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Anna Heenan\*

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### Abstract

*There is a tension at the heart of family law between neoliberal ideas of autonomy, which assume freedom of choice and promote economic independence, and the demands of caring for children. This article considers this tension in the context of proposed reforms to the law of financial provision on divorce. Drawing on lessons from Sweden, considered a global leader when it comes to gender equality, this article explores two central claims underpinning the proposals for reform. First, that reforming the law will increase gender equality in society, and, second, that neoliberal autonomy would be a desirable guiding principle for the law of financial remedies in a more gender equal society. Both claims are rejected. Instead, it is suggested that gender equality cannot be achieved without state intervention. Even then, if families are to have a genuine choice about how to arrange their lives, the law of financial remedies on divorce must retain the flexibility to respond to the costs of caring.*

**Keywords:** financial remedies, financial remedy reform, autonomy, equality, care

### Introduction

Which comes first – equality at work, affordable childcare and flexible working patterns, or reformed spousal support? ... there is “something fundamentally repulsive about the whole idea of dependent women”. And I think that it is only when a reformed financial provision and property law based on equality is promoted that women will push for, and achieve better working conditions and more respect. This is what has come about in other jurisdictions with more equal law. I believe that after one more generation there will be nothing controversial about my Bill.<sup>1</sup>

What does gender equality look like in the twenty-first century, and what is the interplay between family law and gender equality in society? For Baroness Deech, gender equality is linked to economic independence. She believes that reforming the law of financial provision to assume such

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<sup>1</sup> R Deech, ‘Financial Provision Reform’ [2018] Fam Law 1251.

independence is necessary to push women to achieve it, and that this will increase gender equality in society. Further, she suggests that England and Wales should follow the example of other jurisdictions that have reformed their law in this way. This article challenges these assertions and shows why reforming the law of financial provision based on these assumptions is likely to perpetuate, rather than erode, gender inequalities on divorce in England and Wales.

In England and Wales, there is a tension between the law of financial remedies, which increasingly promotes the financial independence of spouses on divorce, and the way in which parents in intact families divide childcare responsibilities between them. Within intact families, it is common for fathers to work full-time and mothers to work part-time and perform a greater share of childcare responsibilities.<sup>2</sup> When parents separate, this division of responsibilities is problematic. Increasingly, there is an emphasis on both parties becoming financially independent following separation. However, whereas the breadwinner may be able to support him- or herself financially following separation, part-time work has long-term financial repercussions,<sup>3</sup> which can interfere with the ability of the caretaker to be economically self-sufficient.

Alison Diduck considers that family law's role is to determine the value of the compromises people make for the sake of their family, and of the care they perform, and to decide who is responsible for paying for the financial consequences of those compromises.<sup>4</sup> Debates around reforming the law of financial remedies reflect very different ideas about how the law should recognise the economic impact of childcare responsibilities. The view outlined in the opening quotation is consistent with a neoliberal view of autonomy in family law, which is becoming increasingly influential. This is discussed further below, but, in short, such a view assumes that spouses make economically rational

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<sup>2</sup> See, for example, ONS, 'Women shoulder the responsibility of unpaid work' (*ONS Digital*, 10 November 2016) <http://visual.ons.gov.uk/the-value-of-your-unpaid-work/>, last accessed 8 January 2020, which suggests that women perform 60% more unpaid work than men and ONS, 'Women in the labour market: 2013' (25 September 2013) [www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/womeninthelabourmarket/2013-09-25](http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/womeninthelabourmarket/2013-09-25), last accessed 8 January 2020, which suggests that women with children are less likely to work than those without (the reverse is true for men); and ONS, 'Families in the labour market, UK: 2019' (24 October 2019) [www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/familiesandthelabourmarketengland/2019](http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/familiesandthelabourmarketengland/2019), last accessed 8 January 2020, which suggests that 3 in 10 mothers compared to 1 in 10 fathers had reduced their working hours because of childcare responsibilities. See also Eurostat, 'Part-time employment as percentage of the total employment, by sex and age' <https://bit.ly/2ZAMqbe>, last accessed 6 July 2020, which suggests that in the UK 38.6% of women work part-time compare to 9.6% of men (cf in Sweden, 31.6% of women and 11.7% of men work part-time).

<sup>3</sup> M Costa Dias, R Joyce and F Parodi, 'The gender pay gap in the UK: children and experience in work' (*IFS*, February 2018), [www.ifs.org.uk/uploads/publications/wps/MCD\\_RJ\\_FP\\_GenderPayGap.pdf](http://www.ifs.org.uk/uploads/publications/wps/MCD_RJ_FP_GenderPayGap.pdf), last accessed 19 March 2020, 22-3.

<sup>4</sup> A Diduck, 'What is Family Law For?' (2011) 64 *Current Legal Problems* 287, 314.

decisions in their own (individual) best interests, and that the decision to care for children is a freely made choice. On this view, those who care for children, still primarily women in England and Wales,<sup>5</sup> must be incentivised to push for ‘better working conditions and more respect’.<sup>6</sup> Further, spouses should not be expected to support one another financially after divorce. The opposing view disputes this understanding of childcare responsibilities, instead understanding caretaking decisions as at least partly shaped by social structures, such as the availability of childcare,<sup>7</sup> and / or cultural norms, such as those around motherhood and care.<sup>8</sup> It is also argued that the law should be able to share the ‘economic impact of marriage, child-raising and divorce fairly between the spouses, in the context of the reality of the lives that people lead’.<sup>9</sup>

This debate epitomises a central challenge for modern family law. Whilst neoliberal ideas of autonomy are increasingly influential,<sup>10</sup> they fail to capture the reality of people’s lives. For example, choice rhetoric fails to recognise the continued gendered division of caretaking responsibilities in society<sup>11</sup> and the gendered images of mothers and fathers that accompany them.<sup>12</sup> Thus, as Lucinda Buckley explains, neoliberal autonomy ‘reinforces the gendered division of labour, while disguising how the costs of childrearing and caring work are generally allocated to women’.<sup>13</sup> Such visions of autonomy also, therefore, fail to account for power imbalances between those in a relationship arising from the different roles they have played within that relationship.<sup>14</sup>

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<sup>5</sup> See, for example, all ONS sources cited at n 2, above.

<sup>6</sup> R Deech, ‘Financial Provision Reform’ [2018] Fam Law 1251.

<sup>7</sup> See, for example, J Lewis, ‘Gender and the Development of Welfare Regimes’ (1992) 2 *Journal of European Social Policy* 159, R Crompton and C Lyonette, ‘The new gender essentialism – domestic and family ‘choices’ and their relation to attitudes’ (2005) 56 *The British Journal of Sociology* 601.

<sup>8</sup> See, for example, B Pfau-Effinger, ‘Gender cultures and the gender arrangement – a theoretical framework for cross-national gender research’ (1998) 11 *Innovation: The European Journal of Social Science Research* 147 and M Kremer, *How Welfare States Care* (Amsterdam University Press, 2007).

<sup>9</sup> E Hitchings and J Miles, ‘Financial Provision Reform’ [2018] Family Law 1358.

<sup>10</sup> See, for example, A Barlow, R Hunter, J Smithson and J Ewing, *Mapping Paths to Family Justice* (Palgrave 2017), Felicity Kaganas, ‘Justifying the LASPO Act: authenticity, necessity, suitability, responsibility and autonomy’ (2017) 39 *Journal of Social Welfare and Family Law* 168, J Mant, ‘Neoliberalism, family law and the cost of access to justice’ (2017) 39 *Journal of Social Welfare and Family Law* 246, and A Diduck, ‘Autonomy and family justice’ [2016] *CFLQ* 133, 134.

<sup>11</sup> See n 5, above.

<sup>12</sup> See, for example, J Curtice, E Clery, J Perry, M Phillips and N Rahim (eds) *British Social Attitudes 36* (2019) <[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)> accessed 28 October 2019, for gendered social attitudes to dividing childcare. For a discussion of the different expectations of the care performed by mothers and fathers see, for example, C Smart, ‘The Legal and Moral Ordering of Child Custody’ (1991) 18 *Journal of Law and Society* 485 and E Dermott, *Intimate Fatherhood A Sociological Analysis* (Routledge 2008).

<sup>13</sup> L Buckley, ‘Relational Theory and Choice Rhetoric in the Supreme Court of Canada’ (2015) 29 *Canadian Journal of Family Law* 251, 258-9.

<sup>14</sup> See, for example, S Thompson, *Prenuptial agreements and the presumption of free choice: issues of power in theory and practice* (Hart, 2015).

This article provides a different perspective on these debates. It uses Sweden, widely considered a leader in gender equality,<sup>15</sup> as a lens through which to consider whether, in a more gender equal society, neoliberal autonomy might be a desirable guiding principle for financial remedy reform. A Swedish perspective has been considered in the context of post-separation child arrangements,<sup>16</sup> but no recent work looks specifically at the law of financial remedies.<sup>17</sup> Given the asserted connection between neoliberal ideas of autonomy and gender equality, Sweden's role as a world leader in gender equality makes it an important case study when thinking about how family law intersects with gender equality in society. Is, as Deech claims, pushing women to achieve better working conditions and more respect the key to achieving gender equality?

This is not to say that Swedish family law is neoliberal. As will be discussed below, the underlying ethos of family law, and other social policy, reforms since the 1920s has sought to balance economic independence for men and women with protection for the financially weaker party.<sup>18</sup> Rather, Sweden provides an example of a more gender equal country in which the norms of neoliberal autonomy may be less problematic. Thus, the aim is not to look to Sweden for reform ideas per se, but rather as a way of testing the assumptions of reforms inspired by neoliberal ideas of autonomy in England and Wales.

The article begins by outlining the family law and policy context in England and Wales. It considers the growing influence of neoliberal ideas of autonomy. It then explores two central claims underpinning the proposed reforms of financial remedies law based on those ideals: first, that reforming this branch of the law will create greater gender equality in society, and, second, that neoliberal autonomy would be an appropriate guiding principle for reform of financial remedies law in a more gender equal society. Both claims are rejected.

