country in the World?" Money and Marriage in Sweden' (1999) 47 *The Sociological Rev.* 766; C. Vogler and J. Pahl, 'Money, Power and Inequality within Marriage' (1994) 42 *The Sociological Rev.* 263.

<sup>100</sup> J. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (1993) 108.

<sup>101</sup> Treloar, op. cit., n. 84, p. 346.

<sup>102</sup> Id.

their ex-partners perceived these payments as being for their benefit. This is exemplified by the following accounts:

Emily: 'Cause a lot of his pay is based on bonuses, depending on performance and things like that. ... I've had to really fight to get those out of him. So ... that has caused a bit of tension. I think – I sense a bit of resentment from him that he thinks he's paying me money. I think that's quite common. ... [H]e doesn't really like paying me money [laughs]. ... [A]nd I'm not sure he reminds himself it's not really for me.

Louise: [E]very time I spoke about money, it would end up in a huge argument where he would call me a money-grabbing ... whatever. ... [Y]ou know, I wanted to get as much money out of him as I could. He ... could never see that, actually, I was doing it for the children.

This perception also explains Alison's approach of asking for money only for specific items (described above): in making the benefit to her children clear, she avoided any suspicion that payments were for her.

This complexity – of children's needs, and of the extent to which children are seen to generate economic needs – is important when thinking about bargaining behaviours. Rather than being grounded in a framework of economic rationality, negotiations are informed by varying and nuanced caring relationships. Failing to account for this can cause harm. It risks children's physical and emotional needs being unmet in the child arrangements. Furthermore, failing to account for the 'derivative dependency'<sup>103</sup> that this generates risks financial harm to carers.

The differences that Treloar notes in mothers' and fathers' financial attitudes may reflect differences in the care that they perform.<sup>104</sup> Primary carers are predominantly mothers, who are often responsible for day-to-day household expenses.<sup>105</sup> In Sweden, Nyman noted that children's expenses tended not to be budgeted for, and came out of mothers' incomes.<sup>106</sup> If these expenses are disguised in intact families, this sets the backdrop for post-separation arrangements. This invisibility is also relevant when thinking about the nature of the care performed by parents (considered in the section on shared care arrangements below).

Having identified economic rationality's limitations when describing bargaining dynamics, it is worth reflecting on whether family law should encourage parents to negotiate in this way. Perhaps the best illustration of the differences between an approach based on the norms of neoliberal autonomy and a more relational approach looking at the welfare of the family as a whole is the contrast in the approaches of three participants: Elizabeth and Matthew, formerly married to each other, and Jason, a former cohabitant. All were in post-separation shared care arrangements (with primary carer mother arrangements beforehand), all talked about the importance of arrangements

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<sup>103</sup> Fineman, op. cit., n. 8, p. 35.

<sup>104</sup> Treloar, op. cit., n. 84.

<sup>105</sup> F. Mazotta et al., 'Household Management Systems and Women's Decision Making within the Family in Europe' (2019) 25 *Feminist Economics* 126; J. Pahl, 'Individualisation in Couple Finances: Who Pays for the Children?' (2005) 4 *Social Policy & Society* 381.

<sup>106</sup> Nyman, op. cit., n. 99, p. 784.

that worked for their children, and all felt that their arrangements achieved this. However, their methods of achieving these goals differed, as did the relative importance placed on the parental autonomy and rights.

Jason described his child arrangements and the rationale behind them as follows:

Jason: [I]t can get a bit floaty, flaky, and fluffy around the edges and I'd like that to be really trimmed, really clear. So, with –

Interviewer: Can you explain what you mean by ... 'floaty around the edges'? ... [W]hat happens and what are some of the problems?

Jason: So, handover as an example. ... [G]ood example is last summer, so six weeks and ... they were only on time for handover ... once.

Interviewer: OK.

Jason: So it was like, that's flaky ... – just leave a bit earlier ... You know, I know that if you're half an hour late or an hour late, I'm just going to add it on Sunday or Saturday.

Interviewer: OK.

Jason: But why do that? ... [I]t's that kind of stuff ... – probably trivial but the more I try and keep it focused. If it had been the other way, if I hadn't really bothered about all this kind of stuff, it would be completely messy.

Interviewer: OK.

Jason: So.

Interviewer: So in terms of ... seeing your [child] at all or in terms of –

Jason: In terms of me ... receiving what's my right as a father.

