Obligation and Commitment in Family Law

Gillian Douglas

• HART •
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2018

Copyright © Gillian Douglas, 2018

Gillian Douglas has asserted her right under the Copyright, Designs and Patents Act 1988 to be identified as Author of this work.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers.

While every care has been taken to ensure the accuracy of this work, no responsibility for loss or damage occasioned to any person acting or refraining from action as a result of any statement in it can be accepted by the authors, editors or publishers.

All UK Government legislation and other public sector information used in the work is Crown Copyright ©. All House of Lords and House of Commons information used in the work is Parliamentary Copyright ©. This information is reused under the terms of the Open Government Licence v3.0 (http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3) except where otherwise stated.

All Eur-lex material used in the work is © European Union, http://eur-lex.europa.eu/, 1998–2018.

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Douglas, Gillian, author.

Title: Obligation and commitment in family law / Gillian Douglas.

Description: Oxford [UK] ; New York : Hart Publishing, 2018. | Includes bibliographical references and index.

Identifiers: LCCN 2017052960 (print) | LCCN 2017055287 (ebook) | ISBN 9781782258537 (Epub) | ISBN 9781782258520 (hardback : alk. paper)

Subjects: LCSH: Domestic relations—Great Britain. | Parent and child (Law)—Great Britain. | Family policy—Great Britain.

Classification: LCC KD750 (ebook) | LCC KD750 .D69 2018 (print) | DDC 346.4101/5—dc23

LC record available at https://lccn.loc.gov/2017052960

ISBN: HB: 978-1-78225-852-0
ePDF: 978-1-78225-854-4
ePub: 978-1-78225-853-7

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by TJ International Ltd, Padstow, Cornwall

To find out more about our authors and books visit www.hartpublishing.co.uk. Here you will find extracts, author information, details of forthcoming events and the option to sign up for our newsletters.

8

The Law of Family Obligations

[A]ltruism is 'compulsory' for women in a way it is not for men.[1]

Individual interests in the domestic relations require to be secured in two aspects. On the one hand they must be secured as between the parties thereto. On the other hand they must be secured as against the rest of the world. As it is commonly put, the law has to give effect to the right of the one party to the relation against the other and enforce the corresponding duty toward the former … The law has never attempted to deal fully with the first of these tasks. Religion, boni mores and the internal discipline of the household have largely sufficed to secure the interests of the members of the household, as among themselves.[2]

I. CARE, OBLIGATION AND COMMITMENT

THE PRECEDING CHAPTERS in this book set out to provide a retrospective examination of how family law has been used to impose, regulate and enforce obligations on family members. Rather than attempt a comprehensive treatment of the consequences of forming a recognised family unit, be it one based on marriage (or civil partnership), parenthood or something else, the focus has been on key case studies of the core positive obligations imposed by family law, which were selected for two reasons. First, they were intended to examine how far the concept of obligation has been effectively used through law, to promote and sustain caring within the family, in order to assess whether the law reflects an 'ethic of care' as well as 'justice'. Taking care of family members through the medium of financial support, caring about family members through love and commitment, caring for family members through the performance of care work, and taking account of how family members feel and are affected by the care provided, have all found expression in various ostensibly binding and enforceable provisions of law. They are especially manifested in the

[1] J Finch, *Family Obligations and Social Change* (Cambridge, Polity Press, 1989) 40, drawing on H Land and H Rose, 'Compulsory altruism for some or an altruistic society for all?' in P Bean et al (eds), *In Defence of Welfare* (London, Tavistock, 1985).

[2] R Pound, 'Individual Interests in the Domestic Relations' (1916) 14 *Michigan Law Review* 177, 179.

provisions regarding spousal and child maintenance, and provisions that may be seen as seeking to solidify the emotional bonds of family life, through the duty to cohabit and the promotion of shared parenting. The case studies, particularly the discussion of 'caring relationships' in Chapter 7, sought to provide an opportunity to reflect on what the consequences of taking a more functional approach to the recognition of 'family'-like relationships, based on caring, might look like. In so doing, the aim was to shift the focus of attention beyond relational identity issues, towards what happens 'after equality' (or some form of legal recognition) for diverse family forms has been achieved.[3]

Secondly, I sought to use the case studies to explore whether the change in our understanding of the notion of 'commitment', from a term meaning an obligation or a burden, to a more active form of promise and dedication, reflects a change in attitude regarding the nature and scope of legal obligations placed upon family members to care for each other. I traced the changes in the law relating to the core marital obligations to cohabit and support, and the core parental obligations of maintenance and what is now termed 'involvement', in order both to understand how far these reflected shifts in social attitudes and family behaviour and to explain why it has proved so difficult to enforce ongoing legal obligations when families split.

The developments traced through the case studies suggest two primary reasons for the problematic nature of legal family obligation, both related to how we conceptualise and understand 'family' (whether as a noun, verb or adjective). The first takes us back to where we started in Chapter 1, with the assumption that family members are fundamentally bound together by altruism and love, affection, care and personal commitment. Family life actually does take place in the sphere of emotions and is marked by closeness, not in the domain of arm's-length rationality. In reconceptualising this family life within the discourse of law, it may not be surprising that the fit between our differing ways of thinking—emotional and legal—is not a good one, or that at various times, those making the law conclude that the issue does not belong in the legal domain at all and is non-justiciable.

The second reason lies in the way the law has constructed the legal family as a unit—and one that is constituted by the man. Historically, the rights of women and the status of children depended upon whether they were part of the man's marital family. Under the influence of liberalism in the nineteenth century, many of the reforms discussed in the case studies have been about displacing the husband/father from the centre of the family and recognising the distinct interests of individual members of that family. But such individualism has ultimately served, I suggest, to favour men,

[3] See R Leckey (ed), *After Legal Equality: Family, Sex, Kinship* (Abingdon, Routledge, 2015).

not women or children, because men are more easily able to leave one family unit and establish another. Under the further influence of liberalisation in the twentieth century, the law developed so as both to reflect and to facilitate the drive to emotional fulfilment that now underpins intimate relationships. The combined effect has been to safeguard male interests. Even when reforms have appeared to displace male dominance and promote female equality within the family, men's greater economic power has always been re-asserted, diminishing the ability of law to compel men's compliance with both financial and affective obligations. The discussion in this chapter now broadens the focus beyond the case studies themselves to elucidate these arguments.

II. ALTRUISM, FAMILY OBLIGATION AND NON-JUSTICIABILITY

The history set out in the earlier chapters suggests that the law on family obligations can be understood as passing through three different phases, depending on the extent to which the civil law has been seen as an appropriate mechanism for regulating what is otherwise regarded as the altruistic and private nature of family life. So, at the start of the modern period, family obligation was seen primarily as an issue of morality and religion, rather than of civil law. In the nineteenth and twentieth centuries, it came to be seen as a matter that was amenable to legal regulation through both public and private law, which could be used to improve family behaviour. But in the twenty-first century, it is seen as governed by emotion and psychological factors, and so once more best dealt with outside the justice system.

