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WOMEN IN ENGLISH FAMILY LAW: WHEN IS EQUALITY EQUITY?

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The principle that women are equal with men lies at the heart of their emancipation, and underpins the enactment of the *Women's Charter* of Singapore. But the question of how that equality is to be reflected in women's treatment under the law is more complicated. The device usually employed in the law is that of formal equality—on the face of the legislation, or in the case-law, women are to be regarded and *assumed* to be equal. But it does not follow from the principle that men and women *should* be treated as equal under the law, that their position in the wider society is *in fact* equal. This article examines two key aspects of English family law which exemplify the problem of the gap between formal and substantive equality for women: asset division on divorce and post-separation parenting.

I. INTRODUCTION

The principle that women are equal with men lies at the heart of their emancipation, and underpins the enactment of the *Women's Charter*[1] in Singapore. But the question of how that equality is to be reflected in women's treatment under the law is more complicated. The device usually employed in the law is that of formal equality—on the face of the legislation, or in the case law, women are to be regarded and *assumed* to be equal. For example, English family legislation on maintenance and financial support now makes no distinction between husbands and wives.[2] But it does not follow from the principle that men and women *should* be treated as equal under the law, that their position in the wider society is *in fact* equal. If their economic, social or cultural position is unequal, then a 'gender blind' approach to the application of laws may in fact sustain or increase substantive inequality and produce an inequitable outcome. The marking of the 50th Anniversary of the enactment of the *Women's Charter* provides a valuable opportunity to reflect on this crucial aspect of modern family law and policy.

Leong Wai Kum has written cogently on the political achievement of the *Women's Charter*, and noted that even though it is substantially a code of *family* law, its title, focused on the position of women, is significant in linking it to the political and economic development of women as intended by the founders of the modern state

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1 Cap. 353, 1997 Rev. Ed. Sing.

2 Compare *ibid*., ss. 69 and 113, which impose a spousal maintenance liability on husbands but not wives.

of Singapore.[3] By contrast, family law in England and Wales, no doubt reflecting in part our traditional reluctance to write down our constitutional principles in one place, remains a patchwork of legislation, some still dating back to the 19th century, supplemented by ever-increasingly complex case-law, which has been required to respond to the very rapid and profound social changes in family structure and behaviour over the past forty years. These changes include a decline in marriage, with the lowest ever recorded marriage rate of around 20 per 1000 unmarried people in 2008 (down from a peak of 78.4 per 1000 men, and 60.5 per 1000 women in 1972); an increase in divorce, with the rate of divorce more than doubling from 6 per 1000 married people in 1971 to over 14 per 1000 in 1993, before falling back (due to the decline in marriage) to a rate of 11.2 in 2008; the growth of extra-marital cohabitation from 11% of non-married women aged 18 to 49 in 1979 to 29% in 2002; and the acceptance of homosexual relationships, with nearly 38,000 same-sex unions[4] recognised through registration under the *Civil Partnership Act 2004*.[5]

It is against this backdrop of rapid social change that this article examines two key aspects of English family law which exemplify the problem of the gap between formal and substantive equality for women: how assets are to be divided on divorce and what arrangements are to be made for post-separation parenting of children. In each case, there have been moves over the past decade to interpret the equality principle as requiring the *equal sharing* of assets and of the care of children, leading in the latter case to calls for children to spend *equal time* with each parent. The first shift in approach has been led by the senior judiciary, through their re-interpretation of the legislation governing property division on divorce. The second has been driven by men's lobby groups acting at the political level. This article argues that while the equal sharing of assets can be justified as enhancing the position of women by seeking to redress their otherwise unequal economic position in society as it is currently structured, the suggestion that children's time should be shared out equally between their parents ignores the differential burden that continues to fall on women as the primary carers of children in British society, and runs the risk of increasing their inequality. It also, of course, fails to treat the welfare of the child as the paramount consideration, as required by section 1 of the *Children Act 1989*.[6] The focus here, however, is unapologetically on the position of women.

II. The Achievement of Formal Equality for Women in English Family Law

Just as the *Women's Charter* underscores the importance of how women are treated by the laws governing their family relationships if they are to stand any chance of equal treatment in the wider spheres of government, the market and society, so too women's emancipation in England and Wales in fact began, not with political

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3 Leong Wai Kum, "Fifty Years and More of the *Women's Charter* of Singapore" (2008) Sing. J.L.S. 1 at 10.

4 All statistics are for England and Wales only, and are taken from the Office for National Statistics, online: U.K. National Statistics <http://www.statistics.gov.uk/> (last searched in December 2010).

5 (U.K.), 2004, c. 33.

6 (U.K.), 1989, c. 44.

recognition through the struggle for suffrage, but with legal recognition of their position as mothers, and then as wives.

At common law, a father had complete rights over his legitimate children to the exclusion of the mother. The first measure which gave women some limited standing against their husbands was passed in 1839, when the Court of Chancery was given the power to award custody of a child, up to the age of seven, and access up to the age of 21, to the mother, provided that she had not committed adultery.[7] Mothers' rights were gradually expanded until, in 1925, the *Guardianship of Infants Act 1925*[8] provided that mothers and fathers were to be treated on an equal footing in considering their claims for custody and access, although it did not extend the rights of the father to mothers outside of court proceedings.[9] In fact, only with the enactment of the *Children Act* in 1989 did the position of married mothers and fathers finally reach complete formal equality, with the abolition of the common law rule that, during his lifetime, the father was the sole guardian of his legitimate child.[10]

A campaign to enable married women to retain title over their property developed alongside these changes. Most importantly, the *Married Women's Property Act 1882*[11] provided that, henceforth, married women would keep title to the property they brought into their marriage, and could acquire title to any further property, holding it as their "separate" property and eschewing any concept of community of marital property.[12] However, true equality took until the enactment of the *Equality Act 2010*, when the presumption of advancement (whereby it was presumed that a transfer of property by a husband to his wife was intended as a gift to her) and the husband's common law duty to maintain his wife were abolished, and the joint ownership of moneys derived from a "housekeeping allowance" no longer applied only to payments made by a husband to the wife.[13]

III. Property Allocation on Divorce and the "Yardstick of Equality"

The concept of "irretrievable breakdown" as the sole ground for divorce introduced by the *Divorce Reform Act 1969*[14] was followed by amendment to the powers of the courts to deal with the financial and property consequences of the termination

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7 *Custody of Infants Act, 1839* (U.K.), 2 & 3 Vict, c. 54, also known as *Talfourd's Act*.