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<sup>15</sup> Different gender equality rankings consider different things when assessing the issue. The EU gender equality index, for example, bases Sweden's top position on the relative gaps in attainment between men and women in six areas: work, money, knowledge, time, power and health (the UK ranks fifth): see EIGE, 'Gender Equality Index 2019: Sweden' <https://eige.europa.eu/publications/gender-equality-index-2019-sweden>, last accessed 5 June 2019. The World Economic Forum ranked Sweden fourth globally on the basis of gender-gaps in four categories: economic participation and opportunity, educational attainment, health and survival and political empowerment (the UK ranks 21st): see World Economic Forum, 'Global Gender Gap Report 2020' [www3.weforum.org/docs/WEF\\_GGGR\\_2020.pdf](http://www3.weforum.org/docs/WEF_GGGR_2020.pdf), last accessed 5 June 2020.

<sup>16</sup> See, for example, A Newnham, 'Shared residence; lessons from Sweden' [2011] *CFLQ* 251 and S Harris-Short, 'Building a House Upon Sand: Post-Separation Parenting, Shared Residence and Equality – Lessons from Sweden [2011] *CFLQ* 344.

<sup>17</sup> See, however, D Bradley, *Family Law and Political Culture* (Sweet & Maxwell, 1996) and D Bradley, 'Sexual Equality and Maintenance Allowances in Sweden' (1989) 9 *OJLS* 403.

<sup>18</sup> M Brattström, *Makars Pensions-Rättigheter* (Uppsala University, 2004), 317.

The Swedish experience lends limited support to the idea that reforming family law alone can promote gender equality in society. Reforms to Swedish family law have been accompanied by sustained efforts to promote gender equality more broadly. These include measures to support the reconciliation of paid work and care, such as generous parental leave and subsidised state childcare. It is, therefore, misleading to look at family law measures in isolation.

More fundamentally, it is suggested that even in a more gender-equal society like Sweden, neoliberal autonomy is problematic as a principle for financial remedy reform. The goal of financial independence on divorce is incompatible with freedom of choice about how to share care within intact families, unless a role for the state is assumed. The longer-term financial consequences of part-time work mean that those who do sacrifice their career for children will be less able than breadwinners to support themselves financially when marriages end. Unless the state helps to support caretakers and their children financially, the result may be to leave those individuals in very financially precarious positions.

#### **The law of financial remedies in England and Wales: a very brief introduction**

Before considering the arguments for reform, it is important to understand the legal framework. In England and Wales, marriage, per se, has no effect on how spouses hold property, but on divorce a court has a wide discretion about how to distribute economic resources between them based upon statutory and case law principles. The court is directed to reach a fair result.<sup>19</sup> Fairness means ensuring that the parties' needs are met and, if there is any surplus above the amount required to meet those needs, that any relationship-generated disadvantage is compensated for and the fruits of the marital partnership are otherwise shared between the parties.<sup>20</sup> In deciding what is fair, the court is directed to consider a list of factors outlined in s 25 of the Matrimonial Causes Act 1973 and to consider whether it would be appropriate to achieve a clean break.<sup>21</sup> Unlike the position in Sweden, outlined below, capital, income and pensions are dealt with holistically in England and Wales, and the resources can be offset against one another to achieve an overall 'package deal'. For example, one spouse may receive a greater share of the capital assets in return for not receiving any spousal maintenance or a share of the other spouse's pension.

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<sup>19</sup> *White v White* [2000] UKHL 54.

<sup>20</sup> *Miller v Miller ; McFarlane v McFarlane* [2006] UKHL 24.

<sup>21</sup> Matrimonial Causes Act 1973, s 25A.

The Divorce (Financial Provision) HL Bill (2019-21) (the Bill)<sup>22</sup> proposes reform of financial remedies law that is influenced by a neoliberal idea of autonomy. In short, it proposes three main changes. First, it seeks to limit the division of assets on divorce to matrimonial property,<sup>23</sup> i.e. property acquired during a marriage other than by gift or inheritance.<sup>24</sup> Currently, all property owned by either spouse falls within the courts' powers under the Matrimonial Causes Act 1973, although in cases where assets exceed needs, arguments can be made about excluding 'non-matrimonial property'. Secondly, the Bill creates binding pre-nuptial agreements;<sup>25</sup> currently such agreements are persuasive but not binding.<sup>26</sup> Thirdly, it seeks to limit the term of periodical payments to five years, unless serious financial hardship can be established.<sup>27</sup> Whilst periodical payments are relatively rare in practice,<sup>28</sup> the courts currently have discretion to make periodical payments for any period, including until either spouse dies, if this is required by the circumstances of the case. As will be discussed below, these reforms would make the position under English and Welsh law more like the position in Sweden, by restricting periodical payments and dividing assets equally, rather than dividing according to the principles of need, compensation and sharing. By contrast, however, in Sweden, subject to the exceptions discussed below, all assets, and not only matrimonial assets, would normally be divided equally. Moreover, the Bill's changes are proposed against a backdrop of very different social structures to those in Sweden.

This article focuses on the theoretical underpinnings of these reform proposals, and specifically the neoliberal idea of autonomy they embody. The next section explores in greater depth neoliberal ideas of autonomy and their influence across family law to understand the rationale for the reforms.

### **Neoliberal autonomy and family law in England and Wales**

Neoliberalism is not only an economic policy but also an ideology that considers that political and social concerns should be organised by reference to market principles<sup>29</sup> such as 'competition,

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<sup>22</sup> At the time of writing, this Bill was introduced by Baroness Shackleton on 20 January 2020. The provisions, however, mirror those of Bills with the same name introduced by Baroness Deech in previous parliamentary sessions.

<sup>23</sup> Divorce (Financial Provision) HL Bill (2019-21), cl 2.

<sup>24</sup> *Ibid*, cl 2.

<sup>25</sup> *Ibid*, cl 3.

<sup>26</sup> *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42.

<sup>27</sup> Divorce (Financial Provision) HL Bill (2017-19), cl 5.

<sup>28</sup> E Hitchings and J Miles, 'Financial remedies on divorce: the need for evidence-based reform' (2018) [www.nuffieldfoundation.org/sites/default/files/files/briefing%20paper%20Jun%202018%20FINAL.pdf](http://www.nuffieldfoundation.org/sites/default/files/files/briefing%20paper%20Jun%202018%20FINAL.pdf), last accessed 8 January 2020.

<sup>29</sup> W Brown, 'American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization' (2006) 34 *Political Theory* 690, 694.

economic efficiency and choice'.<sup>30</sup> This vision is accompanied by a 'minimalist state',<sup>31</sup> which favours the privatisation and deregulation of welfare services.<sup>32</sup> Neoliberalism also has a vision for the individual, which emphasises 'hyperindividuality',<sup>33</sup> personal responsibility<sup>34</sup> and economic self-sufficiency.<sup>35</sup> Citizens are considered '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>36</sup> Underlying this is an assumption of a "capable adult", unbound by structural constraints, who needs "activating".<sup>37</sup>

Diduck suggests that two different dimensions of autonomy are expressed in the family justice system:

The first expression is structural and procedural. It relates to the creation of an autonomous system of dispute resolution that is separate from and runs parallel with the formal justice system.<sup>38</sup> The second expression is conceptual and relates to assumptions about a particular kind of individual autonomy that must be activated and allowed to flourish in family justice.<sup>39</sup>

The second dimension is the focus here; the reforms proposed by the Bill are concerned with shaping the law to express a norm of individual autonomy, rather than with creating an autonomous system of dispute resolution. Martha Fineman explains that '[a]utonomy is the absence of economic dependence on outsiders, particularly the government.'<sup>40</sup> It is this vision that leads Diduck to

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<sup>30</sup> W Larner, 'Neo-liberalism: Policy, Ideology, Governmentality' (2000) 63 *Studies in Political Economy* 5, 5.

<sup>31</sup> Ibid.

<sup>32</sup> N Fraser, 'Feminism, Capitalism and the Cunning of History' (2009) 56 *New Left Review* 97, 107 and W Larner, 'Neo-liberalism: Policy, Ideology, Governmentality' (2000) 63 *Studies in Political Economy* 5, 5.

<sup>33</sup> S McLean, 'Individual Autonomy or Social Engagement? Adult Learners in Neoliberal Times' (2015) 65 *Adult Education Quarterly* 196, 200.

<sup>34</sup> See, for example, N Fraser, n 32 above, 107.

<sup>35</sup> M Fineman, *The Autonomy Myth A Theory of Dependency* (The New Press, 2004), XVI.

<sup>36</sup> W Brown, n 29 above, 694.

<sup>37</sup> K Brown, 'Re-moralising "vulnerability"' (2012) 6 *People Place and Policy Online* <<https://extra.shu.ac.uk/ppp-online/re-moralising-vulnerability-2/>> accessed 26 September 2018

<sup>38</sup> For discussion of how this aspect of neoliberalism can be seen in family law, see, for example, A Barlow, R Hunter, J Smithson and J Ewing, *Mapping Paths to Family Justice* (Palgrave, 2017), F Kaganas, 'Justifying the LASPO Act: authenticity, necessity, suitability, responsibility and autonomy' (2017) 39 *Journal of Social Welfare and Family Law* 168 and J Mant, 'Neoliberalism, family law and the cost of access to justice' (2017) 39 *Journal of Social Welfare and Family Law* 246.

<sup>39</sup> A Diduck, 'Autonomy and family justice' [2016] *CFLQ* 133, 134.

<sup>40</sup> M Fineman, *The Autonomy Myth A Theory of Dependency* (The New Press, 2004),9.



describe autonomy as the friendly face of individual responsibility.<sup>41</sup> This is reflected in Buckley's view of how families are seen within a neoliberal paradigm:

In the family context, neoliberalism reinterprets conduct based on relational values (such as love and altruism) in the language of rationality and self-interest. It also privatizes welfare considerations, including caring responsibilities. Families are essentially expected to be both self-governing and self-sufficient, rather than relying on state support.<sup>42</sup>

However, this vision does not correspond with the way that marriage seems to be perceived in either England and Wales or Sweden. In England and Wales, research looking at cohabitants suggests the importance of marriage lies in its public display of the parties' relationship<sup>43</sup> and that people tend to be optimistic, rather than economically rational, when thinking about their own relationships.<sup>44</sup> Similarly, in Sweden, Margareta Brattström explains that 'the rules governing spouses' property should operate in a context where marriage is deemed to constitute a community in which the spouses' division of work and expenditure is determined by other factors than the acquisition of maximum financial gain for each party'.<sup>45</sup>

This disconnect between visions of marriage and neoliberal ideals is particularly clear in the post-separation family. For example, the neoliberal vision of financial independence described above is evident in the increasing numbers of clean break orders made by the courts.<sup>46</sup> It is even more visible in the ethos underpinning the Bill. Deech has argued, '[i]f 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>47</sup> This idea of autonomy is closely linked to financial independence: being autonomous means being able to manage without a man. This does not necessarily demand that a woman be able to support herself financially; she could instead gain independence through reliance on the state. However, such a position would be

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<sup>41</sup> A Diduck, 'Autonomy and Vulnerability in Family Law: the missing link' in Wallbank J and Herring J (eds) *Vulnerability, Care and Family Law* (Routledge 2013), 96.