A. Family Morality and Religious Duty

At the start of the period covered by the case studies, in the early nineteenth century, so far as the law was concerned, the nature of a person's behaviour towards members of his or her family was primarily a matter of morality, governed by religion and hence controlled by the Church courts, rather than the civil law. The obligations of marriage contained within the concept of consortium were enforceable as between the spouses[4] through the ecclesiastical courts in suits for divorce *a mensa et thoro* and restitution of conjugal rights, with, originally, spiritual sanctions (such as excommunication) for

[4] The action for 'criminal conversation' or other tortious interference with the husband's rights was against the wife's lover: see L Stone, *Road to Divorce England 1530–1987* (Oxford, Oxford University Press, 1990) ch 9. Stone (ibid at 233) points out that in nearly all other European countries, adultery was a crime.

non-compliance with decrees. As was seen in Chapter 3, such remedies were in practice mainly invoked as a means to secure maintenance in the form of alimony or through making a private settlement, thus monetising the duty to cohabit. By the time the ecclesiastical jurisdiction was abolished, it had become recognised that the power of the Church to influence behaviour was diminished: even the threat or imposition of imprisonment did not guarantee a return by a deserting spouse to cohabitation.

In this period, the civil law only became involved in family affairs when these impinged on the public purse, or property rights. The Poor Law was a necessary response to failures in family solidarity; the elderly or incapacitated, or a mother and her children, constituted a potential drain on the resources of the parish if they had no kin willing to support them. But despite potentially harsh punishments, including imprisonment, the authorities were often ineffective in recouping their costs, and were forced to recognise that it might be sensible to accept that men were more likely to support their current families than those they left behind.

For the more prosperous, marriage settlements, separation agreements and wills might entail legal proceedings in the common law or Chancery courts, and these might concern 'family' issues, such as whether to enforce provisions for maintenance or how far to control a father's rights of guardianship. But in so far as these cases might involve the 'welfare' of the parties' children, this was understood in terms of morality and religious conformity,[5] and the civil courts were divided over how far they could allow the spouses to sidestep moral and religious precepts and evade the ecclesiastical jurisdiction and canon law principles by private agreement. The only time that maintenance for the wife (and perhaps the children through her claim) might come to the attention of a civil court was when a trader attempted to enforce a debt against the husband, and the court's concern was with the issue as a commercial, not a family, matter.

It does not follow that there was no interest in what went on within the privacy of the family unit. There was plenty of detailed scrutiny of how people behaved, both by the Church courts and by the civil courts when they did have to deal with a family matter. But the civil law followed the canon law and upheld the right of the husband or father to dictate the lives of 'his' family members in most instances, as right and proper, moral and Christian. There was little scope left in which the civil law could be used to 'intervene' and disagree with him.

[5] See, eg, two wardship cases: *Shelley v Westbrooke* (1821) Jac 266: Shelley, as an atheist, was denied custody of his children; *Wellesley v Beaufort* (1827) 2 Russ 1, *Wellesley v Wellesley* (1828) [1824–34] All ER Rep 189, HL: father denied custody because he had scandalously flaunted his mistress and encouraged his children to swear. The decision of Lord Eldon LC in the Court of Chancery is reported in detail in *The Annual Register* (1827) 297–310.

B. Law Reform and Obligation

The case studies demonstrate a major shift in attitude during the nineteenth century regarding the role of government and the power of law to affect and improve human, including family, behaviour. The use of law to seek to reform behaviour became a key tool of social progress, along with sewers, gaslights and schooling. Various approaches were taken to reforming family law, and the law of family obligation, from using the coercion of the new Poor Law to try to encourage family members to provide financial support for each other, to making private law remedies available to women to obtain maintenance and custody of their children. Such reforms demonstrated the willingness of the state to guide individuals as to the appropriate family behaviour and norms they should be following, and the confidence that was felt in the effectiveness of law to influence family behaviour.

The transfer of the function of policing family behaviour from the ecclesiastical to the secular courts in 1857 did not mean that 'morality', particularly sexual morality, was no longer a concern, of course. The case studies show how entitlement to both maintenance and custody or access was determined, to a considerable extent, until well into the twentieth century, by the sexual double standard, which released a husband from the duty to maintain a 'guilty' wife, proclaimed her unfit to care for her children and reinforced the shame attached to her misconduct, so as to act as a general deterrent to all women. Nonetheless, there was considerable faith amongst first-wave feminists and others in the power of *law* to influence and govern behaviour to the advantage of women, and to educate the lower classes in particular as to appropriate norms and attitudes of family conduct. Law reformers promoted the creation of new legal remedies, placed directly in the hands of women, such as a direct right to seek maintenance from a spouse or father, and new legal principles, such as a more sympathetic stance towards the claims of 'motherhood' in respect of custody and access to children.

These developments were a result of the growing influence of both economic and social liberalism, and its accompanying recognition of the interests of individual family members, especially wives and mothers. This individualism seems to have become allied with the view, increasingly prevalent in the second half of the twentieth century, that the purpose of intimate relationships is to provide emotional self-fulfilment for the parties, and that they are entitled to search for this through a succession of relationships rather than to settle for an unsatisfactory status quo. It eventually became accepted legal policy that not only should no moral blame or stigma attach to most instances of marital breakdown, but that the individual's wish to search elsewhere for emotional self-fulfilment should be facilitated, through a clean break from a spouse. Compare the sentiment of

Sir William Scott at the end of the eighteenth century, with that of Ward J in the late twentieth:

> For though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals; yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility.[6]

> Whilst this court deprecates any notion that a former husband and extant father may slough off the tight skin of familial responsibility and may slither into and lose himself in the greener grass on the other side, nonetheless this court has proclaimed and will proclaim that it looks to the realities of the real world in which we live, and that among the realities of life is that there is a life after divorce.[7]

Reform of the law became necessary to allow those caught up in unsatisfactory marriages to free themselves, both emotionally and financially, through easier access to divorce, and the ability to achieve a financial clean break from the ex-spouse. But liberalism also extended to the *responsibilities* of individual family members. Women who sought equality of treatment in property law and economic opportunities were increasingly expected to make themselves capable of financial independence. The obligation of support was turned into an obligation to share the marital property. The message that financial self-sufficiency after divorce is the desirable goal had become dominant, notwithstanding the lack of economic equality between men and women.

In the parent/child relationship, it seems that shifting attitudes, perhaps derived from psychological theory, perhaps from the gendered organisation of family roles, produced similar changes to the law. Legal policy moved away from focusing on marital misconduct as a sign of unfitness to parent, to an emphasis on the importance of the mother, and then of the father, to the child's wellbeing. But just as it came to be recognised, in relation to marriage, that the obligation to cohabit could not be enforced through the restitution of conjugal rights decree or the refusal of divorce, so it was regarded as inappropriate to enforce an obligation on the non-resident parent to maintain contact with a child. Instead, that parent's obligation towards his or her child was, until recently, primarily to be fulfilled through the payment of maintenance for the child. Attempts to use the law (both private, through civil court actions taken by the parent with care, and public, through enforcement by the social security authorities) to improve the level and frequency of maintenance were therefore made intermittently throughout

[6] *Evans v Evans* (1790) 161 ER 466, 467.