8 (U.K.), 15 & 16 Geo. V, c. 45.

9 Apart from enabling mothers to appoint a testamentary guardian to act jointly with the surviving parent: see the discussion by Stephen Cretney, *Family Law in the Twentieth Century: A History* (Oxford: Oxford University Press, 2003) at 569-573.

10 This was accomplished by abolishing the concept of "guardianship" as applying other than after the death of a parent, not by making the mother equal guardian.

11 (U.K.), 45 & 46 Vict., c. 75.

12 Compare the discussion by Leong, *supra* note 3 at 14-15, 19-21 regarding the development of an effective "deferred community" regime under the *Women's Charter*, and see discussion below for the current position on divorce under English law.

13 *Equality Act 2010* (U.K.), 2010, c. 15, part 15. Note that these provisions are not yet, in fact, in force! Compare s. 54 of the *Women's Charter*, which preserves the housekeeping allowance as a payment by the husband only.

14 (U.K.), 1969, c. 55.

of the marriage. Apart from some fairly minor (though not insignificant) amendment in 1984,[15] the legislation, consolidated in the *Matrimonial Causes Act 1973,*[16] continues to govern this area of law. Yet the economic position of women has undergone significant change in the intervening period, and must be borne in mind when evaluating how the law operates.

In 1971, the employment rate for women in the United Kingdom was 56%, while by the end of 2008, it was 70%.[17] Men's rate of employment declined from 92% in 1971 to 79% in 2008.[18] However, the pattern of women's employment is very different from that of men: while around 3/4 of men were in full-time employment, only around half of women were so employed.[19] The rate of employment increases as children become older—63% of married/cohabiting women with a child under five were employed, compared with 82% of those whose youngest child was under 18, although it may be noticed that partnership status is important, with only 35% of non-married/cohabiting women with a child under five employed.[20] These figures show how women in Britain have become increasingly economically active since the 1973 Act was passed—but how they tailor their working hours to enable them to remain the primary carers of children, and are hence still significantly dependent upon the resources of their spouse or partner, either financially or through the provision of child care whilst they are working.

When first enacted, section 25(1) of the *Matrimonial Causes Act 1973* directed the courts to seek to place the parties, so far as it was practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if their marriage had not broken down—a provision still extant in the *Women's Charter* as regards the assessment of maintenance.[21] However, the English provision was abolished in 1984, it being considered that it was both unfair (as the husband might have been divorced against his will and without proof that he had committed a matrimonial offence) and largely unattainable (as there would not usually be sufficient resources to ensure that neither spouse suffered a diminution in their standard of living).[22] No other objective was put in its place, but in *White v. White* it was stated that "the outcome on these matters, whether by agreement or court order, should be fair. More realistically, the outcome ought to be as fair as is possible in all the circumstances."[23] Thus, "fairness" can be regarded as the overriding objective of the jurisdiction.

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15 *Matrimonial and Family Proceedings Act 1984* (U.K.), 1984, c. 42, which enabled the court to impose a clean break settlement with no continuing financial ties between the parties.

16 (U.K.), 1973, c. 18.

17 Based on women aged 16 – 59. See Office for National Statistics, *Social Trends*, No. 39—2009 Edition (Newport: Palgrave Macmillan, 2009) at chap. 4.

18 *Ibid.* at 48.

19 *Ibid*.

20 Age will be relevant to this figure—women over pension age are, of course, less likely to be employed—and more likely to be widowed.

21 *Women's Charter*, s. 114(2).

22 *Matrimonial and Family Proceedings Act 1984*, implementing the recommendations of the Law Commission of England and Wales, *the Financial Consequences of Divorce*, Law Com. No. 112 (London: Her Majesty's Stationery Office, 1981).

23 [2001] 1 A.C. 596 at 599 (H.L.) (Lord Nicholls of Birkenhead) [*White*].

Section 25(1) now simply requires the court to give first consideration to the welfare, while a minor, of any child of the family, and to have regard to "all the circumstances of the case" including a set of specific factors set out in section 25(2).[24] A new provision, section 25A, was inserted to encourage the court to consider the appropriateness of making a clean break between the parties, whereby they will have no continuing financial ties through the provision of periodical payments. Coupled with extensive powers over the parties' property (regardless of who held legal title to it, and whether it derived from gift, inheritance or the efforts of one spouse only) and income, the legislation gave the courts an extremely broad discretion, with consequential opportunity for different approaches taken to similar circumstances and thus a high degree of unpredictability and uncertainty in the likely outcome of litigation.

Yet there is strong pressure on the parties to settle, rather than have the case adjudicated, in order to reduce their legal costs.[25] There has thus been a consistent call, indeed dating right back to when the legislation was first enacted, for clear judicial guidance on how this discretion should be exercised, so that lawyers can provide meaningful advice to clients to enable them to reach a fair agreement.[26]

The law has gone through three phases of development as the courts have attempted to lay down such guidance, reflecting a shift in our understanding of what marriage is fundamentally about. In the first phase, epitomised in *Wachtel*,[27] the courts continued to apply a very traditional approach to assessing a wife's claims, limiting her to a one-third (rather than one-half) share of the available income for her ongoing support, and applying the same proportion to her claims to capital assets.[28] The basis for this approach was that the wife was a *dependant* of the husband, who—given the requirement on the court to put the parties in the position they would have been in if the marriage had continued "and each had properly discharged his or her financial obligations and responsibilities towards the other"—continued as the family's breadwinner despite the divorce.

In the second phase, with the abolition of this objective in 1984, a view of marriage as freely terminable and autonomous assumed greater significance. Clean break settlements with no ongoing financial ties, and which encouraged the parties "to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down",[29] became favoured. This switched the focus of the court's attention away from periodical payments of maintenance to the division of capital. However, the courts began to be confronted with claims involving extremely wealthy spouses. Where the capital at stake ran into the millions, giving

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[24] These are of course, very similar to those contained in s. 114 of the *Women's Charter*, but the latter applies to the assessment of *maintenance* rather than division of "matrimonial assets", which are subject to a more specific set of considerations in s. 112.