<sup>42</sup> L Buckley, 'Relational Theory and Choice Rhetoric in the Supreme Court of Canada' (2015) 29 *Canadian Journal of Family Law* 251, 258-9.

<sup>43</sup> S Duncan, A Barlow and G James, 'Why don't they marry? Cohabitation, commitment and DIY marriage' [2005] *CFLQ* 383.

<sup>44</sup> A Barlow and J Smithson, 'Legal assumptions, cohabitants' talk and the rocky road to reform' (2010) 22 *CFLQ* 328, 331.

<sup>45</sup> M Brattström, *Makars Pensions-Rättigheter* (Uppsala University, 2004), 317

<sup>46</sup> E Hitchings and J Miles, 'Financial remedies on divorce: the need for evidence-based reform' (2018) [www.nuffieldfoundation.org/sites/default/files/files/briefing%20paper%20Jun%202018%20FINAL.pdf](http://www.nuffieldfoundation.org/sites/default/files/files/briefing%20paper%20Jun%202018%20FINAL.pdf), last accessed 8 January 2020.

<sup>47</sup> R Deech, 'Financial Provision Reform' [2018] *Fam Law* 1251, 1251-2.

incompatible with the vision of neoliberal autonomy, which envisages a more limited role for the state.

Autonomy is also associated with choice. As discussed above, neoliberal visions of autonomy assume that individuals are rational economic actors who make decisions in their own self-interest. The idea of choice is, however, problematic when it comes to decisions around childcare. First, as will be discussed further in the Swedish context below, the choices parents make around care of their children are shaped by cultural and structural factors. Culturally, ideas of motherhood and fatherhood are different in both England and Wales and Sweden, and these ideas inform the choices that people make. Structurally, factors such as the cost and availability of childcare affect the range of decisions open to parents. Second, and relatedly, as Jane Lewis explains, the choices made by mothers and fathers are intertwined:

Allied to choice for mothers is the issue of enabling choice for fathers, in and of itself, but also because fathers' choices (for example, to work long hours) constrain those of mothers.<sup>48</sup>

This is compounded on separation. As noted in the introduction, the decisions people make about how to divide paid work and childcare can have long-term financial consequences. This matters less in an intact family, where parties are optimistic and decisions are made in the interests of the unit as a whole, than in the post-separation family, where both partners need to find a way to be economically independent. Even if care is shared more equally post-separation, it will not necessarily correct the difference in the parties' respective incomes arising from a previously unequal division of care.

Nevertheless, the proposed reforms are underpinned by an idea of choice. As Deech has explained in another context:

The strongest argument in favour of maintenance is that the divorced wife will have raised children and her career has been undermined by marriage. Given that most women work,

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<sup>48</sup> J Lewis, 'Childcare Policies and the Politics of Choice' (2008) 79 *The Political Quarterly* 499, 506.

this is a matter of choice; childcare does not take up the whole of a long marriage; and the wealthier the spouses the less likely that there was much to do by way of housework.<sup>49</sup>

Whilst most women in England and Wales do work, as explained above, they are more likely to work part-time than men,<sup>50</sup> which has financial consequences on separation.<sup>51</sup> It is also notable that the gender pay gap in England and Wales was 17.3% in 2019.<sup>52</sup> Sweden has made concerted efforts to introduce policies to promote gender equality, many of which are concerned with the reconciliation of paid work and care..

The following discussion explores Swedish family law and policy to interrogate two related claims underpinning the reforms proposed in the Bill. The first, encapsulated in the opening quotation, is that equality follows the law. If the law is reformed to assume financial independence, then women will be encouraged to push for that equality in society more widely. The second is that a neoliberal vision of autonomy is an appropriate guiding principle for the law in a more gender equal society.

### Sweden: law and context

Before considering Swedish law in more detail, it is important to recognise the differences between the Swedish and English and Welsh legal systems. Whereas ‘a matrimonial property regime<sup>53</sup> is an institution unknown to English law’,<sup>54</sup> Sweden has a deferred community of property regime<sup>55</sup> under which each spouse owns his or her own property and is responsible for his or her own debts, but

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<sup>49</sup> R Deech, ‘It’s time to update our divorce laws’ *The Guardian* (15 September 2019) [www.theguardian.com/commentisfree/2009/sep/15/divorce-law-maintenance-update](http://www.theguardian.com/commentisfree/2009/sep/15/divorce-law-maintenance-update), last accessed 8 January 2020.

<sup>50</sup> See, for example, ONS sources cited at n 2, above.

<sup>51</sup> H Fisher and H Low, ‘Recovery from divorce: comparing high and low income couples’ (2016) 30 *International Journal of Law, Policy and the Family* 338 and M Brewer and A Nandi, ‘Partnership dissolution: how does it affect income, employment and well-being?’ (*Institute for Social & Economic Research*, September 2014) [www.iser.essex.ac.uk/research/publications/workingpapers/iser/2014-30.pdf](http://www.iser.essex.ac.uk/research/publications/workingpapers/iser/2014-30.pdf), last accessed 26 September 2018.

<sup>52</sup> ONS, ‘Gender pay gap in the UK: 2019’ [www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2019#main-points](http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2019#main-points), last accessed 4 June 2020.

<sup>53</sup> Described by Cooke et al as ‘the systematic organisation by the law of property rights that result as an automatic consequence of certain relationships – traditionally marriage and more recently registered partnerships’: E Cooke, A Barlow and T Callus, ‘Community of Property A Regime for England and Wales?’ (The Nuffield Foundation, 2006), 1.

<sup>54</sup> S Cretney, J Masson and R Bailey-Harris, *Principles of Family Law* (Sweet & Maxwell, 2002), 102.

<sup>55</sup> Note that spouses can specify in a pre-nuptial agreement that property is separate property, which means it will fall outside of deferred community. Provided that a pre-nuptial agreement is signed by both spouses and registered with the National Tax Agency it will generally be upheld. Legal advice and financial disclosure are not required. See M Jänterä-Jareborg, ‘Marital Agreements and Private Autonomy in Sweden’ in J Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart, 2012).

each spouse has a right to claim half of the marital property's net value at the end of the marriage.<sup>56</sup> Unlike the position in England and Wales, where income, capital and pensions claims are dealt with together, the rules of the Swedish matrimonial property regime operate separately from the law on spousal maintenance. However, the property share a spouse receives will affect their need for maintenance. Spousal maintenance is generally only possible for a transitional period, unless a spouse has difficulty in supporting him or herself after a long marriage or there are extraordinary reasons.<sup>57</sup> While pensions theoretically fall within community of property, in practice most are exempt from that community because they cannot be transferred and 'some special reason exists that can justify the exemption of those rights from the division of property'.<sup>58</sup> Spouses' pensions are, however, taken into account in the assessment of whether maintenance should be paid.<sup>59</sup>

Under the deferred community regime, marital property comprises all property that is not separate (as defined in section 7:2 of the Marriage Code).<sup>60</sup> If the donor specifies that a gift or inheritance is separate property then these will be excluded, otherwise they will be divided equally.<sup>61</sup> Personal property, which includes clothing, damages for personal injuries and personal presents that a spouse has received, can be excluded 'to a reasonable extent'.<sup>62</sup> It is possible to depart from the equal division of marital property in marriages of less than 5 years.<sup>63</sup> However, this seems to be unusual in practice.<sup>64</sup>

Spousal maintenance in Sweden is very rare indeed. Like, the Bill's proposed reforms, David Bradley has noted that changes to the law in Sweden to restrict spousal maintenance were part of 'a conscious and deliberate effort to promote sexual equality'.<sup>65</sup> Caroline Sörgjerd explains that

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<sup>56</sup> Couples in Europe, 'Couples in Sweden' (Notaries of Europe, European Notarial Network and Uni Graz, 2012) [www.coupleseurope.eu/en/sweden/topics](http://www.coupleseurope.eu/en/sweden/topics), last accessed 10 October 2018.

<sup>57</sup> Commission on European Family Law, 'Marriage Code of Sweden' (Official translation by the Swedish Government with amendments since 1994 unofficially translated by M Jänterä-Jareborg), 6:7 <http://ceflonline.net/wp-content/uploads/Sweden-Divorce-Legislation.pdf>, last accessed 9 January 2020.

<sup>58</sup> M Brattström, *Makars Pensions-Rättigheter* (Uppsala University, 2004), 318.

<sup>59</sup> Commission on European Family Law, 'Marriage Code of Sweden' (Official translation by the Swedish Government with amendments since 1994 unofficially translated by M Jänterä-Jareborg), 6:7 and 6:8, <http://ceflonline.net/wp-content/uploads/Sweden-Divorce-Legislation.pdf>, last accessed 9 January 2020.

<sup>60</sup> L Carlson, *Fundamentals of Swedish Law* (2nd edition, studentlitteratur Ab, 2012), 207.

<sup>61</sup> M Jänterä-Jareborg, M Brattström and K Walleng, 'Property relationship between spouses: National report: Sweden' (CEFL, October 2008) <http://ceflonline.net/wp-content/uploads/Sweden-Property.pdf>, last accessed 29 September 2017, 13.

<sup>62</sup> *Ibid*, 13-14.

<sup>63</sup> *Ibid*, 30.

<sup>64</sup> See the accounts of Swedish lawyers discussed in A Heenan, 'Equal Sharing and Unequal Caring? How should family law and policy take account of caretaking responsibilities on parental separation?' (DPhil thesis, University of Exeter 2019).

<sup>65</sup> D Bradley, 'Sexual Equality and Maintenance Allowances in Sweden' (1989) 9 *OJLS* 403, 415.