[7] *Delaney v Delaney* [1991] FCR 161, 165. But note that divorce can still be withheld because, although it is clear that the marriage has irretrievably broken down, the applicant fails to make out one of the specific 'facts' by which this must be proven: *Owens v Owens* [2017] EWCA Civ 182, [2017] 4 WLR 74.

the twentieth century. The Child Support Act 1991 constituted, perhaps, the last major attempt by policy makers to use law as a tool to *enforce* family obligation, through what was meant to have been a concerted effort by the state to change the attitude of non-resident parents towards supporting their children. Its failure confirmed an inconvenient truth—that a desire to move on from an unsatisfactory relationship and try again takes priority for many parents over sustaining their ties to the children of that relationship. Moreover, establishing an apparently coercive regime to reinforce those bonds, while at the same time allowing the parent to leave the first family and start a new one in the search for emotional self-fulfilment, sent a mixed message that merely added to the chaos[8] or antinomies[9] that seemed to be inherent in family law and policy.

C. The Sphere of the Emotions

Subsequent reforms appear to have reflected the view that it may be more effective to seek to use the law's expressive capacity to send messages and attempt to nudge family members towards appropriate ways of dealing with each other.[10] That approach coincided with and reflected a return to the view that family matters are largely non-justiciable. This time round, the reason was not because they concern religion and morality, and therefore do not pertain to the legal sphere, but because they concern human emotions, about which courts and lawyers have no particular expertise and for which legal remedies may be inappropriate and unhelpful. Pursuing the logic that had seen the abandonment of the decree of restitution of conjugal rights as a means of enforcing marital duty, irretrievable breakdown rather than spousal misconduct came to be accepted as the appropriate ground for granting a divorce. Moreover, the view advanced by the Law Commission that the divorce court should not conduct an inquest into whether a marriage has *truly* broken down irretrievably, marked a step back from the assumption that family law could be used as a device literally to pass judgment on family behaviour. It would be quite impracticable, and the spouses would be 'better judges of the viability of their own marriage than a court can hope to be, even with the most elaborate and searching inquest'.[11] So the function of divorce law, and of the courts administering it, came to be seen as determining the consequences of the breakdown of the relationship

[8] J Dewar, 'The Normal Chaos of Family Law' (1998) 61 *MLR* 467.

[9] A Diduck, 'What is Family Law For?' (2011) 64 *Current Legal Problems* 287.

[10] J Eekelaar, 'Family Law: keeping us "on message"' [1999] *Child and Family Law Quarterly* 387; H Reece, *Divorcing Responsibly* (Oxford, Hart Publishing, 2003).

[11] Law Commission, *Reform of the Grounds of Divorce: The Field of Choice* (Law Com No 6, 1966) para 71.

rather than adjudicating on the breakdown itself, and the parties were encouraged to settle those consequences between themselves.

Despite the attempt to reframe family breakdown as a non-legal issue (as indeed, it is in most respects), the allocation of the marital resources and the determination of ongoing financial obligations are certainly matters that remain amenable to resolution in accordance with a legal frame of reference. The courts accordingly continued to lay down an immense body of case law concerning financial remedies on marital breakdown and divorce, and it has been proposed, but not yet enacted, that they should have the jurisdiction to exercise another, though different, 'principled discretion' to determine financial relations at the end of a cohabiting, rather than marital, relationship.[12] Child maintenance, too, is an issue that can be cast in legal terms. Indeed, in the form of 'child support', it is subject to an excessively technical and vast body of rules, which require a very high level of legal expertise to understand and apply. This is unfortunate given that the rules are not administered by lawyers and are expected to be used by parents as a guide to making private 'family based arrangements' without any legal assistance.

Yet even though money and property are still subjects that the law *is* regarded as capable of dealing with, both the spousal and parental obligations of support seem to have been recast as social or moral norms rather than legal duties. It is now acceptable to move on and form a new family, and the law must facilitate this. Spouses who try to block this by resisting a financial clean break, or parents whose demands for child maintenance are seen as excessive or unreasonable, are regarded as letting their emotions override their good sense and as acting *immorally* by using financial matters as a proxy for their unwillingness to face up to the end of the relationship.

The discouragement of recourse by parents to the formal system of enforcing the child maintenance obligation is presented as an aspect of the law's general inappropriateness for determining issues concerning the upbringing of children. Once marital misconduct ceased to be used as the touchstone for the allocation of custody or access, the focus shifted squarely to the 'welfare' of the child, a concept itself imbued with other moral judgments as to the appropriate behaviour and fitness of the respective parents. But the existence of competing psychological theories concerning child adjustment and the impact of divorce, and the inherent uncertainty of predicting whether arrangements for a child's future care may be likely to advance his or her wellbeing, or expose him or her to harm, revealed the limitations of the court process. Judges cannot necessarily be sure that the decisions they make will actually be in the best interests of children, because they do not

[12] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007).

have the expertise to assess the psychological chances of success, and even with the assistance of experts, they cannot predict the future. Moreover, one finding from the research that does seem to command general support is the message that conflict between the parents is likely to be detrimental to the child's development and adjustment. The very fact that there is a 'dispute' between litigants connotes that the parties occupy opposing positions and that these will be advanced forcefully in the court forum, with the potential to make the conflict between the parents even more bitter and distressing for the child. It can therefore be persuasively argued that disputes over children should be kept out of the family courts, since they are ultimately about non-justiciable issues that would be better resolved elsewhere.

Given that family breakdown is not regarded in policy terms as a (mental) health issue until it reaches a very serious level of distress on the part of either the adults or the child,[13] the only people who can be charged with the responsibility for sorting out post-separation parenting arrangements are the parents themselves. In the modern, 'reform' era, divorce or separation had been regarded as ipso facto engaging the interest of the state and giving it both the right and the duty to 'interfere' in the privacy of the family for the good of society and the good of the children.[14] But the new 'communitarian' turn at the end of the twentieth century and in the new millennium put the onus on parents to resolve any disputes they might have arising out of the end of the relationship, and focused on the 'expressive' and 'channelling' functions of law to do so.[15] Law reforms now sought to steer parents towards information and guidance about good parenting and how to deliver it.[16] They were advised to avoid the courts and resolve their disputes with the assistance of mediators. To try to make sure that they did so, legal aid for representation in most kinds of family disputes was withdrawn, so that unless parents had sufficient resources to pay or had the determination to act in person, they were likely to be deterred from taking their case to court.[17]

[13] For criticism of this view, see G Douglas et al, 'Supporting children when parents separate: a neglected family justice or mental health issue?' [1996] *Child and Family Law Quarterly* 121.