[25] This is demonstrated both through the procedural rules (including an obligation on the court to deal with the case in ways proportionate to the amount of money involved and actively to manage the case to assist the parties to settle: see *Family Procedure Rules 2010*, S.I. 2010/2955, r. 1) and the costs rules, with the "loser pays the winner's costs" principle abolished and each party (unless there is litigation misconduct) bearing their own costs (r. 28.3).

[26] See, *e.g.*, *Wachtel v. Wachtel* [1973] Fam. 72 at 87 (C.A.) [*Wachtel*].

[27] *Ibid*.

[28] For discussion, see G. Douglas, "Bringing an end to the matrimonial post mortem: *Wachtel v. Wachtel* and its enduring significance for ancillary relief" in S. Gilmore *et al*, eds., *Landmark Cases in Family Law* (Oxford: Hart Publishing, 2011).

[29] *Minton v. Minton* [1979] A.C. 593 at 608 (H.L.) (Lord Scarman).

the wife as much as one-third, when she might have played no part in generating it and might have enjoyed a very luxurious lifestyle through no effort of her own, appeared difficult for courts to contemplate. Instead, it was decided that the wife should only have her "reasonable requirements" satisfied.[30] Thus, in cases of this sort, the existence of great wealth enabled the courts to achieve a clean break outcome, in line with the "modern" view of marriages as freely terminable, while continuing to view marriages as unequal relationships in which the wife was the dependent partner.

The third stage of development came in the late 1990s, when married women's increasing involvement in employment and other economic activity began to produce a new wifely model: the wife who played a significant part in generating the wealth enjoyed by the family. Now, instead of a one-third share of assets appearing too large, a limitation to the wife's "reasonable requirements" appeared too small. A breakthrough came in *Conran v. Conran*.[31] There, the spouses had been married for over 30 years, and the wife had played an important role in assisting the husband to build his fortune, worth around £85 million. The trial judge decided that the wife should receive £2.1 million, in addition to a sum of £8.4 million for her reasonable requirements, to reflect her "outstanding" contribution to the welfare of the family, as recognised in section 25(2)(f) of the *Matrimonial Causes Act 1973*.

In *Conran*, the amount of capital awarded showed that the wife was still seen as the "junior" partner in the marital relationship. In the later decision of *White*,[32] however, she clearly played an equal role. The spouses ran a farming business, and the wife had worked on the farm throughout the marriage (again lasting 30 years) as well as bringing up the parties' three children. At first instance, the trial judge regarded the wife's "reasonable requirements" as satisfied by an award which would give her one-fifth of the total assets of some £4.6 million. On appeal, the Court of Appeal recognised the wife's literal "equal partner" status in the farming business, and accordingly increased her share of the assets. However, they took into account disputes between the parties as to the value of the business, and the fact that the spouses had acquired their first farm with the help of a loan from the husband's father. The result was an award to the wife of two-fifths of the assets. Both parties appealed yet again to the House of Lords.

In a crucial judgment, the House rejected the "reasonable requirements" approach as incompatible with the words of the statute. But more importantly, they also adopted a new view of marriage, as a partnership of equals, to which the husband and wife may be expected to make both a financial *and* a non-financial contribution. In the words of Lord Nicholls, giving the leading speech:

> [T]here is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who

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30 *O'D v. O'D* [1976] Fam. 83 at 91 (C.A.) (Ormrod L.J.).

31 [1997] 2 Family Law Reports 615 (C.A.) [*Conran*].

32 *White*, *supra* note 23.

> is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party … If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.[33]

He advised that, before making an order, the judge should "check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so." [34] Lord Cooke, in his own speech in the case, noted that the labels "yardstick" or "check" were unlikely to produce any different result from "starting point"[35] and, after some confusion as to quite when equal shares should be factored into the court's reasoning process, it was duly held by the Court of Appeal in *Charman v. Charman (No. 4)*[36] that what had become known as "the sharing principle" need not be postponed to the end of the process of going through the factors in section 25—it will inform the court's deliberations throughout.

IV. Equal but Different?

It would appear then, that with the decisions in *White* and *Charman*, the courts have successfully modernised the law of ancillary relief to reflect a view of marriage as a partnership of equals, sending out the clear message that awarding an equal share in wealth is the expected outcome of the application of the court's powers. However, it should be noted that, for many families, there will be insufficient wealth to be able to divide it equally in order to meet the parties' (and their children's) respective needs. For such couples, it will remain likely that the spouse with care of the children will continue to receive all or most of the capital they own, and this must obviously be the correct outcome in such cases—to do otherwise would be precisely to place *formal* equality before *substantive* fairness.[37] But where there is sufficient wealth to go beyond the relief of need, while there may now be many (more) cases where spouses do indeed agree on equal shares of their assets,[38] it would be quite wrong to

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33 *Ibid.* at 605.

34 *Ibid.* at 605. In fact, the House ultimately declined to increase the wife's share to 50 per cent, because of the principle that the reasonable decision of an appellate court exercising its discretion should not be upset simply because the further appeal court might take a different view of the correct outcome: *Piglowska v. Piglowski* [1999] 1 W.L.R. 1360 (H.L.).

35 *White*, *supra* note 23 at 615.

36 [2007] EWCA Civ 503 [*Charman*].

37 *Cf.* the findings of Lenore Weitzman regarding the substantive inequality produced by California's "equal sharing" principle in the 1980s: Lenore Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York: Free Press, 1985).

38 There is no firm evidence on this, and the case-law is distorted as it consists overwhelmingly of cases concerning very wealthy spouses. Emma Hitchings conducted a qualitative study of solicitors dealing with the "everyday case" in the aftermath of recent decisions but found that these remain dominated by satisfying the parties' needs: Emma Hitchings, "Chaos or Consistency? Ancillary Relief in the 'Everyday' Case" in Joanna Miles & Rebecca Probert, eds., *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (Oxford: Hart Publishing, 2009) 185.

conclude that the legal world has embraced this principle with open arms. Instead, the message has been advanced by many practitioners and members of the judiciary that the "generosity" of the courts' approach has encouraged wives who have little real connection to this jurisdiction to "forum shop" and seek a divorce here, such that London has become the "divorce capital of the world". Practitioners have sought to find ways round the application of equal shares by seeking to persuade the courts to distinguish the leading cases, and many judges as well as lawyers have called for reform through legislation.[39]

A. *Special Contribution*

The first way in which it was sought to avoid an equal division of assets was through using the factor in section 25(2)(f)—"contribution to the welfare of the family"—to argue that the court should recognise the special or "stellar" contribution of husbands to building up the wealth of the family, rather than that of wives in performing the caring role for which the provision had originally been intended. In *Cowan v. Cowan*,[40] for example, the husband set up a business manufacturing plastic bin liners, which revolutionized the collection and disposal of household waste. At the end of the 35 year marriage the parties' total wealth was around £11.5 million. The Court of Appeal considered that the husband's identification of the potential of bin liners amounted to a display of business "genius" which justified a departure from the yardstick of equal shares to a split of 38% in favour of the wife, and 62% to the husband.