‘financial independence after divorce was made the guiding principle, which signalled to society that this was the desirable goal to strive for’,<sup>66</sup> albeit that only 25% of all married women were financially independent at the time.<sup>67</sup> Spousal maintenance remained available but ‘primarily for a transitional period following the divorce’.<sup>68</sup> The Marriage Code provides that ‘[f]ollowing divorce, each spouse shall be responsible for his or her own support.’<sup>69</sup> Spouses are, therefore, treated ‘as two capable and independent individuals’<sup>70</sup> in Sweden, ‘each responsible for his or her own material well-being’.<sup>71</sup>

The law relating to spousal maintenance in Sweden is, therefore, very different from the discretionary approach in England and Wales guided by the principle of fairness. Instead, Swedish family law can be seen as embodying the sort of neoliberal autonomy that Deech favours (although Swedish law is less restrictive than the Bill’s proposals, since it shares all property, not just ‘matrimonial property’). It is, however, important to see Swedish family law in the context of wider social and legal policy measures. For example, an individual income tax regime was introduced in 1971<sup>72</sup> to try to increase women’s economic autonomy. As Åsa Gunnarsson explains:

A basic fundament in the Swedish welfare state is the recognition of the lack of sex equality produced by the division of paid market labour and unpaid domestic work. This division is officially resisted by a political strategy to promote the reconciliation of paid work and family life in a dual-earner family. Individual obligations via income tax, and individual social rights based on earnings-related social security schemes are measures that, as one of several objectives, aim to increase economic autonomy for married women.<sup>73</sup>

Workforce participation is also facilitated by generous parental leave and public daycare provision.<sup>74</sup> Sweden was the first country to introduce paid parental leave for fathers in 1974,<sup>75</sup> when a gender-

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<sup>66</sup> C Sörgjerd, *Reconstructing Marriage* (Intersentia, 2012), 111.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> Commission on European Family Law, ‘Marriage Code of Sweden (Official translation by the Swedish Government with amendments since 1994 unofficially translated by M Jänterä-Jareborg) <http://ceflonline.net/wp-content/uploads/Sweden-Divorce-Legislation.pdf>, last accessed 15 November 2017.

<sup>70</sup> C Sörgjerd, *Reconstructing Marriage* (Intersentia, 2012), 110.

<sup>71</sup> *Ibid.*, 111.

<sup>72</sup> Å Gunnarsson, ‘Introducing independent income taxation in Sweden in 1971’ (2016) FairTax Working Paper Series No. 2, Forum for Studies on Law and Society <https://umu.diva-portal.org/smash/get/diva2:930244/FULLTEXT01.pdf>, last accessed 19 March 2020.

<sup>73</sup> *Ibid.*, 5.

<sup>74</sup> The Official Site of Sweden, ‘10 things that make Sweden family friendly’ (last updated 22 October 2018) <https://sweden.se/society/10-things-that-make-sweden-family-friendly/>, last accessed 7 August 2019.

neutral parental leave replaced maternity allowance.<sup>76</sup> Today, where both parents have parental responsibility, 480 days of leave is notionally divided equally between them, which can be taken until the child is 8.<sup>77</sup> Additionally, parents are entitled to up to 120 days of temporary parental leave enabling them to take time off work when children under 12 are sick.<sup>78</sup> Of the 480 days of parental leave, 90 are reserved to each parent.<sup>79</sup> However, the remainder can be transferred. Whilst not gender specific, the reserved months tend to be referred to as 'daddy months',<sup>80</sup> with mothers taking most of the leave. Meanwhile, as for daycare, the Official Website of Sweden explains, '[y]ou can send your child to preschool (förskola) for a maximum cost of SEK 1,425 [c. £120]<sup>81</sup> per month.'<sup>82</sup>

This discussion illustrates the interplay between individual responsibility, responsibility for a partner and state responsibility.<sup>83</sup> As Baroness Hale, writing extra-judicially, explains, '[t]he more the private family can look after its own, the less the State will have to do.'<sup>84</sup> This context is important when considering the possibility of family law influencing gender equality in society more generally.

### **Claim 1: Reforming the law of financial remedies will result in greater gender equality**

It is difficult to conclude from the Swedish experience that reforming the law of financial remedies in England and Wales will necessarily achieve greater gender equality. First, it is hard to isolate the effects of family law reforms from the wider law and policy context. Gender equality was an explicit goal of family law reform in Sweden, and the reforms were introduced at a time when society was very unequal. In the 1969 guidelines to the Committee on Family Law reviewing the Marriage Code, the government considered that:

... there is no reason to refrain from using legislation regarding marriage and family as **one of several** instruments in seeking reform toward a society in which every individual can take

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<sup>75</sup> A-Zofie Duvander, T Ferrarini and S Thalberg, 'Swedish parental leave and gender equality - Achievements and reform challenges in a European perspective (Institute for Future Studies, 2005), [www.iffs.se/media/1118/20051201134956filU8YIJLRAaC7u4FV7gUmy.pdf](http://www.iffs.se/media/1118/20051201134956filU8YIJLRAaC7u4FV7gUmy.pdf), last accessed 10 July 2018.

<sup>76</sup> Ibid.

<sup>77</sup> The Official Site of Sweden, n 74, above.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> See, for example, J Ekberg, R Eriksson and G Freibel, 'Parental Leave - A Policy Evaluation of the Swedish "Daddy-Month" Reform' (2013) 97 *Journal of Public Economics* 131.

<sup>81</sup> Based on the exchange rate as at 21 August 2019.

<sup>82</sup> The Official Site of Sweden, n 74 above.

<sup>83</sup> J Miles, 'Responsibility in Family Finance and Property Law' in J Bridgeman J, H Keating and C Lind (eds) *Regulating Family Responsibilities* (Ashgate, 2011).

<sup>84</sup> B Hale, 'Equality and autonomy in family law' (2011) *Journal of Social Welfare and Family Law* 3, 4.

responsibility for himself, without being economically dependent on those close to him, and a society where equality between men and women is a reality".<sup>85</sup>

However, this cannot be divorced from the wider societal context in which other reforms, including those just discussed, were also being introduced to promote gender equality:

The political discourse at the time [that policies relating to parental leave and childcare were introduced] also stressed that equality between men and women was important to the reform. Individual and mutual responsibility for family subsistence was seen as necessary for gender equality to be accomplished. Both parents were regarded as responsible for the care of children and for domestic work.<sup>86</sup>

Further, the introduction in 1995 of the concept of reserved months of parental leave was explicitly couched in terms of gender equality:

It is important that fathers take parental leave. An increased use of parental leave by fathers should contribute to a change in attitudes among managers; they will view parental leave as something natural to consider when planning and organizing the work. This change in attitudes is necessary for both men and women to dare to take parental leave without a feeling of jeopardizing their career or development opportunities at work. Another reason for increasing fathers' use of parental leave is that women's prospects of achieving equal opportunities to men in the labor market will be limited, as long as women are responsible for practical housework and children. A shared responsibility for the practical care of children would mean a more even distribution of interruptions in work between women and men, and women would thereby gain better opportunities of development and making a career in their profession.<sup>87</sup>

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<sup>85</sup> Official Reports Series of Swedish Legislative and Investigative Commissions *Familj och äktenskap* (Family and Marriage) (SOU, 1972:41), 58 (unofficially translated by A Singer) (emphasis added).

<sup>86</sup> U Björnberg, 'Ideology and choice between work and care: Swedish family policy for working parents' (2002) 22 *Critical Social Policy* 33, 35.

<sup>87</sup> Government Bill 1993/94: 147 Gender Equality Policy: Shared Power – Shared Responsibility. Translation from J Ekberg, R Eriksson and G Freibel, 'Parental Leave - A Policy Evaluation of the Swedish "Daddy-Month" Reform' (2013) 97 *Journal of Public Economics* 131, 132.

Today, both men and women are expected to work, regardless of their family situation,<sup>88</sup> and these policies facilitate this. As will be discussed further below, this position is connected to concerns that married women should have economic autonomy.<sup>89</sup>

Sweden is a world leader on gender equality, officially regarded as 'one of the cornerstones of Swedish society.'<sup>90</sup> It topped the EU Gender Equality Index in 2019,<sup>91</sup> and has never finished lower than fourth in the World Economic Forum's Annual Gender Gap Report.<sup>92</sup> It has also been suggested that, as well as being central to society, gender equality is an important part of what it means to be Swedish.<sup>93</sup> The fact that this is not the position in England and Wales must be borne in mind when considering the ability of financial remedy reform to achieve gender equality. Although mothers and fathers can now share parental leave in England and Wales,<sup>94</sup> there have not been the same efforts to promote a sharing of leave between parents, and – although there are some suggestions that it is increasing<sup>95</sup> – uptake has been very low.<sup>96</sup> Further, childcare in England and Wales is generally not subsidised until a child is aged 3 (although funding is available for 2-year olds in some cases).<sup>97</sup> These very real differences in the policy context in the two jurisdictions mean that it cannot be assumed that financial remedy reform alone would create a more gender equal society.

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<sup>88</sup> See, for example, E Sundström, 'Should mothers work? Age and attitudes in Germany, Italy and Sweden' (1999) 8 *International Journal of Social Welfare* 193, 197, J Hoem, 'Why does Sweden have such high fertility?' (2005) 13 *Demographic Research* 559, E Svensson and A Gunnarsson, 'Gender Equality in the Swedish Welfare State' (2012) 2 *Feminists@Law* <http://journals.kent.ac.uk/index.php/feministsatlaw/article/view/51/160>, last accessed 10 July 2018.

<sup>89</sup> Å Gunnarsson, 'Introducing independent income taxation in Sweden in 1971' (2016) FairTax Working Paper Series No. 2, Forum for Studies on Law and Society, <https://umu.diva-portal.org/smash/get/diva2:930244/FULLTEXT01.pdf>, last accessed 19 March 2020, 5.

<sup>90</sup> The Official Site of Sweden, 'Gender Equality in Sweden' (last updated 28 June 2018) <https://sweden.se/society/gender-equality-in-sweden/>, last accessed 5 October 2018.

<sup>91</sup> European Institute for Gender Equality, 'Gender Equality Index 2019: Sweden' <https://eige.europa.eu/publications/gender-equality-index-2019-sweden>, last accessed 13 January 2020.

