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1. Sharing loss on divorce — A commentary — (2018) 32 AJFL 132

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Commentary

Sharing loss on divorce — A commentary

*Alison Diduck**

There is no question that the law of financial remedies on divorce is in need of reform. Gillian Douglas highlights this need clearly as she reviews the way the current law fails in many respects to meet the needs of 21st century divorcing families across the whole financial spectrum. Hers is a call to begin this reform from first principles. It asks us to think carefully about what it is that we are trying to do with financial remedies after divorce. What should financial remedies remedy? While this is Douglas' main question, as she also highlights, it implicates questions of what we understand the modern marriage relationship to be.

In this brief comment on Douglas' provocative article, I wish to offer my own reflections upon the questions she raises and the answers she proposes to them. But while Douglas offers practical suggestions for reform, my reflections are more in the spirit of critique. They sit squarely within Douglas' criticism of the law's preoccupation with the property and financial concerns of the wealthy and the direction the case law provides for us to determine fairness on divorce, but are an attempt to explain and critique how we got to this point, and to shed light on how difficult it would be for things to be different.

As Douglas demonstrates, the law is primarily, almost exclusively, focused on identifying and sharing assets on divorce; the so-called 'fruits' of the marital relationship, which of course assumes that the marriage does bear significant fruit. She sees another side of marriage and divorce, however, one that results in loss as well as gain.

the purpose of the divorce jurisdiction has come to be seen as being to divide the marital acquest with a focus on *gain*, rather than recognising that, for at least 90 per cent of the population, the ending of marriage represents a financial as well as emotional *loss* and potentially ongoing financial disadvantage.¹

To my mind, her astute observation here raises two issues. The first is the effect on contemporary divorces of divorce law's historical concern primarily with property. The second is the law's neglect of the social and personal consequences of divorce that go beyond the private concerns of property-owning spouses.

Douglas' first challenge is to the case law's preoccupation with the property of the rich. As she explains, it is the 'big money' cases that have come to dominate the law reports. But this preoccupation has a long legacy. The orderly transmission and protection of property during marriage were governed originally by the principles of coverture and equitable settlement and while the Ecclesiastical Court had jurisdiction over matrimonial causes, it had no jurisdiction over spouses' property, which remained under the jurisdiction of the Common Law Courts. The Ecclesiastical Court could order alimony for 'innocent' wives after a divorce *a mensa et thoro*, and the Common Law Courts could in these cases assist with separation agreement arrangements² but this decree did not, of course, dissolve the marriage. Parliamentary divorces often included property settlements, but these were also usually pre-arranged between the spouses,³ and were intended to protect the wife from living in poverty and/or to protect her family property. This state of affairs changed only marginally after 1857 when the newly created Divorce Court gained overall jurisdiction in divorce matters over the Ecclesiastical Court's jurisdiction over divorce, the Superior Court's inherent *parens patriae* jurisdiction over children and the Common Law Courts' jurisdiction over property matters. But while the *Divorce Reform Act 1857* (UK) was said by some to be an attempt to democratise divorce, in

reality, the government had no intention of making divorce available to all. According to Stone, 'to virtually all legislators, the poor were seen as a threatening, immoral, dissolute mass of people to whom it would be extremely dangerous to extend the facility of easy divorce, or to offer protection of married women's earnings outside control by their husbands'.⁴ Not only was a petition for divorce in the High Court in London out of the financial reach of the majority, the whole of the *Divorce Reform Act 1857* (UK) 'had clearly been framed primarily in the context of the wealthier families who had at least some capital'.⁵ And for those, the Court seemed concerned to protect the property of 'cuckolded men'.⁶ Even when maintenance was at issue, under the 1857 Act and until 1866, the courts' powers over maintenance 'reflected rather narrowly the social position of those involved in Parliamentary and Ecclesiastical divorce';⁷ payments could only be secured, so the husband had to have assets against which to secure them. Further, while the Court could settle property on an innocent wife, it was usually to return her family property to her use, and the Act gave the court no power to transfer capital to a wife. As Cretney states, 'maintaining the ex-wife was one thing, dissipating the family capital was quite another'.⁸

Members of the 'respectable working class' were forced to make use of alternative forms of family justice. Wives who wished to end their marital relationships were able after 1878 to obtain an order of separation from the Magistrates' Courts if their husband had been convicted of assaulting them, and after 1886 to receive financial remedies if their husbands deserted them. The year 1895 saw the consolidation of these matters into the magistrates' matrimonial jurisdiction, which as Cretney observes, remained the matrimonial law for the non-propertied working poor for 70 years.⁹