The problem with this approach is its scope for renewed gender discrimination. This is not only in relation to the departure from equality of *outcome* which may result. Rather, just as had been the case when the courts imposed the ceiling of "reasonable requirements" on awards to the wife, it produces a lack of equality of *treatment* towards the claims of each spouse. In *Lambert v. Lambert*[41] the Court of Appeal looked again at the issue. The husband had set up a business, shortly before he met the wife, which had done very well over the 23 years of the marriage and which he sold after separating from her for some £20 million. The trial judge described the wife's contribution to the marriage as a full one in terms of looking after the home and bringing up the children, and considered that there was nothing more the wife could have done to make her contribution "special". He characterized the husband as an excellent businessman and successful entrepreneur, although not a "genius". Yet he awarded him 63% of the assets. The wife appealed. The Court of Appeal recognized the danger of gender discrimination arising from the concept of "special contribution". As Thorpe L.J. noted: "if all that is regarded is the scale of the breadwinner's success, then discrimination is almost bound to follow since there is no equal opportunity for the homemaker to demonstrate the scale of her

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[39] See in particular, the extended "postscript" appended to his judgment by Sir Mark Potter P. in *Charman*, *supra* note 36 at paras. 106-126. The Law Commission of England and Wales is currently conducting a review of the law on marital agreements, see further below.

[40] [2002] Fam. 97 (C.A.) [*Cowan*].

[41] [2003] 2 W.L.R. 631 (C.A.) [*Lambert*].

comparable success."[42] He held that once the trial judge "had concluded that the husband was not a genius and that the wife could not have done more, he should not have elevated one contribution above the other, given that the two are essentially incommensurable."[43]

However, it remains possible to argue for a departure from equality based on special contribution. The House of Lords, in *Miller v. Miller; McFarlane v. McFarlane*,[44] adopted the same approach that is taken towards (mis)conduct, and ruled that it may still be taken into account if "it would in the opinion of the court be inequitable to disregard it".[45] It is likely that it remains a factor in negotiating settlements involving wealthy businessmen, although there is no data on how frequently it is relied upon.[46]

B. *The Concept of Matrimonial Property*

The next way in which legal advisers sought to avoid the straitjacket of equal division was through arguing for a concept of "matrimonial assets" to which the sharing principle should be limited. It began to be argued that an outcome could not be "fair" if it took no account of the *source* of the assets in issue. After all, in *White* itself, Lord Nicholls stated:

> Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property.[47]

The matter was discussed in *Miller v. Miller*.[48] The parties were married for less than three years, and had no children. The husband's wealth was estimated at the time of the trial to be around £17.5 million,[49] while the wife was in debt. The wife, who did not, in any event, claim half of the assets, was awarded £5 million and the husband appealed.

The House of Lords dismissed the husband's final appeal, but the two leading speeches, by Lord Nicholls and Baroness Hale, both considered that the source of the assets in dispute is a relevant factor in determining what will be a fair outcome. Lord Nicholls reiterated the distinction he had drawn in *White* between "property acquired during the marriage otherwise than by inheritance or gift … the financial

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42 *Ibid.* at para. 45. See also John Eekelaar, "Asset Distribution on Divorce—The Durational Element" (2001) 117 L.Q.R. 552 at 554.

43 *Lambert*, *supra* note 41 at para. 53.

44 [2006] 2 A.C. 618 (H.L.) [*McFarlane*].

45 *Ibid.* at para. 67 (Lord Nicholls); and at para. 146 (Baroness Hale).

46 In *Charman*, *supra* note 36, the wife conceded that the husband, an insurance under-writer, who had built up assets worth £131m, should be regarded as having made a special contribution, and she was awarded just under 37%, or £48m.

47 *White*, *supra* note 23 at 610.

48 A conjoined appeal with *McFarlane*, *supra* note 44.

49 The husband's true wealth was difficult to estimate since much of it was held in shares in his current employer which were not then eligible for sale.

product of the parties' common endeavour; and property … the parties bring with them into the marriage or acquire by inheritance or gift during the marriage".[50]

Baroness Hale took a slightly different approach, distinguishing between "family assets" and non-family assets. In the former, she included the marital home and its contents, assets acquired for the use and benefit of the whole family, including savings, and family businesses or joint ventures in which both spouses work. Such assets she saw as "the fruits of the marital partnership". In the latter, by contrast, she regarded business or investment assets, generated solely or mainly by the efforts of only one of the spouses. With such assets, she argued, "it simply cannot be demonstrated that the domestic contribution, important though it has been to the welfare and happiness of the family as a whole, has contributed to their acquisition."[51]

C. *Prenuptial Agreements*

Another means of seeking to ring-fence certain assets, whenever and howsoever acquired, and to avoid their equal division, is for the spouses to enter into an agreement over how their property should be divided in the event of a divorce. If such an agreement was made before the marriage itself – a pre-nuptial agreement—or even during the marriage but before the parties had separated, then it was traditionally regarded as contrary to public policy since

> [m]arriage involved a duty to live together and an agreement making provision for the possibility of separation might act as an encouragement to separate. Such agreements were void and the court would pay no regard to them … [Instead u]nder English law it is the court that is the arbiter of the financial arrangements between the parties when it brings a marriage to an end. A prior agreement between husband and wife is only one of the matters to which the court will have regard.[52]

By the beginning of the millennium, partly to encourage spouses to settle rather than litigate, and partly because of greater use of the English jurisdiction by couples who had married abroad having entered into a pre-nuptial agreement, the courts began to give greater weight, as a relevant factor, to the existence of such agreements and to scrutinise their terms.[53] It became imperative for the courts to give clear guidance to legal advisers on just how much weight an agreement was to bear. This is not a development limited to England and Wales. Debbie Ong has discussed how the Court of Appeal in Singapore has also had occasion to pronounce on the weight to be given to a pre-nuptial agreement.[54]

The use of binding contracts to determine spouses' obligations towards one another reflects a clear view of marriage as a "partnership of equals" in which the parties' autonomy should be respected and given effect. As Lord Phillips put it in

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[50] *McFarlane*, *supra* note 44 at paras. 22-23.