<sup>92</sup> The Official Site of Sweden, 'Gender Equality in Sweden', n 90 above.

<sup>93</sup> See, for example, A Towns, 'Paradoxes of (In)Equality: Something is Rotten in the Gender Equal State of Sweden' (2002) 37 *Journal of the Nordic International Studies Association* 157, 165 and L Martinsson, G Griffin, K Giritli-Nygren, 'Introduction' in L Martinsson, G Griffin and K Giritli Nygren (eds) *Challenging the myth of gender equality in Sweden* (Polity Press, 2016), 9.

<sup>94</sup> Shared Parental Leave Regulations 2014, SI 2014/3050.

<sup>95</sup> University of Birmingham, 'University of Birmingham research shows take up of Shared Parental Leave is increasing (27 August 2019) [www.birmingham.ac.uk/news/latest/2019/08/university-of-birmingham-research-shows-take-up-of-shared-parental-leave-is-increasing.aspx](http://www.birmingham.ac.uk/news/latest/2019/08/university-of-birmingham-research-shows-take-up-of-shared-parental-leave-is-increasing.aspx), last accessed 19 March 2020.

<sup>96</sup> See, for example, Gov.UK, 'New "Share the joy" campaign promotes shared parental leave rights for parents' (12 February 2018), [www.gov.uk/government/news/new-share-the-joy-campaign-promotes-shared-parental-leave-rights-for-parents](http://www.gov.uk/government/news/new-share-the-joy-campaign-promotes-shared-parental-leave-rights-for-parents), last accessed 11 September 2018; O Walker, 'Shared parental leave suffers inauspicious start' *Financial Times* (London, 8 August 2018) [www.ft.com/content/9b6cd2b6-9724-11e8-b67b-b8205561c3fe](http://www.ft.com/content/9b6cd2b6-9724-11e8-b67b-b8205561c3fe), last accessed 11 September 2018; and EMW, 'Shared Parental Leave 2017/2018 Update' (EMW, 25 June 2018) [www.emwllp.com/latest/shared-parental-leave-the-gender-pay-gap/](http://www.emwllp.com/latest/shared-parental-leave-the-gender-pay-gap/), last accessed 11 September 2018.

<sup>97</sup> Gov.UK, 'Help Paying for Childcare' (6 April 2016) [www.gov.uk/help-with-childcare-costs/overview](http://www.gov.uk/help-with-childcare-costs/overview), last accessed 8 January 2020.



A second reason for caution in assuming that reform of financial remedy law will achieve greater gender equality is that, even in Sweden, despite its sustained efforts to encourage gender equality, the division of childcare responsibilities and the financial penalties of parenthood remain gendered, albeit that the effects differ between income groups.

The roles of men and women in Swedish society remain different. Not only do women still perform the greater share of caretaking, but it seems that the nature of the care performed by mothers and fathers differs. Women still take the majority of parental leave: in 2017, women took 72% of parental allowance days<sup>98</sup> (previously maternity insurance)<sup>99</sup> and 62% of temporary parental allowance days<sup>100</sup> (a benefit paid in respect of time taken to look after sick children).<sup>101</sup> Research has also found that the gender wage gap within couples increases after they have children, which may be explained by women working fewer hours.<sup>102</sup> Thus, in 1992, Jane Lewis and Gertrude Åström suggested that:

Despite a public commitment to achieving greater equality in the work of women and men, the Swedish system of promoting equal opportunities has only changed the position of women, leaving that of men relatively untouched.<sup>103</sup>

There has been some progress in relation to fathers' parental leave use since then. For example, the introduction of a third month of reserved parental leave in 2016 appears to have increased leave

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<sup>98</sup> Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2018' (SCB, 2018) [www.scb.se/contentassets/4550eaae793b46309da2aad796972cca/le0201\\_2017b18\\_br\\_x10br1801eng.pdf](http://www.scb.se/contentassets/4550eaae793b46309da2aad796972cca/le0201_2017b18_br_x10br1801eng.pdf), last accessed 17 October 2019, 46.

<sup>99</sup> Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2016' (SCB, 2016), [www.scb.se/contentassets/7516e7d2f0834a7b94bfd87593405c7b/le0201\\_2015b16\\_br\\_x10br1601eng.pdf](http://www.scb.se/contentassets/7516e7d2f0834a7b94bfd87593405c7b/le0201_2015b16_br_x10br1601eng.pdf), last accessed 6 December 2017, 41.

<sup>100</sup> Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2018' (SCB, 2018) [www.scb.se/contentassets/4550eaae793b46309da2aad796972cca/le0201\\_2017b18\\_br\\_x10br1801eng.pdf](http://www.scb.se/contentassets/4550eaae793b46309da2aad796972cca/le0201_2017b18_br_x10br1801eng.pdf), last accessed 17 October 2019, 46.

<sup>101</sup> Försäkringskassan, 'Temporary Parental Benefits' [www.forsakringskassan.se/myndigheter/kommuner/foraldradorsakring/tillfallig\\_foraldrapenning!/ut/p/z0/04\\_Sj9CPykssy0xPLMnMz0vMAfjjo8ziLYwMfJ2cDB0NLIINLAW8LT0sXd0sjdx9PIz0g1Pz9AuyHRUB44kboQ!/,](http://www.forsakringskassan.se/myndigheter/kommuner/foraldradorsakring/tillfallig_foraldrapenning!/ut/p/z0/04_Sj9CPykssy0xPLMnMz0vMAfjjo8ziLYwMfJ2cDB0NLIINLAW8LT0sXd0sjdx9PIz0g1Pz9AuyHRUB44kboQ!/) last accessed 13 April 2018.

<sup>102</sup> N Angelov and P Johansson, 'Parenthood and the Gender Gap in Pay' (2016) 34 *Journal of Labor Economics* 545.

<sup>103</sup> J Lewis and G Åström, 'Equality, Difference and State Welfare: Labor Market and Family Policies in Sweden' (1992) 18 *Feminist Studies* 59.

uptake in some groups of fathers.<sup>104</sup> However, it seems that even where fathers take more paid leave, mothers do not necessarily return to work earlier, but instead use of unpaid leave.<sup>105</sup> Thus, a complete shift in the gendered nature of care has not yet been realised:

Together our results suggest that ... family policies have had an important, although small, impact on men whereas women's work has been more resistant to change since the late 1980s. This may be due to tenacious norms of mothers as caretakers, mothers' leave-taking for children's sick days and other care-taking accommodations, as well as a low return for investments in the labor market. Further, men's earnings seem to recuperate from childbirth over a relatively short period of time, indicating they may have greater opportunity to choose when to take parental leave, facilitating easier adaptation to employer preferences to leave-taking during slower periods.

Further, the small decline in couples' income inequality only appears when women have tertiary education, at least thus far...<sup>106</sup>

This is considered concerning, and prompted a government review recommending that the amount of parental leave reserved to each parent be increased to 130 days.<sup>107</sup>

Even where parental leave is shared more equally in Sweden, it is unclear how far the practicalities of caretaking are divided during those periods and longer-term.<sup>108</sup> It has been found, for example,

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<sup>104</sup> Socialförsäkringsrapport, 'Jämställd föräldraförsäkring' (Summary) [www.forsakringskassan.se/wps/wcm/connect/7bdc2540-0e28-4766-8e27-02f82244d358/socialforsakringsrapport-2019-2.pdf?MOD=AJPERES](http://www.forsakringskassan.se/wps/wcm/connect/7bdc2540-0e28-4766-8e27-02f82244d358/socialforsakringsrapport-2019-2.pdf?MOD=AJPERES), last accessed 8 January 2020.

<sup>105</sup> A Karimi, E Lindahl and P Skogman Thoursie, 'Labour supply responses to paid parental leave' (2012) IFAU Working Paper 2012:22, [www.ifau.se/globalassets/pdf/se/2012/wp12-22-labour-supply-responses-to-paid-parental-leave.pdf](http://www.ifau.se/globalassets/pdf/se/2012/wp12-22-labour-supply-responses-to-paid-parental-leave.pdf), last accessed 8 January 2020.

<sup>106</sup> A Nylin, K Musick, S Billingsley, A Duvander and M Evertsson, 'Trends over time in his and her earnings following parenthood in Sweden' (Stockholm Research Reports in Demography no 2019:03) [https://su.figshare.com/articles/Trends\\_over\\_time\\_in\\_his\\_and\\_her\\_earnings\\_following\\_parenthood\\_in\\_Sweden/7654835/1](https://su.figshare.com/articles/Trends_over_time_in_his_and_her_earnings_following_parenthood_in_Sweden/7654835/1), last accessed 8 January 2020, 23.

<sup>107</sup> Slutbetänkande av Utredningen om en modern föräldraförsäkring, 'Jämställt föräldraskap och goda uppväxtvillkor för barn – en ny modell för föräldraförsäkringen' (SOU 2017:101) [www.regeringen.se/4afa97/contentassets/01a6fba2043a4e58aeac32cf52bd3449/sou-2017\\_101\\_jamstallt-foraldraskap-och-goda-uppvaxtvillkor-for-barn.pdf](http://www.regeringen.se/4afa97/contentassets/01a6fba2043a4e58aeac32cf52bd3449/sou-2017_101_jamstallt-foraldraskap-och-goda-uppvaxtvillkor-for-barn.pdf), last accessed 5 December 2019 (Final Report of the Inquiry into Modern Parental Insurance, 'Equal parenting and good childhood conditions for children – a new model for parental insurance').

<sup>108</sup> J Ekberg, R Eriksson and G Freibel, 'Parental Leave - A Policy Evaluation of the Swedish "Daddy-Month" Reform' (2013) 97 *Journal of Public Economics* 131.

that 'fathers who have used parental leave work fewer hours per week than fathers who did not',<sup>109</sup> and that there is a 'negative correlation between length of leave and subsequent working hours'.<sup>110</sup> Further, separated fathers who used more than two weeks of parental leave were significantly more likely to have frequent contact with children after separation than those who did not take leave.<sup>111</sup> What is less clear is whether this greater time involvement translates into performing the same kind of care. There is some data to suggest that greater time involvement does not necessarily result in a greater sharing of the physical work of care.<sup>112</sup> For example, John Ekberg et al found that there was no evidence that men who had children after introduction of the 'daddy month' increased the proportion of the leave they took to care for sick children.<sup>113</sup> Further, it has been suggested that 'fathers tend to take more time in the summer season and around Christmas, and they tend to take more time with children in the second year of their life.'<sup>114</sup> There is some suggestion that this is because this is what is more convenient for their employers.<sup>115</sup> Such leave, therefore, may have less impact on ongoing earning capacity because it is perceived as less disruptive in the workplace and may not, therefore, have the same implications for career progression.