Interviewer: OK.

Jason: And without becoming like one of the father doormats that are out there and like, 'Oh no, I don't have a right to see [them]. I can't see [them]. I'll only see [child] every other weekend.' That was never going to happen. That can't happen. And I've just tried to put the firm, clear boundaries in place because there can be confusion, there can be misunderstandings and actually if all this stuff is put in place now, then we know how it is, you know. You can't say five years down the line, 'Well, hold on – we never discussed this.' This has always been very clear. That's what I always wanted. And [child] is ... very stable, I believe, because [child] understands boundaries. [Child] knows I'm very black and white.

Jason felt that this arrangement worked well for his child and offered stability. Nevertheless, there was also a clear focus on parental rights, requiring clear boundaries for enforcement. This makes sense in the context of neoliberal conceptions of autonomy that cast these arrangements in individualist terms. Jason explained what this meant for his child: 'I think, [child] gets now, especially after last week, that actually, you've got your medicine at that house, and I've got mine and they're two different things, two different diets, two different ways of life.' This divide even translated itself into school meals: Jason's child ate a vegan school meal for half of the school week because 'the official handover time ... [in the shared care arrangement] is 11 on a Wednesday so that means [child's] lunch at school is actually within my time'. Such an approach may not work for every



child, however, and the danger of neoliberal approaches is that they disguise the complexity of children's needs.

By contrast, Elizabeth and Matthew epitomized an approach at odds with the norms of economic rationality, and which recognized the nuances of care discussed above. Elizabeth remarked: 'You don't get an autonomous decision ... in relation to your children. You wouldn't have expected it when you were together, you don't get it now.' For her and Matthew, their child's best interests were central to both financial decisions and child arrangements:

Elizabeth: [T]he magnetic factor has to be the child and so stepping out of your own ... you know, putting yourself in the child's position and, and basically every single decision what is better for them – doesn't matter what I think about it – what is better for them.

Matthew: [T]he single most important thing are ... the needs of the child, and everything else comes secondary to that. ... [I]t may be that ... you can barely bring yourself to speak to your ex-partner for whatever reason, but ... if you can't get over that for your child, I think there's something seriously, seriously wrong.

Against this backdrop, Elizabeth and Matthew reached a financial settlement allowing Matthew to rehouse and calculate child maintenance based on what Matthew could afford alongside a mortgage, which was less than Elizabeth's entitlement under the statutory formula. They also maintained flexible child arrangements. This had costs, as Matthew explained:

I'm not just managing my time and [child's] time but ... I'm working ... with Elizabeth and her partner, my partner, you know, and it's just almost like ... you can't, you can never please anybody any of the time almost is, is how it sometimes feels to me.

This is the antithesis of economic rationality. Working to reach arrangements that suit everyone expressly draws on other values, in stark contrast to Harman's description of *Homo economicus* 'using rational choice and cost-benefit calculation to the express exclusion of all other values and interests'.<sup>107</sup> Neither Elizabeth nor Matthew had control over their own life. Furthermore, both were prepared to sacrifice their financial entitlement for the good of the family. Elizabeth accepted less child maintenance and Matthew decided not to make a claim against a flat in Elizabeth's name to which he had contributed financially. Such an approach is not easy to achieve, particularly in situations of conflict, but it does resonate with research evidence about the shared care arrangements that work best for children. For example, it involves flexibility and sensitivity to children's needs.<sup>108</sup> It is, therefore, perhaps preferable to the more individualized approach favoured by the norms of economic rationality.

This discussion highlights the harms caused by the assumption of economic rationality in family law. It captures only one type of bargaining behaviour, disguising the financial sacrifices most commonly made by carers. This may cause financial harm to carers by failing to meet their needs. Furthermore, if economic rationality is treated as a norm for child arrangements, the danger is that children's needs may be overlooked, thereby causing harm to them too.

<sup>107</sup> Harman, op. cit., n. 62, p. 38.

<sup>108</sup> L. Trinder, 'Shared Residence: A Review of Recent Research Evidence' (2010) 22 *Child and Family Law Q.* 475.