McGregor also recounted in his 1981 Hamlyn Lectures how he and Morris Finer:

traced the history of the three systems of family law which grew up in England. One served the wealthy and powerful; another developed for the remainder of the economically independent population and a third dealt with the destitute, the poor who, for whatever reasons, did not earn their own subsistence.¹⁰

Their work recalled tenBroek's, which identified two systems of family law that developed in England: one for the rich, which was private, formulated in the courts and implemented by judicial discretion, and one for the poor, which was public and formulated and implemented by statute, primarily the Poor Law.¹¹

Class differences in matrimonial law continued well into the 20th century. McGregor saw that the courts immediately after the *Divorce Reform Act 1969* (UK):

treat the breakdown of marriage as giving rise to circumstances similar to those which arise in settling partnership rights upon winding up ... A proportion of the maintenance orders could be regarded as bridging loans for wives in the period between one marriage and the next.

In the second tier, however, in 'the parallel but more limited jurisdiction in the magistrates' courts', this was not the case.

These were patronised almost exclusively by very poor people for half of whom the summary court served as the terminus at which their marital journey ended ... [T]he summary cure for marital ills was all that most working class people could afford.¹²

Of course, the *Matrimonial Causes Act 1973* (UK) ('MCA 1973') purports to serve all divorcing spouses equally, and although the summary jurisdiction of the *Domestic Proceedings and Magistrates' Courts Act 1978* (UK) remains intact, the creation of the new Family Court helps now to bring many family law issues under one jurisdiction. But the way the MCA 1973 is framed and applied in the court, the court's limited accessibility to divorcing spouses and

the jurisprudence it has developed, all seem still to preserve or to resurrect divorce law's historical preoccupation with the property of the wealthy.

McGregor characterised the 'legal scene' in the 1970s as 'a chaos of overlapping jurisdictions and conflicting philosophies, strewn with ... much debris from earlier centuries'¹³ and arguably that 'scene' has not much changed in the new millennium. While some of the jurisdictional issues have been resolved, other, new ones have arisen. Divorce-related property and financial issues of the wealthy are still determined by the exercise of judicial discretion, and while the less wealthy may no longer turn to magistrates as frequently as they once did, they are encouraged to turn to other, less formal means of resolving their marital concerns. Further, we still see in contemporary divorce law McGregor's 'conflicting philosophies' and 'debris' from earlier centuries. These 'conflicts' and 'debris' derive in no small part from the way the law understands marriage, and are related to Douglas' second challenge. As she states, contemporary marriage is characterised as a 'partnership of equals'. She goes on to explain that his model 'fits a view of marriage as a matter of formal equality where the autonomy of each "partner" is the primary feature'.¹⁴ Instead of this model, however, Douglas argues that:

marriage as it is lived now should be conceived more as a 'life plan': a form of 'joint enterprise', in which both spouses make equally valued, though potentially different, contributions to the welfare of the family, as part of the collective endeavour or project of agreeing to share their lives and to develop a joint lifestyle.¹⁵

This difference is important. In contrast to a 'partnership of equals', a 'joint enterprise' or 'life plan' model has the potential to move marriage out of an individual, marketised, economic frame in which autonomy is prized above all, into a social one which values solidarity¹⁶ or collective interests that may transcend or extend those of the private autonomous economic individual. For divorce law, this shift in frame would be significant. It would mean that the social and personal losses arising from the end of the marriage are not only acknowledged to be as significant as the gains, but also become remediable. Like Douglas, I believe this shift in frame to be necessary in order to achieve gender and class fairness on divorce. The difficulty in achieving this shift, however, in my view results from the strength of the frame's foundation as protector of private property interests and the recent trend in family law to conceive even intimate, marital relationships in terms of autonomy, economic rationality and 'choice'. They are linked and together influence the courts' development of financial remedies on divorce.