Women in Sweden spend more time in unpaid work and men more time in paid work.<sup>116</sup> Whereas men spend around 37 hours per week in paid work and women 30 hours, women spend 26 hours engaged in unpaid work compared with men's 21 hours.<sup>117</sup> In 2016, 29% of women worked part-time compared to 11% of men.<sup>118</sup> Further, the fact of women's working only part-time was far more likely to be the result of caring for children, whereas for men other factors such as studying or illness / reduced work capacity were more common motivators.<sup>119</sup> Research further indicates that 'it is

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<sup>109</sup> A Duvander and A Jans, 'Consequences of Fathers' Parental Leave Use: Evidence from Sweden' [2009] *Finnish Yearbook of Population Research* 49, 55.

<sup>110</sup> Ibid, 55.

<sup>111</sup> Ibid, 58.

<sup>112</sup> See J Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge, 1993), 106-8 for a discussion of the difference between this and other aspects of care.

<sup>113</sup> J Ekberg, R Eriksson and G Freibel, 'Parental Leave - A Policy Evaluation of the Swedish "Daddy-Month" Reform' (2013) 97 *Journal of Public Economics* 131.

<sup>114</sup> Ibid, 137.

<sup>115</sup> L Haas and P Hwang, 'Policy is not enough – the influence of the gendered workplace on fathers' use of parental leave in Sweden' (2019) 22 *Community, Work & Family* 58, 67.

<sup>116</sup> Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2016' (SCB, 2016) [www.scb.se/contentassets/7516e7d2f0834a7b94bfd87593405c7b/le0201\\_2015b16\\_br\\_x10br1601eng.pdf](http://www.scb.se/contentassets/7516e7d2f0834a7b94bfd87593405c7b/le0201_2015b16_br_x10br1601eng.pdf), last accessed 6 December 2017, 35.

<sup>117</sup> Ibid, 35. By way of comparison, ONS data suggests that in the UK women do 26 hours of unpaid work compared to men's 16 hours (ONS, 'Women shoulder the responsibility of unpaid work' (ONS Digital, 10 November 2016) <http://visual.ons.gov.uk/the-value-of-your-unpaid-work/>, last accessed 8 January 2020)

<sup>118</sup> Ibid, 53. For a comparison between Sweden and the UK based on Eurostat figures, see n 2 above.

<sup>119</sup> Ibid, 53. Census data in the UK relating to the reasons for people not working at all, suggests that women are most likely to be in this position because they are looking after the family and home, whereas the most common reasons for men to be in this position is that they are students or sick and disabled (see ONS, '2011

primarily the male-dominated types of flexibility that are controlled by the employees, and not the female dominated types of flexibility'.<sup>120</sup> It is also notable that statistics on working hours are based on women and men aged 20-64.<sup>121</sup> It may be that the differences are more pronounced amongst the parents of young children who will tend to be at the younger end of that range.

It is, therefore, important to be aware that law and policy reform alone, even going beyond private family law, does not guarantee gender equality because these issues are highly complex. There remain gender inequalities in Sweden, despite its reputation as a gender equal society and the range of policy measures that have been introduced there to promote such equality. The discussion above suggests that parenting norms remain gendered, and the nature of care expected of, and performed by, mothers and fathers differs. England and Wales has made nothing like the same investment in promoting gender equality, so the apparently gender-neutral norms of financial independence on divorce conflict even more strongly with gendered parenting norms, making it profoundly unlikely that the Bill alone – as a mere measure of private family law reform – can achieve greater gender equality.

### **Claim 2: Neoliberal autonomy is a good basis for financial remedy reform in a more gender equal society**

The discussion above illustrates the difficulties of trying to achieve gender equality, even where this is an explicit social goal. Before examining what a Swedish perspective reveals about this second claim, it is important to unpack Swedish understandings of autonomy, and specifically to consider how the ideas of financial independence and choice are reflected in Swedish family law and policy. Michael Booth reports on an interview with Henrik Beggren<sup>122</sup> in which the latter explained the Swedish vision of autonomy as follows:

Sweden's "statist individualism", as he terms it, enables the very purest form of wholly independent love to blossom between two people. Wives don't stick around because their husband keeps the joint bank account pin code locked in a drawer in his desk, and husbands

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Census analysis: Ethnicity and the Labour Market, England and Wales' (13 November 2014) [www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/ethnicity/articles/ethnicityandthelabourmarket2011censusenglandandwales/2014-11-13](http://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/ethnicity/articles/ethnicityandthelabourmarket2011censusenglandandwales/2014-11-13), last accessed 26 September 2018.

<sup>120</sup> T P Boje, 'Working time and caring strategies: parenthood in different welfare states' in A Ellingsaeter and A Leira (eds) *Politicising parenthood in Scandinavia* (Policy Press, 2006), 202 citing A Grönlund, *Flexibilitetens Gränser*, (Borea Förlag, 2004).

<sup>121</sup> Statistics Sweden, 'Women and Men in Sweden: Facts and Figures 2016' (SCB, 2016) [www.scb.se/contentassets/7516e7d2f0834a7b94bfd87593405c7b/le0201\\_2015b16\\_br\\_x10br1601eng.pdf](http://www.scb.se/contentassets/7516e7d2f0834a7b94bfd87593405c7b/le0201_2015b16_br_x10br1601eng.pdf), last accessed 6 December 2017, 35.

<sup>122</sup> A Swedish Historian and journalist.

don't hold their tongues because their wife's father owns the mill... "...The main objective is not to be dependent on your family, the wife shouldn't be dependent on the husband, the children should be autonomous when they are eighteen, old people should not be dependent on their children taking care of them, and therefore to a large extent the state steps in and provides these things..."<sup>123</sup>

Ideas of both financial independence and choice are evident here. The former is explicit in the discussion of avoiding dependence on a spouse. The idea of choice can be seen in the suggestion that both parties should be free to walk away from their marriage, and are apparent in Swedish family law and policy more broadly. However, as will be discussed below, there is a conflict between them in practice.

Turning first to ideas of financial independence, as described in the section on Swedish law and context above, the law relating to spousal maintenance is premised on spouses' economic independence. The major difference between the Swedish position and the reforms proposed in England and Wales is, however, the envisaged role of the state. In Sweden, the state is assumed to play a role in facilitating economic independence, for example, through generous parental leave entitlements and providing reliable and affordable childcare to all parents, enabling both parents to work. Not so in England and Wales.

Ideas of choice in Sweden are more complex, perhaps reflecting the wider dilemma, outlined by Lewis, of how to deal with a situation in which people make the 'wrong' choices:

Choice may become problematic when people make the 'wrong' choices. Mothers may choose to stay at home for a long period to care for children without realising that this will cost them dear in terms of their pension entitlements, for example.<sup>124</sup> Should government merely applaud such altruism, seek to inform the choice or compensate mothers for it? It is surely dishonourable to do the first without attempting either the second or third of these.<sup>125</sup>

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<sup>123</sup> M Booth, *The Almost Nearly Perfect People* (Random House, 2014), 360.

<sup>124</sup> But note the discussion above about the relevance of a spouse's pension to the question of whether spousal maintenance should be payable (albeit that spousal maintenance is rare in practice).

<sup>125</sup> J Lewis, 'Childcare Policies and the Politics of Choice' (2008) 79 *The Political Quarterly* 499, 506.

The importance placed upon the economic independence of both partners in Sweden means that ideas of choice in the arena of childcare responsibilities are problematic. This is perhaps best illustrated through the experience of cash for care schemes, explained by Giuliana Giuliani and Ann Zofie Duvander as ‘a subsidy for parents whose children are between the ages of one and three and who are not using publicly subsidised childcare’.<sup>126</sup> Cash for care was first introduced in Sweden in 1994,<sup>127</sup> but abolished only a year later.<sup>128</sup> A second scheme was introduced in 2008 and abolished in 2016. The 2008 scheme was justified in the following terms:

The main rationale was to “increase families’ freedom of choice [...] by reducing national political interferences” (Prop. 2007/08:91, p 17). The benefit is supposed to enable parents to spend more time with their children and to support flexibility in their combination of employment and care.<sup>129</sup>

In contemporary discussions of the measure, the idea of choice was explicitly contrasted with the goal of gender equality;<sup>130</sup> while such schemes are gender-neutral, their use is gendered in practice.<sup>131</sup> Those defending the scheme suggested that it served to value ‘the unpaid work women do at home and contributing to making women who do not work outside the home equal to their working husbands and to working women’.<sup>132</sup> However, it was widely viewed in Sweden as a trap for women<sup>133</sup> and there was some evidence that the scheme served to exacerbate existing inequalities. According to Anne Lise Ellingsaeter:

...17 per cent of applicants had only primary education (9 years or less), compared to 11 per cent in the total population... It is estimated that almost 50 per cent of the women who

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<sup>126</sup> G Giuliani and A Duvander, 'Cash-for-care policy in Sweden: An appraisal of its consequences in female employment' (2017) 26 *International Journal of Social Welfare* 49, 49.

<sup>127</sup> A Ellingsaeter, 'Cash for Childcare: Experiences from Finland, Norway and Sweden' (*Friedrich Ebert Stiftung*, April 2012) <http://library.fes.de/pdf-files/id/09079.pdf>, last accessed 9 July 2018.

<sup>128</sup> G Giuliani and A Duvander, 'Cash-for-care policy in Sweden: An appraisal of its consequences in female employment' (2017) 26 *International Journal of Social Welfare* 49, 50.

<sup>129</sup> A Duvander and A Ellingsaeter, 'Cash for childcare schemes in the Nordic welfare states: diverse paths, diverse outcomes' (2016) 18 *European Societies* 70, 76.