### 3.3 | Freedom of choice

The final assumption of the neoliberal subject is that he has freedom of choice. The previous section discussed how caring responsibilities, the division of which is gendered in society, impact upon bargaining behaviours. This section reveals how those same caring responsibilities, and the gendered scripts informing their performance, restrict parents' choices. Alison's situation illustrates the issues well:

And he won't have the children. So ... I've just gone recently for a job interview and everything – don't know if I've got it but I ... had an interview – three days a week, all year round. And he's already said, 'I'm not having the kids. I can't have them all summer.' So, I felt *so* demoralized. I thought, what! What is the bloody point, you know. I'm trying, to, I want to get back to *more* work and reliable –

There are three dimensions to the bind faced by a former primary carer like Alison on separation. First, work history determines employment opportunities: even if Alison's ex-partner had shared care more equally, she would be constrained by past work experience. Second, my data suggest that even where children's time is spent more equally between parents post-separation, this does not necessarily translate into equal care. Third, relationship roles provide the baseline for negotiations on separation and afterwards. Each dimension is now considered in turn.

#### 3.3.1 | The impact of work history

Following the birth of her children, Alison described her position as follows:

I always had a job. I couldn't bear being in the house. I did ... the nine months [of] maternity leave and ... then ... if I couldn't get ... work ..., I'd do voluntary work. I'd do anything ...

This experience of fitting work around children was common for primary carers. In my study, all primary carers had reduced their hours or given up work during their relationships. The only primary breadwinner who had done this was Neil, who explained that 'when the kids were teeny tiny, I worked part time as well'. By contrast, breadwinners were more likely to use flexible working. This was often a benefit of seniority and recognized as unusual:

Matthew: [M]y employer [is] ... very understanding in that ... if I need to leave at short notice, ... it's not a problem. ... I think it's easier in my position, being a manager, in that ... I'm responsible for my own diary, my own time, ... I'm not doing the kind of work that needs me to be ... sat at a desk ... for 35 hours a week and ... there's a bit more flexibility ..., so, ultimately, as long as I'm kind of delivering what I need to do, it's not too much of a problem.

Neil: I could probably think of a dozen men that I know who are in a similar situation to me, but who don't enjoy the flexibility of employer, ... so ... they've just defaulted very, very quickly into being the sorts of fathers that ... see their children once every fortnight ... [M]y point is that ... the employer flexibility thing ... is absolutely crucial

in this. ... I couldn't possibly do what I do if I was working for an employer that wasn't prepared to do that.

Kenneth: I've got the sort of job where you're never really not working. ... [S]o I will either work very late, sometimes I will work from home, sometimes, whatever ... [T]he flip side of that is I have some flexibility ...

Flexibility is important for sharing care. However, it is vital to recognize the differences between this and the primary carers' positions. For the latter, the decision to work part time (or to give up work altogether) was made explicitly to reconcile paid work with care. It often entailed career sacrifices that could not be easily corrected post-separation. For example, Antonia explained the realization in her late twenties that her career was incompatible with having a family. She, therefore, retrained 'because I knew it was something I could do around the children'. Esther talked about dropping 'a whole banding, ... a whole pay grade' when she went back to work after maternity leave because 'my current role ... had moved somewhere which logistically I couldn't get to with ... doing nursery pick-ups and drop-offs'. These decisions have long-term financial implications.<sup>109</sup> Even if shared care is agreed post-separation, freeing up both parents to engage in paid work, past decisions shape future opportunities.

The flexibility arising from seniority is different. Not only might it carry fewer financial penalties, but it may be the product of seniority achieved because of the division of labour during a relationship. In these cases, a clean break on separation may make the carer's financial position very much worse while maintaining continuity for the breadwinner. Separation is not, therefore, a new start for carers, and the failure of neoliberal norms to reflect this may be financially harmful to them.

### 3.3.2 | The extent to which care is shared post-separation

Esther: I pick them up from school, ... feed them, ... take them to ... clubs, Beavers – you know, that type of thing. Yeah, I do all the running around and then he collects them after work. And literally ... like half an hour before bed, huh, clearly.

Shared care is sometimes seen as the answer to financial independence on separation as it allows both parents to work. However, there is limited research on how care is shared post-separation, even where time is shared.<sup>110</sup> The findings of my research lend support to the findings of earlier studies suggesting that care is not necessarily shared equally in such arrangements.<sup>111</sup>

Tronto distinguishes between recognizing a need for care ('caring about'), assuming some responsibility for responding to that need ('taking care of'), and performing the physical work of care ('caregiving').<sup>112</sup> This distinction matters because these roles carry different burdens.

<sup>109</sup> Costa Dias, *op. cit.*, n. 31.