[14] See, eg, the role of the King's/Queen's Proctor to investigate divorcing parties to ensure they had not condoned, colluded or connived in the divorce: S Cretney, *Family Law in the Twentieth Century: A History* (Oxford, Oxford University Press, 2003) 178–88; and the requirement for the court to consider arrangements proposed for the children before granting a divorce: G Douglas et al, 'Safeguarding children's welfare in non-contentious divorce: towards a new conception of the legal process?' (2000) 63 *MLR* 177.

[15] C Sunstein, 'On the Expressive Function of Law' (1996) 144 *University of Pennsylvania Law Review* 2021; C Schneider, 'The Channelling Function in Family Law' (1992) 20 *Hofstra Law Review* 495.

[16] C Piper, *The Responsible Parent* (Hemel Hempstead, Harvester Wheatsheaf, 1993); Eekelaar (n 10); Reece (n 10).

[17] N Lowe and G Douglas, *Bromley's Family Law*, 11th edn (Oxford, Oxford University Press, 2015) 10–14.

Thus, a position has been reached where the state's primary concern in regulating family obligations is to minimise the level of dispute between the parties in arriving at orderly arrangements for their lives and those of their children into the future. Seeking to use legal mechanisms to enforce family obligations once the relationship has ended runs counter to this objective, because it is assumed that it increases the likelihood of present and future dispute between the parties. By contrast, a clean-break financial settlement facilitates the desire of the spouse who wants to end the marriage, to leave the relationship behind and start afresh, because there will be no continuing financial ties to the ex-spouse. It also makes the negotiation of the necessary financial and property arrangements potentially more straightforward, since only the parties' assets need to be divided, and these will usually be allocated either according to needs, or on a sharing basis that reinforces the notion of marriage as a partnership in which both spouses 'contribute', in their different ways, to the welfare of the family.

Yet the logic of the clean break has not been carried over into the promotion of shared parenting after separation. Instead, here the law seeks to advance the welfare of the child through continuing involvement of both parents in the child's life.[18] Parents have been given a clear steer as to the appropriate style of post-separation parenting they should aim for, which, although not specifically determined by division of the child's time, is likely to be understood as such. This in turn influences the amount of money to be transferred between the parents, since greater shared time means a more equal bearing of costs and less need to pay money over from one parent to the other. This is supposed to enable a simpler, more straightforward calculation of child maintenance, which the parties can sort out for themselves without needing to use the child maintenance service. Family obligation, then, in so far as it may still need to be articulated through family law, is not supposed to require the use of a family justice system to make it manifest.

III. THE GENDERED LEGAL APPROACH TO THE FAMILY UNIT

The second reason why it has proved difficult to enforce obligations lies in the gendered nature of family law. Even if this has been moderated by reforms aimed at women's equality, and even if it can work in women's favour, adopting a 'gender neutral' approach in a highly gendered world results in a continuing male orientation in understanding and effect. The traditional family was a unit, headed by the husband/father and with only its common interests recognised by the law—and, famously, as Blackstone explained, those interests were identical with those of the man, because by

[18] Children Act 1989, s 1(2A).

marriage, 'the husband and wife are one person in law'.[19] To suggest that a husband might be legally obliged to maintain his wife or children on anything other than a rhetorical level would have been meaningless. He determined the way in which the family would operate and the state recognised him as having the power and authority to do so. If the wife or a child left the home against his wishes and without his having acted with cruelty, there could be no question of his being required to support them nonetheless.[20]

As the separate interests of individual family members other than the male head came to be socially recognised, so, gradually, the law was reformed to give effect to such recognition. But it is clear that each time a major advance in the position of the wife/mother was achieved, the advantage gained might be undermined through competing attempts to restore the husband/father's dominant position in relation to 'his' family unit.

So, under the canon law, and the law that succeeded it, the maintenance right of a wife who left her husband 'without cause' was suspended as long as she remained in desertion, and there is no evidence to suggest that the restitution decree was effective in reuniting a deserting husband with his wife. A husband might well have been resistant to the suggestion that he had an enforceable obligation towards a wife with whom he no longer wished to live, still less towards a wife who had herself taken the decision to leave, for the family 'unit' he had headed no longer existed. Even when women were granted the remedy of a maintenance order from the magistrates' courts, this was of limited utility, since many husbands resisted the law through non-payment.[21]

Much more recently, in the 1970s, many husbands found it difficult to accept that matrimonial fault on the part of a wife had ceased to determine the financial provision she could receive on divorce. Their sense of grievance was compounded by the requirement on the courts to consider the minimal loss principle, that is, to consider what the parties' financial position would have been if the marriage had not broken down, when making orders. What had been intended as a protection for wives divorced against their will, was presented as an assault on men either similarly abandoned by their wives, or struggling to establish life with a new partner and family. Powerful lobbying by men's groups, with considerable support in Parliament, led to the dropping of the principle and the promotion instead of the clean break, which had been judicially endorsed by the House of Lords. While the clean break

[19] Sir W Blackstone, *Commentaries on the Laws of England* (London, A Strahan, 1800) vol 1, 441.

[20] It did not follow that agreements were not reached to provide such support, of course: see Stone (n 4) pt VII.

[21] O McGregor et al noted the hostility of men to paying what they owed: *Separated Spouses: A study of the matrimonial jurisdiction of magistrates' Courts* (London, Duckworth, 1970) 22, 87, 106, 130.

enabled a woman to avoid dependence on maintenance from a potentially unreliable ex-husband, she still had to continue to hope for his compliance if she needed *child* maintenance as well, and she might well have to trade her long-term financial interests in exchange for current economic stability for herself and her children. The reverse was true for husbands—their earning capacity was not regarded as a marital asset subject to future sharing, so the short-term financial hardship they might suffer by giving up capital could generally be made up with higher income in the coming years,[22] and child maintenance was set at a comparatively low level and poorly enforced.

The clean break and the demand for an end to indefinite maintenance were predicated on viewing each family member as a separate individual. In the case of a wife, it was further assumed that she was socially and economically *equal* to the husband. A dependent wife then found herself in a quandary—if the family was no longer a unit, and she was ostensibly the equal of her husband, on what basis should she look to him for continuing support? Fortunately for wives, the judiciary has evinced some recognition of the economic reality behind the legal rhetoric, in setting out the principles (of need, compensation and sharing)[23] that underpin financial remedies on divorce, including on an ongoing basis. But there have been continuing attempts to protect the interests of (usually) husbands by seeking to create exceptions or set boundaries to the scope of the principles through the developing case law[24] or legislative amendments.[25] The male orientation of the *thinking* about financial obligations between spouses is reflected in the terms of the debate: spouses (read, wives) are expected to demonstrate their 'contribution' through care 'work' in order to 'earn' their fair share of the marital assets. Assets brought into the marriage by one party should be left out of account unless they *must* be included in order to meet a spouse's needs, because they do not form part of the assets of the family 'unit'.