[51] *Ibid.* at paras. 149-151.

[52] *Radmacher v. Granatino* [2011] 1 All E.R. 373 at paras. 3 and 31 (Lord Phillips) (S.C.) [*Radmacher*].

[53] See the discussion in Nigel Lowe & Gillian Douglas, eds., *Bromley's Family Law*, 10th ed. (Oxford: Oxford University Press, 2007) at 1012-1014.

[54] See Debbie Ong, "Prenuptial agreements: a Singaporean perspective in *TQ v TR*" [2009] Child and Family Law Quarterly 536, reviewing the jurisprudence and the ruling in *TQ v. TR* [2009] SGCA 6.

Radmacher,

> [t]he reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best.[55]

This approach also epitomises an assumption of *formal* equality between the spouses but as Baroness Hale pointed out it ignores the fact that "the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she—it is usually although by no means invariably she—would otherwise be entitled."[56] In other words, it fails to take account of the substantive *inequality* that may exist between the husband and wife.

It was for this reason, in part, that the Privy Council in *MacLeod v. MacLeod* [57] distinguished between agreements made before the wedding, and those entered into afterwards. Baroness Hale, delivering the judgment of the Board, stated:

> There is an enormous difference in principle and in practice between an agreement providing for a present state of affairs which has developed between a married couple and an agreement made before the parties have committed themselves to the rights and responsibilities of the married state purporting to govern what may happen in an uncertain and unhoped for future … Post-nuptial agreements, however, are very different from pre-nuptial agreements. The couple are now married. They have undertaken towards one another the obligations and responsibilities of the married state. A pre-nuptial agreement is no longer the price which one party may extract for his or her willingness to marry.[58]

However, this distinction was rejected by the majority of the Supreme Court in *Radmacher*.[59] The German wife and French husband both came from wealthy families, the wife particularly so. They entered into a pre-nuptial agreement in Germany in 1998, which provided that neither party was to derive any interest in or benefit from the property of the other during the marriage or on its termination. The couple married in England later that year, and had two children. They divorced in England in 2007. By that time, the husband had given up a well-paid career in banking, to become a research student at Oxford University, and he sought ancillary relief. The first instance judge noted the existence of the agreement, but still awarded the husband a total of £5.56 million. The wife appealed successfully to the Court of Appeal, and the husband in turn appealed to the Supreme Court. There, the majority[60] held that, since the legislation prohibits the parties from ousting the jurisdiction of the court, an agreement (whether pre- or post-nuptial) cannot be strictly *binding* on the court—it remains for the court to determine what weight it should have. But in so

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55 *Radmacher*, *supra* note 52 at para. 78.
56 *Ibid.* at para. 137.
57 [2010] 1 A.C. 298 (P.C.).
58 *Ibid.* at paras. 31 & 36.
59 *Radmacher*, *supra* note 52.
60 Baroness Hale, the only woman on the Bench, dissented.

determining, it ruled that

> [t]he court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.[61]

The message sent by the majority's ruling is clearly that pre-nuptial (and all nuptial) agreements are likely to carry decisive weight so long as this does not prejudice the interests of the couple's children (whose welfare remains the court's first consideration under section 25(1) of the 1973 Act), nor leave a spouse without her or his needs adequately met.[62] The approach taken by the Supreme Court represents a return to an approach based on formal equality and to an *assumption* that the spouses are in equal positions even if their individual financial circumstances mean that they are not truly and substantively equal. As Baroness Hale, the lone dissentient, pointed out, "there is a gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman."[63] The decision is a retrograde step on the path to real gender equality in family law.[64]

V. Shared Parenting and Claims to Equal Parenting Time

Claims to equal shares have also arisen in the context of post-separation parenting arrangements, also known as "shared residence", "shared care" or "shared parenting time". Once again, it can be argued that the legislation assumes a position of formal equality between mothers and fathers (as was outlined above), but that the application of the law through judicial decision-making has produced an unequal outcome. However, this unequal outcome is in fact substantively fair because it reflects the reality of parenting arrangements in most British families, which is that mothers are expected to, and do, take on the primary care-taking role, both before[65] and after separation.[66]

The accommodation of "equal parenting" claims has come through three mechanisms: first, the undermining of the concept of equal parental responsibility; secondly, increasing use of "shared residence orders", in other words, orders splitting the child's time between the parents; and finally, attempts to introduce legislation

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61 *Radmacher*, *supra* note 52 at para. 75.

62 *Ibid.* at para. 81.

63 *Ibid.* at para. 137. It is of note that the only other female judge involved in the litigation, Baron J., at first instance, also gave less weight to the pre-nuptial agreement than did the male judges in the Court of Appeal and Supreme Court.

64 The whole matter is currently being reviewed by the Law Commission of England and Wales: see the Law Commission of England and Wales, Consultation Paper No. 198, *Marital Property Agreements* (2011).

65 75% of mothers, compared with just 7% of fathers, reported that they have the day-to-day primary responsibility for the care of children: Gavin Ellison, Andy Barker & Tia Kulasuriya, *Work and care: a study of modern parents* (Manchester: Equality and Human Rights Commission, 2009). I am grateful to Sonia Harris-Short for drawing this study to my attention.

66 See Vicki Peacey and Joan Hunt, *Problematic contact after separation or divorce: a national survey of parents* (London: Gingerbread and Nuffield Foundation, 2008), who found that only around 9 to 12% of separated parents had shared parenting arrangements entailing three or more overnight stays per week, a proportion they thought was "unexpectedly high" (at 19).

which would mandate a presumption that a child should spend "equal time" with both parents.