<sup>110</sup> A. Newnham and M. Harding, 'Sharing as Caring? Contact and Residence Disputes between Parents' (2016) 28 *Child and Family Law Q.* 175.

<sup>111</sup> H. Davies, 'Shared Parenting or Shared Care? Learning from Children's Experiences of a Post-Divorce Shared Care Arrangement' (2015) 29 *Children & Society* 1; C. Lacroix, 'Freedom, Desire and Power: Gender Processes and Presumptions of Shared Care and Responsibility after Parental Separation' (2006) 29 *Women's Studies International Forum* 184.

<sup>112</sup> Tronto, *op. cit.*, n. 100, pp. 107–108.

Caregiving may require adapting working patterns to accommodate caring responsibilities. Caring about or taking care of, such as by providing financial support, do not necessarily have the same effects on one's ability to support oneself financially. Esther was not in a shared care arrangement, but her experience provides an important illustration of this difference and the potential financial implications. The child support formula provides a reduction based on the number of nights that a child spends with the non-resident (paying) parent. Esther's children's nights with their father would reduce his child support liability (although he did not in fact reduce his payments). However, Esther was performing the caregiving: she organized her work around being available to collect the children, even on nights that they stayed with their father. Thus, Esther could potentially suffer a double penalty: constraints on her ability to work, restricting her ability to support herself, and reduced child support, because of the time that the children spent with their father.

When it came to shared care arrangements, there were suggestions that even where time was shared equally, caregiving might not be. Elizabeth, Andrew, and Emily were all primary carers pre-separation with shared care arrangements afterwards. All continued to be primarily responsible for organizing things like doctor and dentist appointments, although the other parent might take the child to the appointment. As discussed in the section on economic rationality above, one explanation may be that these aspects of caring are invisible to the person not performing them. Commenting on clothing, for example, Elizabeth explained:

And we would both contribute to clothes and shoes ... and those sorts of things. And ... the reality of that [is] that ... I probably do pay for more. ... I've got a bigger income so I probably pay for more of the clubs and ... classes and things that [child] does. ... I probably do more of just the day-to-day, [child] needs another pair of trousers. It's me that notices so it tends to be me that gets them. ... [A]nd again, just because of the way that I'm paid and the fact that I have a little bit more spare cash, if it's a big expenditure quite often I'll pay for it and Matthew will pay me back for half sort of when he can afford to do that. But ... by and large certainly the official position – and I'm sure Matthew will ... say to you the actual position – is that ... we just try to meet [child's] financial outgoings equally.

This illustrates the complexity of caregiving. Tronto captures this in her discussion of care as a practice made up of four phases.<sup>113</sup> To care well is not just a question of spending time with children, but of noticing and responding to their needs. It is time consuming, can be mentally draining, and involves costs that may be invisible to the other parent. This is not well captured by individualist conceptions of autonomy. There is a risk of harm to children if their physical and emotional needs are not met in the arrangements reached, and to carers if their financial needs and emotional burden are unrecognized.

### 3.3.3 | Relationship roles as the baseline for negotiations

Turning to the third dimension of Alison's dilemma, the extract from her interview above typifies the predicament that carers can face when their ex-partners are unwilling to share care more equally post-separation: they cannot work more, making it more difficult to support themselves. Alison was not alone in wanting her ex-partner to play a greater role in her children's lives,

<sup>113</sup> Id.

although other participants did not make the link to their financial position explicitly. In a 2006 Australian study of parents in post-separation shared care arrangements, Lacroix observed that

mothers' participation was guaranteed in ways that the fathers' was not. Sharing after separation emerged from the context of sharing prior to it and choices the fathers made about whether, and to what extent, they would take on responsibility after separation.<sup>114</sup>

The attendant financial consequences of these so-called choices can be severe. As a former cohabitant, Alison's legal claims against her ex-partner were limited. While they negotiated an arrangement allowing her to remain in their property until the youngest of their children left home, Alison had an older disabled child who would need somewhere to live after that. Alison had no claims for maintenance for herself, and could not increase her earning capacity because her ex-partner would not increase his share of the care.

Thus, freedom of choice applies differently to breadwinners and carers. The breadwinner can choose whether or not to be more involved in their children's lives. Such decisions fit the neoliberal model of weighing up the costs and benefits of alternative courses of action.<sup>115</sup> By contrast, the carer's decisions about paid work and care are made within the framework of the breadwinner's decisions. If the breadwinner will not share care, the carer cannot work more.