The same inclusionary and exclusionary approach applies to the meeting of obligations to children. Significant elements of the cost of raising a child are absorbed within the overall costs of a family, and it is only when the unit

[22] S Jenkins, *Marital splits and income changes over the longer term* (Colchester, ISER, 2008) 16.

[23] *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618.

[24] See G Douglas, 'Women in English family law: when is equality equity?' [2011] *Singapore Journal of Legal Studies* 18, including by the recognition of 'stellar' contributions to the welfare of the family, the ring-fencing of 'non-matrimonial' property, the reintroduction of a 'ceiling of 'needs' for wives of the uber-rich, and the recognition of 'unilateral assets' generated and held by one party during the marriage. Of course, there will occasionally be wives who benefit from this approach as well as husbands—see, eg, *Sharp v Sharp* [2017] EWCA Civ 408—but this does not mean these exceptions are therefore appropriate.

[25] Eg through the Divorce (Financial Provision) Bill 2017–19 (HL) introduced by Baroness Deech, available at publications.parliament.uk/pa/bills/lbill/2017-2019/0026/lbill_2017-20190026_en_2.htm#l1g1.

is broken up that these may become distinct and identifiable. Fathers who were happy to meet such costs when living with their children may baulk at doing so if they are no longer in (such close and continuous) contact with them, especially if they are in dispute with the mothers over the extent of that contact. Where they have children in a new relationship or have become a step-parent to their partner's children, the new family now constitutes their family unit, and many will once more be happier to meet the costs of this unit, the benefits of which they share, than those of the family with whom they no longer live. Where the children of the first family are themselves now part of a new family unit established by their mother, the father may be particularly reluctant to pay money over to her, to spend on herself and her new partner, as he may see it. When the Child Support scheme was enacted to attempt to reinvigorate the effort to require fathers to maintain their children, the level of opposition by fathers was unparalleled in the history of family law. A series of concessions to meet fathers' preference for their 'social' rather than biological/legal family, and indeed their preference for paying less altogether, duly resulted.

A similar pattern can be seen in the development of the law on post-separation care for children. Once again, while there will certainly have been mothers for whom the law has worked very favourably, the general effect has been to ensure that fathers are not disadvantaged when a reform is put in place. When fathers lost their (near) absolute authority to determine whether mothers should have any continuing contact with their children after the marriage broke down, the impact was probably limited. Mothers were not given a *right* to custody or access but only the ability to seek a concession by way of order from the court, and 'guilty' mothers either were not eligible to seek an order or, once divorce became more common, would be refused it. They remained dependent upon the goodwill of the father to negotiate a private settlement giving them care or access to their children. Just when legal sentiment towards mothers became more tolerant, and they were placed in a more equal position with fathers, the 'welfare of the child' became more important and mothers' matrimonial misconduct continued to be held against them on the basis that it showed they were not 'fit' parents. Even when that position became softened, fathers were able to retain their power and decision-making authority in respect of their children by the creation of split orders for custody to the father and care and control (ie the care 'work') to the mother. When mothers finally became more economically able to leave an unsatisfactory marriage and take their children with them, they could not secure a clean break from the *father* (as distinct from a husband's securing a clean break from a *wife*) because contact, indeed sharing the child across both parents' homes, has now become understood to be a right of the child and is believed to be in the child's best interests, so long as the non-resident parent (still mainly fathers) *wants* it and is not

a danger to the child. But if a father does not show such commitment then the value that his 'involvement' is supposed to bring to the child has to be forgotten—while mothers can be 'made' to permit contact, fathers will not be 'made' to exercise it.

In Chapter 1, it was argued that the concept of commitment is gendered. It was suggested that for women, commitment may be more likely to be experienced as *structural* commitment or burden, because they are more likely to be engaged in care in the material sense of 'caring for' their children. In the past (and for many women, still), their greater economic vulnerability and dependence made it difficult for them to seek emotional self-fulfilment by leaving an unsatisfactory relationship. The earlier chapters have shown that the remedies provided by private family law, in conjunction with changing social attitudes to women's employment and 'role', went some way to reducing these constraints, but usually at a cost in terms of reduced income and living standards and the likely continuing responsibility for the primary care of their children.

Men, by contrast, may be more likely to experience commitment as *personal*, to be demonstrated by a promise, or other evidence of dedication, and to be shown in the form of 'caring about' their spouse or children. Post-divorce maintenance is discouraged in favour of a clean-break settlement, usually to the long-term advantage of the husband and disadvantage of the wife. Legal measures are not used (although as was noted in Chapter 6, they potentially could be) to enforce shared parenting against the wish of the non-resident parent, and are not used effectively to require the due payment of child maintenance. The result is that the wife/mother will bear the structural burdens created by the past marriage or relationship. The husband/father's 'personal commitment' will be used as the justification for him to have a right to continuing involvement with his child, while his lack of such commitment will be used to excuse his failure to fulfil his obligation to have such involvement. The extent to which either spouse or parent can 'move on' to find greater emotional fulfilment is clearly gendered too, and so, therefore, is the whole thrust of modern family legal policy.

IV. OBLIGATIONS AND COMMITMENTS IN FAMILY LAW

In Chapter 1, I also suggested that legal family obligations should be described as 'soft' obligations because their applicability and extent are subject to negotiation between the parties (to the extent of being capable of being bargained away completely, as is the case with a clean break settlement waiving a spouse's right to maintenance), and to the determination of the court applying a broad discretion that may result in an applicant's receiving nothing at all (such as refusing a parent all contact with his child).

In this, they are similar to civil remedies in the law of obligations.[26] Yet it is clear that the law has frequently proved to be unsatisfactory and ineffective as a remedial (adjustive)[27] device through such 'family law' measures. Moreover, through deterrent measures restricting access to the courts, it now appears to be regarded as positively undesirable to make legal remedies available for the non-performance of obligations, even to the members of a disrupted family. At most, it might be argued that the extent of the law's role is to proclaim the norms by which families should deal, by themselves, with the problems arising from the breakdown of the relationship and then leave them to get on with it. Of course, it could be argued that this has always been true, and that only a minority of spouses and parents ever resorted to the courts to resolve their disputes. But in the 'reform' era of family law, at least, the courts became more readily accessible to them, and they were not deliberately deterred from using them if they wished.