<sup>130</sup> See, for example, NIKK 'Increased Parental Choice Can Lead to Reduced Gender Equality' (*Nordic Information on Gender*, first published in NIKK magasin 2 2007, page last updated 19 October 2017) [www.nikk.no/en/about-nikk/background/family-policy-2009-2011/4531-2/](http://www.nikk.no/en/about-nikk/background/family-policy-2009-2011/4531-2/), last accessed 9 July 2018 and A Ellingsaeter, 'Cash for Childcare: Experiences from Finland, Norway and Sweden' (*Friedrich Ebert Stiftung*, April 2012) <http://library.fes.de/pdf-files/id/09079.pdf>, last accessed 9 July 2018.

<sup>131</sup> A Ellingsaeter, 'Cash for Childcare: Experiences from Finland, Norway and Sweden' n 130 above, 7.

<sup>132</sup> NIKK 'Increased Parental Choice Can Lead to Reduced Gender Equality', n 133 above.

<sup>133</sup> H Hilamo and O Kangas, 'Trap for Women or Freedom to Choose? The Struggle over Cash for Child Care Schemes in Finland and Sweden' (2009) 38 *Journal of Social Policy* 457.

receive the benefit are economically dependent on their partners... The likelihood of taking the benefit declined with increasing income and education...<sup>134</sup>

Cash for care schemes thus epitomise the challenges of reconciling financial independence and choice in the neoliberal paradigm: allowing the latter can interfere with the former. However, even after the abolition of such schemes, the interplay between ideas of financial independence and choice in Sweden are complex. On the one hand, there are strong norms around all parents engaging in paid work. The core of the Swedish welfare state has been described as 'workfare'.<sup>135</sup> 'men and women alike have been regarded as self-supporting individuals within a labour market in line with the ideal of a dual income-earner family ideology'.<sup>136</sup> Eva Sundström explains that:

Within Swedish welfare policies the individual right to self-sufficiency is emphasized and the social security system is consequently based on the individuals' rights rather than on the needs of the family... Labour market participation is expected from both men and women independent of family situation...<sup>137</sup>

On the other hand, ideas of motherhood and fatherhood remain gendered. In a study looking at the factors influencing parental leave-taking by fathers, for example, Linda Haas and Philip Hwang observe that:

Fathers were expected to live up to the traditional standards of the ideal worker, with heavy work responsibilities and little expectation of caregiving responsibility and most fathers did not question these expectations.<sup>138</sup>

In contrast, Ylva Elvin-Nowak and Heléne Thomsson suggest that '[m]others who live in Sweden have to construct their motherhood within the context of a gender-equality discourse, but in an everyday reality that is not gender equal'.<sup>139</sup> The rhetoric of similarity between men and women conflicts with

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<sup>134</sup> A Ellingsaeter, 'Cash for Childcare: Experiences from Finland, Norway and Sweden' (*Friedrich Ebert Stiftung*, April 2012) <http://library.fes.de/pdf-files/id/09079.pdf>, last accessed 9 July 2018, 6.

<sup>135</sup> E Svensson and A Gunnarsson, 'Gender Equality in the Swedish Welfare State' (2012) 2 *Feminists@Law* <http://journals.kent.ac.uk/index.php/feministsatlaw/article/view/51/160>, last accessed 10 July 2018.

<sup>136</sup> Ibid.

<sup>137</sup> E Sundström, 'Should mothers work? Age and attitudes in Germany, Italy and Sweden' (1999) 8 *International Journal of Social Welfare* 193, 197.

<sup>138</sup> L Haas and P Hwang, 'Policy is not enough – the influence of the gendered workplace on fathers' use of parental leave in Sweden' (2019) 22 *Community, Work & Family* 58, 73.

<sup>139</sup> Y Elvin-Nowak and H Thomsson, 'Motherhood as Idea and Practice: A Discursive Understanding of Employed Mothers in Sweden' (2001) 15 *Gender and Society* 407, 410.

everyday practice, in which 'gender is socially constructed through difference'.<sup>140</sup> Research by Marie Evertsson et al into parental leave use found, for example, that:

For some couples who stress the importance of gender-egalitarian ideals, other ideals and norms around motherhood and fatherhood counteract an equal sharing of the leave ... The qualitative interviews show how women's wishes to be at home during the child's entire first year are connected with motherhood norms and ideals of intensive mothering that – in our interviews – often are embraced by fathers and mothers alike (in the couples that refer to them). Like all interviewed couples, these couples stress the importance of a close father–child relationship, but the first year of the child's life is seen as a special period, an exception. Even these couples often referred to their division of the leave as 'rather equal,' which highlights the strength of the equality discourse in Sweden.<sup>141</sup>

Elvin-Nowak and Thomsson outline three discursive positions relating to the meaning and practice of motherhood in Sweden.<sup>142</sup> The first, stressing the mother's accessibility and closeness to the child, is time intensive: 'By spending as much time with their children as possible, especially when the children are young, the mothers see themselves as immunizing their children against future problems.'<sup>143</sup> Generous parental leave enables this to some extent. However, this ideal can conflict with the obligation to engage in paid work. Caitlyn Collin has observed that in Sweden 'intensive parenting ideals',<sup>144</sup> which expect mothers to make home-cooked meals and ensure that children do not spend too much time in childcare, could create such a conflict, particularly for middle-class mothers.<sup>145</sup>

The second discursive position, described as 'happy mothers make happy children',<sup>146</sup> requires a balancing of work and home life:

In Swedish society, where almost every mother is in the labour market,<sup>147</sup> this kind of discussion has a guilt-triggering effect. The individual task is not only to try and achieve an

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<sup>140</sup> Ibid.

<sup>141</sup> M Evertsson, K Boye and J Erman, 'Fathers on call? A study of the sharing of care work between parents in Sweden' (2018) 39 *Demographic Research* 33, 52-3.

<sup>142</sup> Y Elvin-Nowak and H Thomsson, n 142 above.

<sup>143</sup> Ibid, 414.

<sup>144</sup> C Collin, 'Making Motherhood Work' (Princeton University Press 2019), 61.

<sup>145</sup> Ibid.

<sup>146</sup> Y Elvin-Nowak and H Thomsson, 'Motherhood as Idea and Practice: A Discursive Understanding of Employed Mothers in Sweden' (2001) 15 *Gender and Society* 407, 417.



everyday life where work outside the home can be combined with caring for home and children but also to do this in a way that makes the mother happy and content and, most important, results in the well-being of her child.<sup>148</sup>

Therefore, it appears that changes in expectations around work have not completely transformed expectations of motherhood.

Clarissa Kugelberg's research suggests that these differences can be seen in workplace norms:

Fatherhood was not assumed to affect the working life and jobs of individual men and was thus not a relevant issue to them. Parenthood was interpreted as motherhood and motherhood was seen as problematic, as the time-use norms were difficult for women with restricted timetables.<sup>149</sup>

Similar norms appear to influence fathers' use of parental leave. Haas and Hwang note remarks by managers that such taking such periods of leave was a choice, rather than an expectation. They observe that '[d]iscussion of choice reinforce the gendered division of domestic labor, since mothers do not get to decide how active a parent they want to be.'<sup>150</sup>

Haas and Hwang also identify workplace norms as a reason for the relatively low uptake by fathers of the opportunity to reduce their weekly hours while their children are young.<sup>151</sup> In their study of Swedish workplaces,

Few companies reported a norm that more than 20 percent of fathers reduced their work hours, few experienced an upward trend in reduced hours policy use and most had never had a male manager reduce his hours.<sup>152</sup>

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<sup>147</sup> In 2019, the female employment rate was 79.7% in Sweden (compared with 74.6% in the UK). The relative figures for women working part-time in each country are outlined in n 2 above.

<sup>148</sup> Ibid.

<sup>149</sup> C Kugelberg, 'Constructing the Deviant Other: Mothering and Fathering at the Workplace' (2006) 13 *Gender, Work and Organization* 152, 159.

<sup>150</sup> L Haas and P Hwang, 'Policy is not enough – the influence of the gendered workplace on fathers' use of parental leave in Sweden' (2019) 22 *Community, Work & Family* 58, 67.

<sup>151</sup> L Haas and P Hwang, "'It's About Time!": Company Support for Fathers' Entitlement to Reduced Work Hours in Sweden' (2016) 23 *Social Politics* 142.

<sup>152</sup> Ibid, 162.

They point to three interrelated causes: a lack of pressure from the institutional environment, the cultural context and the gendered culture of work organisations. In relation to the institutional context, they conclude:

...assumptions about full-time work and men's responsibility for childcare are not challenged by policymakers or unions. Use of the right to reduced work hours is also discouraged by lack of wage-based compensation and attention to fathers' right to this in information campaigns. At present, the government and unions seem more interested in promoting mothers' full-time employment than fathers' reduced hours, reinforcing the male model of work.<sup>153</sup>

The cultural context they refer to is one where 'men's lack of equal responsibility for childcare is taken for granted'.<sup>154</sup> Likewise, the gendered culture of work organisations was one in which 'support for men as fathers appeared only lukewarm'.<sup>155</sup>

Elvin-Nowak and Thomsson's final discursive position in relation to the meaning and practice of motherhood, referred to as

"maintaining separate spheres" focuses on the mother as a working woman rather than mother. The femininity produced within the structure for this concept is more independent from the motherhood position. Still, it is always at risk of being perceived negatively in those cases in which the working woman appears to the detriment of the mother.<sup>156</sup>

They note that the 'most prominent feature'<sup>157</sup> in their participants' everyday mothering 'was a never-ending struggle to arrange their own lives as working mothers to the greatest advantage of the children'.<sup>158</sup> This contrasts with research by Haas, Allard and Hwang on the position of fathers:

On average, fathers indicated that within their work group, it was relatively easy for fathers to take time off to care for children... Fathers reported that it was relatively easy for fathers in their group to take the 10 daddy days at childbirth, take leave or take children to the

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<sup>153</sup> Ibid

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> Y Elvin-Nowak and H Thomsson, 'Motherhood as Idea and Practice: A Discursive Understanding of Employed Mothers in Sweden' (2001) 15 *Gender and Society* 407, 424.

<sup>157</sup> Ibid, 418.