A. *Parental Responsibility*

Parental responsibility means "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property."[67] One of the most important reforms to child law brought about by the *Children Act 1989* was the clarification that, regardless of the ending of the parents' own relationship to each other by divorce, each would continue to hold parental responsibility for their child.[68] However, one large-scale empirical study found that nearly 90% of separated parents reported that the parent with primary care of the child took the important decisions relating to the child. It also found that significantly more non-resident parents were unhappy with this situation than parents with care.[69] This level of dissatisfaction suggests that the formal position of the equality of (married and increasing numbers of unmarried) parents enshrined in the statute through the concept of shared parental responsibility is either not understood, or ineffective.

An early indication of this deficiency came in the case-law concerning the making of parental responsibility orders for unmarried fathers. The court must apply the welfare principle and only make an order in favour of the father where this is in the child's best interests. That this is not an unduly burdensome test is illustrated by cases where the courts have held that parental responsibility may be granted although the father is not to be allowed contact with the child, and even where the child is awaiting adoption.[70] Once one reaches the point where there is nothing the father is permitted to do by way of the *exercise* of his parental responsibility, one has to ask what function is fulfilled by bestowing it upon him. The answer was provided by Ward L.J. in *Re S (Parental Responsibility)* where he stated that it is a means of "conferring upon a committed father the *status* of parenthood for which nature has already ordained that he must bear responsibility."[71] In a later case, he made his point even clearer, declaring that "it is important that, wherever possible, the law should confer on a concerned father that stamp of approval."[72]

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67 *Children Act 1989*, s. 3(1).

68 Note that all married parents and unmarried mothers automatically have parental responsibility by virtue of s. 2(1)(2). By s. 4 of the Act, unmarried fathers may acquire parental responsibility, by registration on the birth certificate (since December 2003); by agreement with the mother or by court order. Compare s. 46(1) of the *Women's Charter*: "Upon the solemnization of marriage, the husband and the wife shall be mutually bound to co-operate with each other in safeguarding the interests of the union and in caring and providing for the children" discussed by Leong, *supra* note 3 at 11-14, 17-18. See also *Re C (an infant)* [2003] 1 S.L.R.(R.) 502 at 506 (C.A.): "both parents have equal rights over the child" and *CX v. CY (minor: custody and access)* [2005] 3 S.L.R.(R.) 690 at para. 26 (C.A.): courts must recognise and promote joint parenting so that both parents can continue to have a direct involvement in the child's life.

69 Nick Wikeley *et al*., *Relationship Separation and Child Support Study* (London: Department for Work and Pensions, 2008). 3/5 of parents with care were very happy with this position but nearly 1/5 of non-resident parents were very unhappy: at 55-56.

70 *Re H (A Minor) (Contact and Parental Responsibility)* [1993] 1 Family Law Reports 484 (C.A.); *Re H (Minors) (Local Authority: Parental Rights) (No 3)* [1991] Fam 151 (C.A.).

71 [1995] 2 Family Law Reports 648 at 657 (C.A.), emphasis added.

72 *Re C and V (Contact and Parental Responsibility)* [1998] 1 Family Law Reports 392 (C.A.).

It may be debated whether providing such status is beneficial to the child, or is more about benefitting the parent. Helen Reece has shown how the judges have shifted from asserting a benefit to the child in knowing, or growing up to know, that he or she has had two "concerned" parents, to a frank recognition that it is the *father*, not the child, who needs the order, or, as she puts it, the psychological or symbolic "legitimation" it provides.[73] The need to provide the father with symbolic recognition of his role is also apparent in the equivalent body of case-law which has developed in relation to the making of "shared residence orders".

B. *Shared Residence Orders*[74]

The *Children Act 1989* removed the concepts of "custody" or "care and control" and "access" from English law, and instead provided, under section 8, that a court could make "residence" and "contact" orders. These orders were intended to limit the remit of the courts to "dealing with concrete and practical issues about with whom the child should live [and] what contact she should have with others."[75]

Before the *Children Act 1989*, the Court of Appeal had clearly disapproved of the idea of a child having a home with each of his or her separated parents,[76] but the Law Commission recommended that this position should be reversed,[77] and section 11(4) of the Act expressly provides that "[w]here a residence order is made in favour of two or more persons who do not themselves live together, the order may specify the periods during which the child is to live in the different households concerned." After initially ruling that such an order should only be made in exceptional circumstances,[78] the Court of Appeal then adopted a more accommodating approach, holding that it was permissible to do so as long as there was some "positive benefit" in making the order.[79] Finally, in *D v. D (Shared Residence Order)*,[80] it held that there should be no gloss put on the statutory provisions, nor restrictions placed upon their wording. It accordingly upheld the making of a shared residence order where the children were spending 38% of their time with the father.

Subsequent cases also upheld the making of the order to reflect the actual division of the child's time arrived at by the parents themselves. In such cases, the order was clearly reflecting and confirming the reality of the children's situation.[81] However,

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73 Helen Reece, "The Degradation of Parental Responsibility" in Rebecca Probert, Stephen Gilmore & Jonathan Herring, eds., *Responsible Parents and Parental Responsibility* (Oxford: Hart Publishing, 2009) 85.

74 See Stephen Gilmore, "Court decision-making in shared residence order cases: a critical examination" [2006] Child and Family Law Quarterly 478; Peter Harris & Robert George, "Parental responsibility and shared residence orders: parliamentary intentions and judicial interpretations" [2010] Child and Family Law Quarterly 151.

75 See *ibid.* at 156.

76 *Riley v. Riley* [1986] 2 Family Law Reports 429 (C.A.).

77 Law Commission of England and Wales, "Guardianship and Custody", Law Com. No. 172 (London: Her Majesty's Stationery Office, 1988) at para. 4.12.

78 *Re H (A Minor) (Shared Residence)* [1994] 1 Family Law Reports 717 (C.A.).

79 *A v. A (Minors) (Shared Residence Order)* [1994] 1 Family Law Reports 669 at 678 (C.A.).

80 [2001] 1 Family Law Reports 495 (C.A.).