The novel legal device of setting out guiding principles in legislation demonstrates this belief in the educational function of law, with the inclusion of declaratory statements that are more akin to principles proclaimed in a government White Paper or a Law Commission report, than to a statute. Take, for example, section 1 of the Family Law Act 1996, which was intended to set out the principles that would have governed a revised divorce law but which was never fully brought into force. While directed to the courts and those 'exercising functions' under the parts of the Act dealing with divorce and legal aid, it originally stated:[28]

(a) that the institution of marriage is to be supported;
(b) that the parties to a marriage which may have broken down are to be encouraged to take all practicable steps, whether by marriage counselling or otherwise, to save the marriage;
(c) that a marriage which has irretrievably broken down and is being brought to an end should be brought to an end—
 (i) with minimum distress to the parties and to the children affected;
 (ii) with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances; and
 (iii) without costs being unreasonably incurred in connection with the procedures to be followed in bringing the marriage to an end; and
(d) that any risk to one of the parties to a marriage, and to any children, of violence from the other party should, so far as reasonably practicable, be removed or diminished.

[26] See M Tilbury, 'Remedies and the Classification of Obligations' in A Robertson (ed), *The Law of Obligations: Connections and Boundaries* (London, UCL Press, 2004) 20–21.
[27] J Eekelaar, *Family Law and Social Policy*, 2nd edn (London, Weidenfeld & Nicolson, 1984) pt two.
[28] Only paras (a) and (b) are still in force: Children and Families Act 2014, s 18(2)(a).

Similarly, section 1 of the Children Act 1989 provides that:

(1) When a court determines any question with respect to—
  (a) the upbringing of a child; or
  (b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration.

(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

(2A) A court … is as respects each parent … to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.

This provision is directed to the court, but since parents are encouraged to resolve their disputes without resorting to litigation, it provides important guidance on what is expected of *them*. So too, section 1 of the Family Law Act set the 'tone' and approach that courts and professionals would have been expected to use in dealing with divorcing couples, thus guiding the couples themselves on how to divorce 'responsibly'.[29]

When these kinds of exhortation are put together with the measures introduced to deter the use of the courts or the Child Maintenance Service in favour of private settlement, it seems as if we find ourselves both in Helen Reece's post-liberal world of transmitting messages, and simultaneously in a neo-liberal one. In this neo-liberal world, the state has withdrawn from engagement with even post-separation families, and individual family members must battle with each other for their future security as best they can.[30]

A. Laissez-faire Family Law?

It could therefore be argued that it would now make sense for governments to accept that the law should *overtly* reflect the focus on emotional self-fulfilment that drives people's entry into, and exit from, intimate relationships in modern society, and the view that obligations within a family are voluntary and altruistic, and cannot be enforced against the will of the obligor. This has already effectively happened in relation to obligations before a final separation. The private law has never sought to enforce obligations in the intact family, and the spousal maintenance duty prior to divorce has (except for wealthy spouses seeking maintenance pending suit) largely

[29] Reece (n 10).

[30] For a similar conclusion by a very experienced practitioner, see M Stowe, 'One couple: one lawyer?' [2017] *Fam Law* 737, 739.

become a dead letter. Even on divorce, the maintenance obligation between the spouses has largely disappeared, except where it stands in lieu of capital as part of an overall financial settlement on divorce. And it is accepted in relation to the position of a non-resident parent that he or she will not be compelled to have contact with his or her child after separation.

In shaping future law, then, policy makers could draw directly on the understanding of social family obligations elucidated by Finch and Mason,[31] as being derived from guidelines and sets of criteria rather than precise rules, and always negotiable to fit the parties' individual circumstances. The function of the law would be primarily expressive. Building on some initial attempts that have already been published,[32] the strategy would be to set out in statute and soft law—ideally in an accessible way—guidance for parties to use in negotiations, for example as to preferred arrangements for shared parenting, or preferred financial outcomes on divorce or cohabitation breakdown. To make negotiations simpler, the parameters could be drawn quite narrowly; for example, in divorce, the default could be that marital property should be shared equally, and periodical payments could be time-limited by statute.[33]

It would be recognised (as is already the case) that the official guidance could not constrain the parties either in terms of the arrangements they wished to make, or by requiring them to make any at all. It would be a matter for policy makers whether they thought it appropriate to offer any safeguards to redress any power imbalance between the parties in reaching their 'settlements', such as because of domestic abuse. It would be accepted that the state would cease to have an interest in the financial implications of a divorce (or breakdown) settlement and that it would bear the cost of maintenance of parents and their children if necessary, through the provision of social security as a safety net, if the other spouse/parent declined to do so. The parties would be encouraged to make property agreements before and during the marriage/relationship to limit scope for dispute later and to avoid, if they wished, the default outcome set out in statute. There would be little point in trying to prohibit child arrangements agreements contrary to the accepted understanding of the welfare principle because of different cultural or religious norms, since there would be no expectation that any arrangement made by the parents would need to be scrutinised, still less approved, by a court. The remedial role of the family justice system would

[31] J Finch and J Mason, *Negotiating Family Responsibilities* (London, Routledge, 1993).

[32] See, eg, Family Justice Council, *Guidance on 'Financial Needs' on Divorce* (2016) at www.judiciary.gov.uk/wp-content/uploads/2013/04/guidance-on-financial-needs-on-divorce-june-2016-2.pdf. A guide for litigants may be downloaded at www.advicenow.org.uk/guides/survival-guide-sorting-out-your-finances-when-you-get-divorced.

[33] As proposed by Baroness Deech in her Divorce (Financial Provision) Bill 2017–19 (HL), cl 5(1)(c) (see n 25).

be reduced because arrangements would be what the parties had chosen (either by agreement or default). They might or might not be enforceable as contracts, as is already the case with family-based arrangements for child support. The law would be presented as upholding the primary values of individualism and autonomy, in order to facilitate formal equality and the goal of emotional self-fulfilment.

Family law would still have constitutive and protective functions. The former would be to determine people's relational identity by setting out the rules of eligibility for marriage, parenthood and any other recognised family relationships (such as, in Australia, de facto and caring relationships). This could still be seen as a very important function in terms of making relationships public to others, and giving these relationships formal recognition by the state, but the status thus created would be somewhat empty since it would not import much by way of legal (as distinct perhaps from social) consequences, other than the provision of basic protection from abuse and some tax exemptions. It might become harder to justify the extension of legal recognition to more diverse kinds of relationship. After all, the arguments for reform of the law for cohabitants or others in caring relationships are focused on providing them with improved remedies, not on providing them with a status in and of itself. If the consequence of recognition is no meaningful improvement in the remedies available to them, then it is difficult to see what the point of 'recognition' other than for the purposes of relational identity would be. On the other hand, it could be argued that extending recognition of the relationship should be easier. Marriage could not be 'undermined' by extending 'status' of some kind to cohabitants or others, because marriage itself would have limited consequences.[34]

In many respects, of course, this is exactly the legal position that we have now. In this model, family law is about linkages, rather than ties. It usefully tells us who is legally connected to whom, but it takes little interest in attaching meaningful duties to the parties concerned. It hardly presents a positive picture of the value that is attached by society to families and the 'work' they do, and to promoting an ethic of care. The question arises, therefore, whether there is an alternative scenario, in which family law could do more to provide meaningful recognition of caring, both within traditional relationships and beyond. Here, one can learn from the Australian experience, as well as draw on the reform proposals made in England and Wales.