<sup>158</sup> Ibid.

doctor or school, stay at home to care for sick children, take parental leave full-time for a month, and say no to overtime. But they also reported that it was relatively difficult to adjust work times according to children's schedules at school or daycare, reduce work hours by 25% to care for children and take parental leave full-time for 6 months (the latter being reported as the most difficult to do).<sup>159</sup>

Lucas Forsberg's research likewise found that even within a group of parents 'on a more equal footing than parents in other Swedish studies',

... the women still assume greater responsibility for household work and childcare than the men do. The men are involved in all areas of family life, but they never assume the main responsibility – not for the planning nor for the accomplishment – for household work and childcare.<sup>160</sup>

This appears to be reinforced by Evertsson et al's research examining the sharing of work and care in Sweden,<sup>161</sup> which found that paid work was far more likely to impact on the duration of men's parental leave than women's.<sup>162</sup> Additionally, where paid work did impact on women's activity around taking leave, it tended to result in their taking longer leave, whereas for men it tended to result in shorter leave:

This may to some extent capture occupational differences in schedules as more women than men work in preschools and schools, facilitating returns to work at the start of the semester.<sup>163</sup>

These different expectations of mothers and fathers mirror perceptions in England and Wales about how parents should divide paid work and caring responsibilities when children are young. In the UK, the most popular method of dividing parental leave according to the 2019 British Social Attitudes report is for the mother to take most of it and the father to take some (43%) with very limited support for the father taking all leave and the mother none (fewer than 0.5%) or the father taking

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<sup>159</sup> L Haas, K Allard and P Hwang, 'The impact of organizational culture on men's use of parental leave in Sweden' (2002) 5 *Community Work and Family* 319, 336.

<sup>160</sup> L Forsberg, 'Involved Parenthood Everyday lives of Swedish Middle-Class Families' (DPhil thesis, Linköping University, 2009), 167.

<sup>161</sup> M Evertsson, K Boye and J Erman, 'Fathers on call? A study of the sharing of care work between parents in Sweden' (2018) 39 *Demographic Research* 33.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*, 43.

most of the leave and the mother some (fewer than 0.5%).<sup>164</sup> Further, when it comes to looking after children under school-age, 69% favour a mother staying at home (31%) or working part time (38%), with the father working full-time.<sup>165</sup>

Despite the complex interplay of these background norms and other factors around questions of choice in Sweden, there does not seem to be the same degree of concern about the gendered nature of choices made as was the seen in discussions around cash for care schemes. For example, in Kugelberg's research, it was found that:

Gender segregation was not seen as a matter of inequality but as a problem for individuals presenting themselves at work, being able to work full time and being able to take on heavy jobs. Combining motherhood with a job was seen as the mother's private business.<sup>166</sup>

Thus, once again, the Swedish experience reveals the complexity of neoliberal ideas of autonomy for the law of financial remedies on divorce. Whilst ideas of financial independence and choice have an instinctive appeal, they are potentially incompatible where decisions about childcare made during a relationship have financial effects after it finishes, unless (crucially) a significant role for the state is assumed.

## Conclusion

What lessons that can be learned from Sweden when thinking about financial remedy reform in England and Wales? Fundamentally, a Swedish perspective reveals the dangers of neoliberal autonomy for family law, particularly in a context where (as in England and Wales) there is limited state support to enable parents to combine paid work with caretaking responsibilities. Broader Swedish policies – such as subsidised nursery care allow caretakers to undertake paid work – are central to any success in achieving the sort of financial independence envisaged by the Bill. This support simply does not exist to the same extent in England and Wales. Moreover, the Swedish experience suggests that *even with* such policies in place deep-seated gender norms around care cannot be overturned. Thus, it is clear that reforming the law of financial remedies is unlikely to create a more gender equal society by itself. The first claim explored in this article is undermined.

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<sup>164</sup> J Curtice, E Clery, J Perry, M Phillips and N Rahim (eds) *British Social Attitudes 36* (2019) [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), last accessed 28 October 2019.

<sup>165</sup> Ibid.

<sup>166</sup> C Kugelberg, 'Constructing the Deviant Other: Mothering and Fathering at the Workplace' (2006) 13 *Gender, Work and Organization* 152, 157.

Beyond this, a Swedish perspective illustrates the challenges of neoliberal autonomy even in a more gender equal society, undermining the second claim explored here. It is not possible to ensure financial independence if parents are free to choose how to divide paid work and care between them, as the carer will be less able to support him or herself financially after separation. Further, these choices are gendered: norms of motherhood and fatherhood persist even when concerted efforts are made to change them. The discussion above reveals the very different expectations of motherhood and fatherhood in Sweden. Research suggests a similar pattern in England and Wales. Esther Dermott's research, for example, suggests that it is not the time spent on fatherhood that is key to whether someone is seen as a good father.<sup>167</sup>

The aspects of parenting the fathers viewed as most significant indicated that "caring about" was more important than "caring for"; fathers concentrated on the aspects of parenting that were least "work-like" and downplayed the requirement to perform regular child maintenance activities.<sup>168</sup>

Measures designed to promote gender equality in Sweden have not swept away these understandings. The neoliberal vision of autonomy underpinning the Bill ignores this dimension, and the limits these norms place on the ability of such reforms to achieve gender equality in society. Society does not judge the choices made by mothers and fathers in the same way. For example, the discussions above around expectations of how parental leave and the care of young children will be shared envisage very different roles for mothers and fathers.<sup>169</sup> Proceeding on the basis of an assumption that economic independence should be achieved on divorce, therefore, risks simply rendering these differences even more invisible, with significant financial consequences for caretakers and their children on divorce. Whilst women are likely to be disproportionately affected because of the gendered division of caretaking in society, it is the *caretaking role* that is incompatible with economic self-sufficiency.<sup>170</sup> Male caretakers who perform this role are likely to be similarly financially affected on divorce if the law is unable to distinguish between the different roles played by the two parents.

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<sup>167</sup> E Dermott, *Intimate Fatherhood A Sociological Analysis* (Routledge, 2008), 62.

<sup>168</sup> *Ibid.*

<sup>169</sup> J Curtice, E Clery, J Perry, M Phillips and N Rahim (eds) *British Social Attitudes 36* (2019) [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), last accessed 28 October 2019.

<sup>170</sup> M Fineman, 'Responsibility, Family, and the Limits of Equality: An American Perspective' in C Lind, H Keating and J Bridgeman (eds) *Taking Responsibility, Law and the Changing Family* (Ashgate, 2011), 40.

Further, it is worth reflecting on whether, even if it were possible to create a society in which caretaking was shared equally between parents, this would be desirable in England and Wales. The norms of intensive parenthood,<sup>171</sup> such as home-cooked meals and being cared for by parents, are simply incompatible with the unencumbered worker envisaged by neoliberal ideas of autonomy. Acceptance of neoliberal autonomy means rethinking our norms of parenthood, and of motherhood in particular. Relatedly, accepting the financial independence aspect of neoliberal autonomy means accepting limitations on choice. The Swedish experience of cash for care schemes suggests willingness to curtail parental choice where it conflicts with the goal of economic self-sufficiency. It would be possible to try to create incentives in England and Wales to encourage parents to share care more equally, for example, by mandating an equal division of parental leave. However, census data suggest that women of certain ethnic groups in England and Wales are more likely not to work in order to care for children,<sup>172</sup> so policies that aim to encourage all adults to engage in paid work equally would have a disproportionate impact on these groups. Is this desirable? Further, for those in lower socioeconomic groups, a radical rethink of parental leave funding may be required to make it economically viable for parents to split such leave, rather than for the lower earner to take the majority.<sup>173</sup> Do we want a society in which all families have to function in the same way?

Relatedly, it is worth considering whether, even if care were shared more equally in intact families and that led to more shared care arrangements post-separation, this would achieve economic independence on separation. Australian research into shared care arrangements, for example, found that:

Both equal care mothers and fathers were more likely to be working part-time than full-time and only one of the eight equal care fathers had a full-time job. Nearly half of our equal carers were also self-employed. This is consistent with family-friendly work hours being conducive to workable 50/50 arrangements, and also suggests the complexity of juggling full-time paid work with shared care of children following separation.<sup>174</sup>

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<sup>171</sup> C Collin, 'Making Motherhood Work' (Princeton University Press, 2019), 61.

<sup>172</sup> ONS, '2011 Census analysis: Ethnicity and the Labour Market, England and Wales' (13 November 2014) [www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/ethnicity/articles/ethnicityandthelabourmarket2011censusenglandandwales/2014-11-13](http://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/ethnicity/articles/ethnicityandthelabourmarket2011censusenglandandwales/2014-11-13), last accessed 8 January 2020.

<sup>173</sup> Whilst there may be a disincentive for parents to split leave wherever there is a big disparity in parental incomes, Swedish data suggests that as fathers' leave use increases generally it is those in the lowest income groups who are least likely to take long leaves and most likely to take no leave at all (G Andersson, A Duvander and M Evertsson, 'Fathers' Uptake of Parental Leave: Forerunners and Laggards in Sweden, 1993-2010' (2020) 49 *Journal of Social Policy* 361).

<sup>174</sup> B Fehlberg, C Millward and M Campo, 'Shared post-separation parenting in 2009: An empirical snapshot' (2009) 23 *Australian Journal of Family Law* 247.

There are very real questions about whether all parents could find such employment if shared care became the norm. In a study of Swedish lone mothers, Jenny Alsave found that middle-class mothers were more able than working-class mothers to work flexibly and had greater access to practical and financial support from their social networks to help with balancing paid work and care.<sup>175</sup> There is, therefore, an important class dimension to these debates: middle-class parents have options that are not necessarily available to working-class parents. Moreover, even if more parents could find flexible work, it is not clear whether such jobs would be sufficiently well paid for all parents to be financially self-sufficient on separation. Alsave notes that the struggles faced by Swedish lone mothers need to be seen against the backdrop of 'Sweden's generous licensed childcare, taken for granted by Swedish parents'.<sup>176</sup> This is very different from the position in England and Wales, where childcare is less extensive and more expensive.<sup>177</sup> Relying on private family solutions such as shared care arrangements *without significant state support* may simply make balancing work and care a challenge for more parents, and only achievable for those with higher incomes and better support networks, with the result that more parents and children are left in financially precarious positions on divorce.

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<sup>175</sup> J Alsave, 'Working it out: strategies to reconcile work and family life among Swedish lone mothers' (2017) 6 *Families, Relationships and Societies* 325.

<sup>176</sup> *Ibid*, 336.

<sup>177</sup> *Ibid*.