Consider first the property/wealth focus of the *MCA 1973*. This focus is partly because of the history of divorce law; it was designed for monied people. But it is more than that. Law's Enlightenment legacy of formal equality, property rights, economic rationality and autonomy mean that all relations, even marriage, are now comprehended through what Cotterrell calls 'law's supporting ideologies of property, liberty, the minimal state, and the rule of law',¹⁷ which contractualise and marketise marital relationships. Regan's view is similar. He suggests that claims for support or property at the end of the marriage are understood through a 'property rhetoric',¹⁸ which includes market labour desert theory. Regan sees the 'property rhetoric' as being associated with three notions: autonomy as independence from others, limiting obligations to those that can be characterised as voluntarily assumed; property as a reward for economically productive labour in the marketplace; and economic inequality as inextricable feature of a market system that 'protects private property rights'.¹⁹ Linked with the labour desert theory, which says that property rights are justified as a reward for the expenditure of one's labour' and which Regan sees as the principal normative theory of property,²⁰ financial remedies on divorce remain primarily within a frame that promotes the 'partnership of equals' model of marriage over the 'joint life plan' model.

This frame is not inevitable, however. Historically, family relations were thought to be different from arm's length market relations; spouses were not assumed to make economically rational decisions and if they were a partnership of any sort, it was certainly not one of equals. As we know, often the previous frames were damaging, but the shifts from coverture to the paternalism and assumed altruism of the breadwinner/homemaker model to the current partnership of equals model demonstrate first of all that the frame is not fixed. They also demonstrate, however, the difficulty of wholesale change. Even within the contemporary autonomy based 'partnership of equals' property

frame, ideas of paternalism and altruism may continue to have some purchase as 'debris' and philosophical remnants from centuries past. In addition to the partnership of equals, we see them, for example, in divorce law's paternalistic concern to protect the economically vulnerable spouse by meeting her 'needs' after divorce along with its (belated) acknowledgement of the value of non-financial contributions to the welfare of the family. Further, while many adhere to the view that marriage is a shared unit that 'transcends the self' in which some family obligations are based upon altruism and collectivism rather than individual economic rationality, on divorce, both parties and the law find themselves required to reconcile that ambivalent rhetoric within the current autonomy/property frame. This ambivalence creates a situation where divorcing spouses are required to see themselves as:

distinct individuals with distinct interests asserting claims and assuming obligations on the basis of these interests, even while the claims they assert and the obligations they assume flow from the fact that in the past they were members of a marital community in which individual interests were indistinguishable from the interests of the unit ...²¹

And so, when guidance from the courts instructs us to consider needs, as well as equal sharing and compensation, when assessing and adjusting the financial consequences of divorce we see precisely the conflicting left-over philosophies and debris that litter the dominant property rhetoric. The principle of needs expresses part of divorce law's paternalistic, protective function, even while it remains trapped within law's supporting ideologies when needs are remedied along the lines of McGregor's idea of a 'bridging loan'. Equal sharing looks only to sharing the marital acquets in their private property or monetary form and not to the social, emotional or spiritual gains spouses may have accrued that do not take these forms, such as the satisfaction and pleasure of having and rearing children or the ability to progress in one's occupation outside the home when one does not have child care responsibilities.²² Neither does it look to the loss of the insulation the marriage may have provided the wife/homemaker from loss of that same ability to progress, to accrue job seniority, employment experience, training opportunities, social capital or from the gender pay gap, the glass ceiling and other structural gender-based disadvantages while permitting her husband to benefit from these. Equal sharing does not account for losses or gains of this type which become manifest and only begin to matter, as Douglas highlights, on divorce.

The judicially-created principle of compensation could account for some of these losses, but has become tied in knots as attempts to quantify them must be given some market value and are expressed in a tort-like language of lost opportunity. This approach is probably not surprising as the principle of compensation must fit in to the property frame designed for dealing with the choices and property of wealthy autonomous individuals and is applied to a relationship that is defined as private in neo-liberal economic terms as a 'partnership of equals' and calculated according to market desert principles. Indeed, while both compensation and periodical payments (meeting needs) fit the contemporary frame, they do so uneasily; as long as they also express competing philosophies of paternalism and collective good in marriage, it is not surprising that few orders for financial relief are based on compensation principles or that periodical payments are less and less frequently ordered.