[34] For early 'functionalist' calls to abolish the consequences flowing from marriage as a status, though with the goal of extending remedies rather than reducing them, see E Clive, 'Marriage, An unnecessary legal institution?' and B Hoggett, 'Ends and Means—the Utility of Marriage as a Legal Institution' in J Eekelaar and S Katz (eds), *Marriage and Cohabitation in Contemporary Societies: Areas of legal, social and ethical change: an international and interdisciplinary study* (Toronto, Butterworths, 1980).

B. Remedial Family Law

It could be argued that the key to achieving better recognition of care is to combine the law's remedial and expressive functions more deliberately and consistently. The object of providing a legal 'remedy' is to make good a loss or repair a detriment, or to reverse an unjust enrichment. It was suggested in Chapter 1 that one can justify the imposition of obligations of care on those within a family on three possible bases. In the case of children, bringing a dependent child into the world or assuming the care of a child (say, through adoption) creates a duty to care in all its senses in respect of that child until he or she can function independently. In the case of adults, they can make a mutual commitment in marriage, or through other express forms of contracting, to care for each other, giving rise to binding obligations. Where such mutuality is absent, however, it was argued that it does not follow that just because one person provides care for another, that other should be duty-bound to make good any loss that results to the carer; otherwise, there would be no place for genuine altruism and the care recipient would have no agency and choice as to whether to accept or refuse the care.[35] Something additional is required, and it was suggested that it is the fact that the care recipient has *accepted* the gains and benefits of the relationship that justifies the imposition of a duty to redress any imbalance between the parties. The idea that contribution, on the one hand, and acceptance (or acquiescence), on the other, together give rise to claims and obligations in respect of each other, reflects both an ethic of justice and an ethic of care.

i. Adult Relationships

A remedial family law approach focusing on the losses and the gains of a relationship fits the modern liberal individualist approach, just like a clean-break settlement, by allowing adult parties at the end of their relationship to draw a line underneath it while redressing the economic imbalance that has arisen in consequence of it. It thus goes with the grain of current social attitudes. But unlike a pure focus on 'disadvantage', I suggest that by emphasising the willingness of the partner to receive the benefits of the relationship as well, it can be demonstrated that *both* parties gained (or expected to do so) as well as lost from the relationship.[36] The law can then be moved away from viewing the claimant as a dependant and supplicant who is seeking

[35] See J Eekelaar, *Family Law and Personal Life* (Oxford, Oxford University Press, 2006) 47–48; J Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (London, Routledge, 1993) 106–08.

[36] For a similar approach, albeit from the position that the stronger party should not be able to 'freeload' off the weaker, see M Weiner, 'Caregiver payments and the obligation to give care or share' (2014) 59 *Villanova Law Review* 135, 150.

relief of her needs. Instead, it can be seen to be concerned with giving due recognition to the entitlements *each* party has accrued through the investments they both made in the relationship, and with providing fair recognition of both the gains and the losses each has incurred.

A claim to provision at the end of a marriage can be based on the parties' mutual agreement to an equal partnership, as evidenced by the marriage contract (subject to any lawful marital property agreement which says otherwise), so that the starting point for determining entitlement would be equal shares of the parties' combined assets, as established in the current case law.[37] But this would only be the starting point. The rationale of gain and loss should be used to determine the final outcome, because a crude application of a principle that mandates 'equal shares of the marital acquest' is unlikely to remedy the disadvantage suffered by the financially weaker spouse in many cases. As Baroness Hale has declared, the objective should be to ensure that both parties are provided with 'an *equal* start on the road to independent living'.[38] That requires a comparison of how readily each can adjust to, bear and make good the loss of the relationship, and, as is well understood by the courts, it may well therefore justify *unequal* shares and ongoing financial provision for the weaker party.

Exactly the same reasoning logically applies to those in non-marital relationships. But the fact that spouses did enter into a (default) marital contract provides a simple point of distinction for those who would wish to treat marriage and non-marital relationships differently. By contrast, the regime envisaged for those who cohabit could be *justified* by the investment (the 'sacrifice' or 'contribution') made by the claimant, and willingly accepted or acquiesced in by the partner, but *assessed* according to the loss/gain incurred. (It is accepted that in many cases where the parties have limited means, the end result would be the same whether the parties had been married or not.) One could take a leaf from the Australian book by making the regime available to any partnership that demonstrated the provision and acceptance of care, if that would make reform more likely to be enacted. Or one could limit eligibility to cohabitants without upsetting marriage defenders, because all that this would be doing, in effect, is to widen (by statute) the scope of an estoppel claim.

ii. The Parent/Child Relationship

I have argued that, in the case of a dependent child, causation is a sufficient basis for attaching the responsibility to care (in all its senses) in respect of

[37] See ch 7. Whether any assets should continue to be 'ring-fenced' to reflect their pre- or extra-marital acquisition is a matter for debate: see *Hart v Hart* [2017] EWCA Civ 1306.

[38] *Miller v Miller: McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [144], emphasis added.

that child to his or her parents. Where that care is not forthcoming, I suggest that the notion of relationship-generated disadvantage should be extended to recognising the detriment suffered by the child as a result.

In respect of child maintenance, the point would be straightforward. Under the current child support rules, the full amount of any maintenance paid by the non-resident parent, no matter how small, goes on top of any social security payment to the parent with care and the children, and even small sums can help towards relieving poverty.[39] The potential financial detriment to the child of the non-payment of maintenance by his or her parent, who could have provided him or her with a better living standard, is therefore obvious. It might be argued that where the primary carer is wealthy, and especially where the non-resident parent is not, the child would suffer no loss from the latter's non-payment, and requiring him or her to pay a token amount is an empty gesture. It is true that the child may suffer no *financial* loss in such a situation, but it does not follow that he or she suffers no *detriment*. The 'good' of parental involvement in the child's life, which is now part of the welfare principle under the Children Act, should apply to 'taking care of' the child in a financial sense as well as 'caring about' him or her in the emotional sense. The parent's contribution of financial support therefore still reflects his or her own obligation to meet any detriment to the child. After all, if the parents were living together, they would, presumably, combine their assets to meet the 'needs' of the whole family, including the child.

The parent who considers that the child is no longer part of his or her family unit and is not therefore 'entitled' to his or her financial support, should be on weak ground in nonetheless asserting any 'right' to involvement in the child's life. If the parent instead wishes to assert that the child *is* still part of his or her family unit, there can be no argument against sharing the cost of raising the child, both through a shared care arrangement, if this is in the child's interests, and through helping to meet the financial requirements of the child in the other household.