81 See, *e.g.*, *Re A (Children) (Shared Residence)* [2002] EWCA Civ 1343 (child spending 4 nights per week and half of school holidays with mother) and *A v. A (Shared Residence)* [2004] EWCA Civ 142 (children spending equal time with each parent).

as is implicit in the fact that the parents were in dispute over the making of the order, the importance of these rulings lies in the readiness of the courts to order shared residence despite the fact that the parents would not co-operate with each other. Upholding the making of an order in the face of fierce conflict between the parents has become common in the reported case-law.[82] Indeed, in *A v. A (Shared Residence)* the order was made precisely because the parents were in dispute. Wall J. stated that

> [i]f these parents were capable of working in harmony, and there were no difficulties about the exercise of shared parental responsibility … I would have made no order as to residence … Here, the parents are not, alas, capable of working in harmony. There must, accordingly, be an order. That order, in my judgment, requires the court not only to reflect the reality that the children are dividing their lives equally between their parents, but also to reflect the fact that the parents are equal in the eyes of the law, and have equal duties and responsibilities towards their children.[83]

Shared residence may therefore be ordered where parents cannot co-operate with each other regarding their children, either to ensure that one parent is not therefore "marginalised" by the other or to provide the same kind of psychological and symbolic affirmation of the position of the father, as has become the rationale for the making of parental responsibility orders. For example, in *Re F (Shared Residence Order)*[84] Wilson J. agreed that a shared residence order should be made notwithstanding that the parents were living 400 miles apart, in Scotland and Southern England, because "labels can be very important". Indeed, the Court of Appeal has upheld a shared residence order where a mother was given permission to take the child to South Africa for two years, to provide "formal recognition of an underlying reality, namely, that both parents have parental responsibility which they will continue to exercise."[85] The point was made more strongly still in *Re A (Joint Residence: Parental Responsibility).* The President of the Family Division, Potter P., stated that

> [i]t is now recognised by the court that a shared residence order may be regarded as appropriate where it provides legal confirmation of the factual reality of a child's life or where, in a case where one party has the primary care of a child, it may be *psychologically beneficial to the parents* in emphasising the equality of their position and responsibilities.[86]

VI. Equal Parenting Time

It might be argued that these developments are not problematical. The concept of shared parental responsibility and orders for shared residence are now basically no

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[82] See *Re R (Residence: Shared Care: Children's Views)* [2005] EWCA Civ 542; *Re P (Children) (Shared Residence Order)* [2005] EWCA Civ 1639.

[83] [2004] EWHC 142 (Fam.) at para. 124 [*Re A (Shared Residence)*]. It should be noted that s. 1(5) of the *Children Act 1989* provides that a court should not make an order "unless it considers that doing so would be better for the child than making no order at all."

[84] [2003] EWCA Civ 592 at para. 32.

[85] *Re A (Temporary Removal from Jurisdiction)* [2004] EWCA Civ 1587.

[86] [2008] EWCA Civ 867 at para. 66, emphasis added.

more than symbolic affirmations of parental status and thus no more than manifestations of the formal equality which one would expect of modern parenting law.

However, one final feature of the jurisprudence on shared residence orders is that it is not essential that the child spends more or less equal time with each parent. In *Re F (Shared Residence Order)*[87] a mother appealed unsuccessfully against the transfer of residence of the parties' two children to the father, even though the judge had made a shared residence order to both parents. The arrangement was that the children would spend alternate weekends, an additional weekend every two months, and half the school holidays with the mother—an arrangement quite likely to have been treated as "sole residence plus contact" in earlier times. For this mother, the "label" and psychological recognition of "shared residence" did not in fact provide her with what she wanted, which was more *time* with the children.

It is not surprising that the question of how much time should be allocated to each parent has therefore now come to the fore and in particular, calls have been made for "equal time" to become the norm. These have come primarily from a number of fathers' lobbying groups, who began in the early years of the millennium by complaining of perceived bias in favour of mothers on the part of the courts when deciding residence and contact disputes.[88] In fact, research by Joan Hunt and Alison Macleod found no evidence of such bias.[89] An earlier study by Carol Smart *et al*. found that both fathers *and* mothers thought the courts were biased against them: fathers felt they too readily awarded mothers residence, and mothers felt there was effectively a presumption of contact in favour of fathers.[90] As far as residence was concerned, the researchers found that courts tended to favour whatever arrangement had been in place prior to the application: since mothers tended to be the primary carers, the courts tended to maintain this position.

Fathers' groups have now sought to incorporate into English law[91] the approach taken in Australia under the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth.). This introduced a presumption of equal shared *parental responsibility* which requires the court to consider, when making arrangements for a child after parental separation, whether a child should spend *equal time* with both parents or, where that is not practicable or in the child's best interests, whether he or she should spend "substantial and significant" time with each of them. It is important to note that the legislation does not introduce a presumption of "equal time"—the presumption is that shared parental responsibility is desirable, and that if that presumption is satisfied, *then* the court must go on to consider how much time the child should spend with each parent. In English law, as we have seen, shared parental responsibility is a given, not just a presumption, but the legislation says nothing

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87 [2009] EWCA Civ 313 [*Re F*].

88 See, *e.g*., U.K. House of Commons Constitutional Affairs Committee, *Family Justice: the operation of the family courts*, (London: The Stationery Office Limited, 2005) at paras. 40-61.

89 Joan Hunt & Alison Macleod, *Outcomes of applications to court for contact orders after parental separation or divorce* (London: Ministry of Justice, 2008), at 240 and c. 10.

90 Carol Smart *et al*., *Residence and Contact Disputes in Court*, vol. 2 (London: Department for Constitutional Affairs, 2005) at 29-31.

91 Through the *Shared Parenting Orders Bill*, 2010-2011 Sess., 2010, introduced as a private member's bill in 2010/11.

about how the child's time should be allocated between the parents, and the House of Commons Select Committee rejected such an idea in their 2005 Report on the family justice system, considering that "[a]n arbitrary 'template' imposed on all families, whatever the needs of the child, would relegate the welfare of individual children to a secondary position."[92]

The Australian research found that shared care arrangements had increased amongst litigating parents where conflict was highest, resulting in around one-third of cases being made the subject of shared time orders.[93] As Liz Trinder has noted, this means that "the use of shared care in these higher conflict and higher risk cases is at twice or three times that found in the wider community."[94] Yet researchers also found that children in shared care arrangements where there was high conflict had greater problems than those with a sole carer, especially where the arrangements were rigidly fixed with minimal flexibility. These are unfortunately precisely the cases where, as demonstrated by *Re A (Shared Residence)*[95] the English courts appear to be ready to sanction shared residence orders because the parents are unable to "work in harmony" and the order will make clear what each is supposed to do and expect from the other. Where shared residence is ordered in conflicted families, therefore, it appears to do relatively little for the child and indeed, may be positively detrimental.[96] Should provisions akin to the Australian regime be enacted in English law they would run counter to both this body of evidence and the recommendation of the House of Commons Select Committee that "arbitrary templates" concerning shared care are contrary to the welfare of the child.