Douglas wishes to remove marriage from the partnership of equals model, yet still retain some aspects of Enlightenment liberal individualism in the law governing financial remedies on divorce. For her, the law's focus would be on the impact on the parties of the *end* of their joint marital project, not on the impact of the marriage itself. She would focus on what each of the parties has *lost* at that point, rather than simply on their gains. There is no loss of the 'goods' arising from the joint marital enterprise while that enterprise continues. It is only at the end that the loss is incurred. And so, while one party may be in financial need after the divorce, that need arises because of the loss she suffered on divorce. Remedying this loss provides a focus for the law and justification for her spouse's obligation to make redress that is different from an ill-rationalised paternalistic obligation simply to meet her needs. As Douglas states, to calculate the losses incurred by the end of a joint life project, we need to look at how readily each can adjust, bear, and make good the disadvantage the organisation of marital living caused to him or her on divorce. The law must remedy losses, therefore, in order to share fairly each party's ability to recover from the impact of the divorce.

Douglas begins with a presumption that the marital assets be shared equally, but says that should be only a starting point because it does not acknowledge the differential ability of the spouses to recover from the divorce. It assumes an economic and social equality that we know does not exist in the real, material and social world, even if it seems to exist in the 'mind' of the law. Remedying loss, therefore, takes into account the effect at divorce of having engaged in a joint life project that was experienced differently by each party. Yet as Douglas states, it:

would fit the modern liberal individualist approach to marriage, just like a clean break settlement, by allowing adult parties at the end of their relationship to draw a line underneath it, but it would also give more scope to redress the economic imbalance that has arisen in consequence of its ending.²³

But even this novel approach leaves us within the property/autonomy frame. Douglas argues that three losses should be accounted for after the presumption of equal sharing: loss of the marital home, loss of financial support for child care costs and loss of pension provision. These, she says are the most urgent losses accruing from the end of the marital project. Remedying these losses would go some way to equalising the parties' abilities to recover from the divorce. While I agree that these losses are significant and ought to be remediable, I question why, if the goal ultimately is to redress economic imbalance as a consequence of the marriage ending, she excludes the way that imbalance may also be affected by 'structural disadvantage caused by the way work and care are socially organised'.²⁴

On divorce, both parties incur loss of the financial, emotional, property and other 'goods' of their joint marital enterprise, including the insulation the joint project may have provided for one spouse from loss of seniority, employment experience, training opportunities, social capital, the gender pay gap and the glass ceiling, and the opportunities provided to the other spouse to benefit from many of those structural conditions. If the ultimate goal is to adjust fairly, or equalise as far as possible, each party's respective ability to adjust after the loss of the joint enterprise, the law must acknowledge that those abilities depend to some considerable degree on gender and structural conditions.

In the spirit of acknowledging the publicness of private living, I would suggest that the loss to (primarily) women and the gain to (usually) men consequent upon the way work and care are socially organised should also be taken into account when 'equalising' as far as possible their abilities to recover from the divorce. These structural conditions provide normative constraints upon men's and women's choices in organising their marital living and clearly affect their relative abilities to recover from the end of those living arrangements on divorce. Further, marriage, while intact, provides economic and social 'goods' or benefits not only for the parties but also for the state, and there is arguably an obligation upon all to share fairly the loss when it ends. The state's responsibility may lie in its child and elder care policy, equal pay policy, in encouraging shifts in work culture, and the like, but these obligations do not detract from the concurrent responsibilities of individual spouses.

Douglas wants us to rethink what the marital relationship means, and I agree. Her 'joint enterprise model' shifts slightly the current model, but does not take it outside the private property frame. Yet, if marriage and divorce have a social as well as an economic meaning, it seems to me that that meaning is best reflected in a financial remedies law that is outside the property frame. And so, importantly, when we ask what financial orders should remedy, we need to acknowledge not only what the marital relationship meant for the partners vis-a-vis each other but also vis-a-vis the state or the public. The social and economic organisation of the public not only provides the context in which people marry and divorce, it is also implicated in and profoundly affects the consequences of marrying and divorcing for people. I think that is Douglas' point in highlighting the way in which different economic and housing circumstances in different parts of England and Wales mean that the losses suffered in those different regions must be adjusted accordingly. I think this is also her point in contrasting the experiences of women divorcees with those of men. The law of financial remedies on divorce has an aspect of the public about it, in other words. It is not only

about the private property and private financial relations of presumptively equal parties. As Collins says:

private law must always struggle with the endeavour of how to cope with the competing concerns of individual and collective interests. It can never limit itself to an examination of individual rights and corrective justice between two individuals. It must always have regard to collective interests, to the distributive patterns produced by its rules.²⁵