Even where the law offers financial redress,<sup>116</sup> the discussion of bargaining power above reveals the effect of power imbalances on negotiations. Furthermore, where the breadwinner is unwilling to make financial provision, autonomy for the carer may involve not claiming, even if this leaves them financially vulnerable. If the breadwinner chooses to become more involved in their children's lives post-separation, this does not free the carer from the financial consequences of past decisions. The carer's work history may stop them from being able to support themselves through paid work. Finally, past unequal patterns of care may continue, even where children's time is divided more equally between their parents. Choices for the carer are not, therefore, the expression of free will assumed by neoliberal ideas.

## 4 | CONCLUSION

The findings of this research are important for family law and policy. First, focusing on the assumptions of individuals underpinning neoliberal policies reveals their failure to capture lived realities, and in particular the connections between financial and child arrangements where parents separate. These different assumptions cause specific harms. Cumulatively, these harms reveal the complexity of family life and the extent to which neoliberal policies fail to account for caring relationships. This causes harm by devaluing care.

Turning first to these specific harms, this research provides empirical insights into bargaining dynamics on separation, providing a corrective to the neoliberal assumption of equal bargaining

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<sup>114</sup> Lacroix, *op. cit.*, n. 111, p. 190.

<sup>115</sup> Lemke, *op. cit.*, n. 39.

<sup>116</sup> On divorce, it would be possible to argue for financial provision based on the financial needs resulting from caring responsibilities. Furthermore, in very rare cases, it might be possible to make a claim for compensation for the loss of career. There are no such options for cohabitants.



power. This has implications for the growth of private ordering in family law: if individuals are not equally placed to negotiate, then it may be harmful to encourage them to do so without support mechanisms. These findings may also be relevant for mediation, where existing work warns of the need for effective screening of domestic abuse<sup>117</sup> and the need to compensate for power imbalances between parties.<sup>118</sup>

Relatedly, this research reveals that the desire to be financially independent from an ex-partner may be strongest for those who are least able to achieve it. This desire for independence appears, however, to be underpinned by assumptions of state financial support. This highlights the importance of looking at family law and policy holistically: if private ordering results in uneven financial settlements on separation, it is vital for the state to support carers and children. Such a role for the state conflicts with the norms of neoliberal autonomy, which favour a more restricted role. Therefore, these norms may cause financial harm if the safety net for carers and children is inadequate.

Second, this research illustrates that the economic rationality assumed to characterize bargaining captures only one sub-set of bargaining behaviours: those more commonly exhibited by breadwinners. In particular, it suggests that carers' decisions may be more likely to be informed by children's needs, even where this causes them financial detriment personally. This is disguised by neoliberal norms, and provides another important counter to moves towards private ordering. My empirical findings also provide insights into the bigger question of whether economic rationality in family law is desirable. It is suggested that when it comes to child arrangements, a more relational approach, taking account of the specific needs of the individuals (parents and children) concerned, is preferable, and that an approach guided by individualized ideas of autonomy may be harmful in failing to do so.

Finally, this research provides insights into the complexity of family decision making, challenging assumptions of freedom of choice. My findings reveal the tension between the desire to start afresh on separation, epitomized by the desire for financial independence from a former partner, and the reality that past decisions shape future opportunities. This is important for both financial and child arrangements post-separation. As regards the former, this research adds to existing critiques of proposed reforms to financial remedies law, which seek to limit financial claims on divorce.<sup>119</sup> As regards the latter, the research suggests that even in shared time arrangements care may not be shared equally. Consequently, there is a need to think more deeply about what it means to care, and perhaps to move away from focusing solely on the division of a child's time.

Taken together, these findings call for a rethink of the principles underpinning family law. Neoliberal norms of autonomy fail to capture the realities of family life and obfuscate the position of carers, whose financial position is connected to their caring responsibilities. In casting caring decisions as choices for which the carer is responsible, family decisions are disguised and care is devalued. These norms also fail to recognize children's needs, which are individual and changing, and therefore require a more holistic legal approach.

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<sup>117</sup> See n. 88.

<sup>118</sup> Kelly, *op. cit.*, n. 78.

<sup>119</sup> Heenan, *op. cit.*, n. 38; Hitchings and Miles, *op. cit.*, n. 6; Thompson, *op. cit.*, n. 70.

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