VII. Conclusion

In the same way that equal division of assets has moved centre stage in the courts' allocation of property on divorce, as providing real recognition of the equal status of the wife during the marriage, so too, equal parenting time has become a rallying point for fathers seeking to assert their equal status to mothers. One could argue that this is only fair—after all, if women are to demand and receive an equal share in the wealth which might have been generated by their husbands, surely it is right that fathers should be granted equal time with the children that they too have brought into the world?

However, the two situations are not parallel and cannot be treated as equivalent, and not just because one cannot chop a child in half whilst one can divide a bank account. In the case of property allocation on divorce, the contributions made by the wife and husband during the marriage are regarded as "incommensurable"[97] and so are to be treated equally. A wife who gives up work to take care of the home and family cannot compete with the husband who earns the family income. That is

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92 *Supra* note 88 at para. 60.

93 Rae Kaspiew *et al.*, *Evaluation of the 2006 family law reforms* (Melbourne: Australian Institute of Family Studies, 2009) at 125.

94 Liz Trinder, "Shared residence: A review of recent research evidence" [2010] Child and Family Law Quarterly 475 at 480 [*Trinder*].

95 *Re A (Shared Residence)*, *supra* note 83.

96 See *Trinder*, *supra* note 94 at 485.

97 *Cowan*, *supra* note 40 at para. 87.

usually an arrangement agreed by the parties during the marriage and so the courts have held that they must abide by the consequences when the marriage ends—a husband is not to deny his wife a share of the wealth when he agreed to her not having to generate it in the first place. Her weaker financial position, post-divorce, is to be recognised and as far as possible, recompensed, and the husband continues to be able to exploit his higher earning capacity after the divorce.

In relation to childcare, the position is at first sight the same: the parents will usually have agreed that the mother will take the primary caring role and the father the main breadwinner role. Indeed, while there have been considerable changes in social attitudes to the role of fathers, under which they have come to be expected—and to expect—to have a much more intimate and close emotional relationship with their children than might have been the norm half a century ago,[98] the reality is that the function of *care-taking* of children remains the primary responsibility of mothers.[99] It could be said that on this basis, the contributions that mothers and fathers make to their children's wellbeing during the parental relationship—mothers as carers, fathers as bread-winners—should similarly be treated as "incommensurable", just as their contributions to the overall wealth of the family are, and thus to be treated equally.[100] But the question then follows as to *how* such equal treatment is to be achieved without creating unfairness and substantive *inequality*.

Clearly, a straightforward application of the *White* principle of equal sharing simply cannot apply to the division of a child's time. The equal division of capital assets is limited to those accumulated or enjoyed during the marriage; it does not continue to apply to assets acquired or expanded post-separation. Earners are not expected to continue to share their wealth with their former spouses indefinitely. An equivalent equal division of the child's *time* cannot be applicable since this relates to the future position of the child for an indefinite period and must of course be based on the child's welfare needs and interests, not the equal legal standing of the parents.

But secondly, mandating an equal time regime regardless of the position before the parents separated is to downgrade, or even ignore, the contribution that the mother made during the parental relationship, and thus runs quite counter to the underlying principle of *fairness* on which the equal sharing approach is based. This is not just a question of reflecting and continuing to respect the functional roles that the parents carried out during their relationship. As Sonia Harris-Short has noted, "in contrast to fathers who, despite recent changes in their parenting roles, continue to define themselves primarily in terms of their paid employment, mothers tend to define themselves primarily as mothers, with other commitments fitted around their primary childcare responsibilities". She argues that mothers' resistance to sharing their children is "deeply rooted in the considerable physical and emotional investment many mothers have made in raising their children and their anxiety at being forced

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98 For a full analysis of the changing position of fathers in British society, see Richard Collier & Sally Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Oxford: Hart Publishing, 2008).

99 *Ibid*. See also the evidence drawn upon in Sonia Harris-Short, "Building a House upon Sand: Post-Separation Parenting, Shared Residence and Equality—Lessons from Sweden" (delivered at Arts and Humanities Research Council seminar, 'Post-separation families and shared residence: setting the interdisciplinary research agenda for the future', 7 January 2011.

100 One could in fact argue against this, given that the evidence also shows that, even where women are employed outside the home, they assume the major burden of caring and housekeeping: Harris-Short, *ibid*.

to relinquish their primary care-giving role".[101] To suggest that on separation, this investment should be ignored and the mother made to give up her primary carer role without any balancing compensation (and what could such compensation consist of?) promotes a rigid formal equality without recognising the reality of how family life is organised and what continues to be culturally and socially expected of women. It is unfair and inequitable and the very opposite of what the House of Lords sought to achieve in *White v. White.* Substantive equality and fairness demand that both parents continue to honour the parenting arrangements that they agreed during their relationship, which may require the mother to retain her primary care of the child and thus spend more "time" with that child than the father—always, of course, subject to the best interests of the child.

Just as *Radmacher*[102] was an atypical ancillary relief case in that it was the wife whose wealth was at stake, so too *Re F (Shared Residence Order)*[103] was an unusual residence dispute in that it was the father who was (made) the primary carer of the children. But these facts should not obscure the reality that in Britain today, men are usually wealthier than women and more likely to be the higher earner in the family, and women are usually the main carers of children.

The formal equality of men and women under the law is, of course, a necessary but not a sufficient condition for promoting an improved position for women. As this article has attempted to show, it can provide an excuse and cover for legal outcomes which are anything but fair and which undermine the progress that women have undoubtedly made. It was noted at the outset that England and Wales does not have the equivalent of a *Women's Charter* to set out women's rights and obligations. The challenges that they continue to face to their position as wives and mothers suggest that there may be much to be said for exploring whether it would be valuable to emulate the Singaporean example.

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[101] *Ibid*.

[102] *Radmacher*, *supra* note 52.

[103] *Re F*, *supra* note 87.