If contemporary marriage is as Douglas describes it, a 'joint enterprise' or a joint life plan, we are beginning to reconceive the legal and political discourse in which families and marriage exist; we begin to think of them as constituted and sustained by, as well as lived in, their social context. Instead of a 'partnership of equals' bound up within neo-liberalism, formal equality and autonomy, we might see a relationship bound up in other values perhaps including solidarity,²⁶ interdependence, mutual vulnerability or relational autonomy²⁷ and thus we take them out of the property frame. This new legal discourse would take seriously the objective of sharing fairly each party's *ability to adjust* from loss of that joint life plan, rather than only particular losses and acquiescence consequent upon it. This objective would remove the need to identify or itemise remediable losses or gains and to apply a market-based value to them. It would simply acknowledge that the ability to adjust to the loss of the joint project itself should be fairly shared and is affected by the parties' individual circumstances, but also by gender-based structural conditions that influenced those circumstances and the relative abilities of each party to negotiate their economic recovery at its end. This approach to marriage and divorce would be a radical shift in frame indeed. It would require a challenge to law's 'supporting ideologies', including its property frame, and to family law's place within that frame. It is thus unlikely to happen in the near future, and as Douglas acknowledges, even her reform proposal requires a shift in the legal mindset:

But, in England and Wales, the views of the judiciary, the Law Commission, the House of Lords, legal academia and even much of legal practice are likely predominantly to reflect a mindset shaped by a jurisprudence and litigation focused on the wealthy.²⁸

Given the historical legacy of divorce law's concern for the wealthy and the common law's property rhetoric, this likelihood is not surprising.

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1 In this volume: Gillian Douglas, 'Sharing financial losses as well as gains on divorce' (2018) 32 *Australian Journal of Family Law* 108 (emphasis in original).

2 W R Cornish and G de N Clark, *Law and Society in England 1750–1950* (Sweet and Maxwell, 1989) 376.

3 Lee Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth Century England* (University of Toronto Press, 1983).

4 Lawrence Stone, *Road to Divorce: England 1530–1987* (Oxford University Press, 1990) 374.

5 Stephen Cretney, *Family Law in the Twentieth Century: A History* (Oxford University Press, 2003) 397.

6 *Ibid* 95.

7 Cornish and Clark, above n 2, 389.

8 Cretney, above n 5, 397.

9 *Ibid* 446.

10 O R McGregor, *Social History and Law Reform* (Stevens and Sons, 1981) 47.

11 Jacobus tenBroek, 'California's Dual System of Family Law: Its Origin, Development, and Present Status: Part I' (1964) 16 *Stanford Law Review* 257, 287.

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- 12 McGregor, above n 10, 48–9.
- 13 Ibid 47.
- 14 Douglas, above n 1, 122.
- 15 Ibid (footnote omitted).
- 16 Anne Barlow, 'Solidarity, autonomy and equality: mixed messages for the family?' (2015) 27 *Child and Family Law Quarterly* 215.
- 17 Alison Diduck, *Law's Families* (Cambridge University Press, 2003) 145 citing R Cotterrell, 'Feasible Regulation for Democracy and Social Justice' (1988) 15 *Journal of Law and Society* 5.
- 18 Milton C Regan Jr, *Alone Together: Law and the Meanings of Marriage* (Oxford University Press, 1999) 162. And see Thorpe LJ's comments in *Dart v Dart* [1997] 1 FCR 286, 294: 'The scheme of [MCA 1973] must also be set in the wider perspective of history and general civil law. In this jurisdiction rights of property are not invaded or reduced by statutory powers save for specific and confined purposes.'
- 19 Regan, above n 18.
- 20 Ibid 169.
- 21 Diduck, above n 17, 164.
- 22 Craig Lind, 'Value in Personal Relationships and the Reallocation of Property on Divorce' in Susan Millns and Simone Wong (eds), *Wealth and Poverty in Close Personal Relationships: Money Matters* (Routledge, 2017) 118.
- 23 Douglas, above n 1, 123.
- 24 Ibid 125.
- 25 Hugh Collins, 'Utility and Rights in Common Law Reasoning: Rebalancing Private Law Through Constitutionalization' (2007) *Dalhousie Law Journal* 1, 14.
- 26 Barlow, above n 16.
- 27 Alison Diduck, 'Autonomy and Vulnerability in Family Law: The missing link' in Julie Wallbank and Jonathan Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge, 2014) 95.
- 28 Douglas, above n 1, 131.

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