But what if the non-resident parent has no interest in maintaining involvement with his or her child? Or the parent cannot, in the child's best interests, be permitted to have any contact or care? I suggest that such a lack of engagement is as much a loss or detriment to the child as non-payment of maintenance. That, after all, is the prevailing belief applied to decisions on shared care and contact between a parent and child. If having a meaningful relationship with both of one's parents is indeed a 'right' of the child then there is an obligation on the part of the parents to meet it, and to remedy or prevent the detriment the child would otherwise suffer. The disengaged

[39] C Bryson et al, *Kids aren't free: The child maintenance arrangements of single parents on benefit in 2012* (London, Nuffield Foundation, 2013) Table 3.4.

parent should, therefore, understand that he or she is no less in default for non-performance of the contact/involvement obligation than he or she would be for failing to meet the support obligation.[40]

Chapters 5 and 6 showed that parents with care are discouraged from taking legal proceedings (or invoking administrative processes) to try to enforce either of these obligations, and that when they do, the sanctions for non-compliance are often ineffective. Moreover, a 'message' focused on detriment to the child from non-involvement may still run counter to the possible preference of the non-resident parent to focus on his or her new family. Family law reforms that seek to move family law in a direction different from prevailing social norms are likely to be unsuccessful, as the child support experiment proved to be, if they are not reinforced by other aspects of social structure and organisation. It might therefore take a long time to persuade all parents of the importance of 'involvement' with and care of *all* of one's children, in a safe and appropriate way. The 'message' is not sensibly going to be enforced through penalties or sanctions, but social attitudes to parenting have, clearly, changed very significantly in recent years. It has long been argued that safe and positive involvement in a child's life, and a desire to support the child both financially and emotionally, are more likely to develop if care has been shared before the parents' relationship founders, not just afterwards.[41] As is very well known, that requires structural change in the workplace and the organisation of family and social life more generally, to enable both parents to play their part. Feminists have of course been calling for such change for many years, but that does not make it less important to seek to achieve.

C. Caring Relationships

i. Care and Support for Parents

It was noted in Chapter 7 that care for parents or other kin, while seen as a matter of *moral* obligation, has generally not been regarded as a matter of legal prescription in England and Wales. Yet care for the elderly is going to be the most serious challenge facing social and family policy makers in the

[40] The dangerous parent is also in default, but of course there should be no question of allowing, let alone enforcing, contact which puts the carer or the child at risk.

[41] Ch 6. See Family Justice Review (Chair, D Norgrove), *Interim Report* (London, Ministry of Justice, 2011) para 5.73; J Wallbank, 'Getting tough on mothers: regulating contact and residence' (2007) 15 *Feminist Legal Studies* 189; J Wallbank, '(En)Gendering the fusion of rights and responsibilities in the law of contact' in J Wallbank, S Choudhry and J Herring (eds), *Rights, Gender and Family Law* (Abingdon, Routledge, 2010); S Harris-Short, 'Building a house upon sand: post-separation parenting, shared residence and equality—lessons from Sweden' [2011] *Child and Family Law Quarterly* 344.

coming years. Some jurisdictions[42] have imposed or re-imposed private or public law obligations of financial support on adult children. But in England and Wales, this is an unlikely possibility, especially given that it has proved so difficult to require even spouses or parents to make ongoing provision for their dependants.

Moreover, one could argue that in British society, families are seen as the settings in which children can be raised to become independent adults, and the view that adults should be financially independent of each other is very strong. Although practical help (excluding childcare) may be provided more by children to their parents than vice versa, transfers of financial help tend to go down the generations rather than up (as the use of the 'Bank of Mum and Dad' to assist with housing costs makes clear).[43] It would therefore be even harder to impose a legal obligation of support on adults towards their parents than it has been to do so in respect of each other and their children. Nor is it as obvious as might be thought that the obligation *should* be imposed. None of the three different rationales for family obligation previously identified applies to the adult child/parent relationship. The birth and upbringing of children are the result of decisions and actions taken by parents, not by the children themselves, so the children cannot be regarded as the moral cause of their parents' vulnerabilities.[44] Even where a parent might suffer a detriment in earning capacity due to child caring, from which the child gains through the love and care he or she receives, the child cannot be regarded as deliberately choosing or acquiescing in receiving such care. The parent/child relationship is not in any sense a contractual one.

While a moral obligation on children to reciprocate forms of care might be asserted, Finch and Mason's findings on the contingent and negotiable nature of kin ties suggest that it would be very hard to translate this into law. Indeed, more than a century of the provision of state pensions and benefits to meet the financial needs of the elderly suggests the central social and cultural importance of being regarded as having financial 'independence' from other adult kin. This can be coupled with the fact that elderly people may require extensive care work that cannot be undertaken by children who live far away, or who have their own responsibilities and obligations to partners and children. Whatever the solution to the problem of elder care might be, it does not seem to lie in private family law.

[42] See, eg, A Lee, 'Singapore's Maintenance of Parents Act: A Lesson to Be Learned from the United States' (1995) 17 *Loyola International and Comparative Law Review* 671; F Swennen and L Verhaert, 'Intergenerational solidarity and elder care in the Low Countries' [2015] *Child and Family Law Quarterly* 285.

[43] Finch and Mason (n 31) 31.

[44] And systems may exempt children whose parents were abusive or neglectful from having to support them: see Swennen and Verhaert (n 42) 291.

ii. Care for Others

By contrast, the recognition of the performance of care as giving rise to a *claim* appears to be less problematic, since it would be justified—and limited—by the same contribution, detriment and acceptance as was proposed for cohabiting partnerships. But the experience of the regimes introduced in parts of Australia does not appear to suggest that they do much to recognise and reward the provision of care. If it were felt important to ensure that any such regime was not too all-embracing of 'carers', it would be necessary to introduce eligibility requirements similar to those in Australia as to the kind of relationship (a couple or partnership?) and the kind of care undertaken (unpaid care work only?), adding complexity to the law. Moreover, a private law remedy of this kind places an obligation to compensate on the care recipient, who might actually be more 'vulnerable' than the carer himself or herself. Unlike a marriage or cohabiting partnership, where the ideal of equality can itself be a driver of the compensation to be paid (through redressing the balance between the gainer and the loser), there is no reason why a care giver and care beneficiary should be treated as equals, any more than a parent and dependent child are. And perhaps the oddest consequence of the Australian approach is that the carer may himself or herself be the party required to provide the compensation—precisely because the law requires that there be a *relationship* of care between the parties, of which either may take advantage.[45]

D. 'Family-based' Remedies

It could be argued that viewing family obligations as necessitating a remedial jurisdiction for their enforcement ignores, on the one hand, the availability of contracts and, on the other, the increasing *unavailability* of the family justice system to those who lack the means to pay for legal assistance.

It would certainly be possible, and perhaps desirable, to encourage more family members to contract with each other, or at least to 'settle' with each other the arrangements for a final 'account' of their gains and losses at the end of a relationship, or the future care and support of their children. Suitable protections could be put in place to try to minimise any inequalities of bargaining power.[46] There would still need to be a remedial element to the law, however, if only to determine whether a given arrangement should be enforceable and, if so, to enforce it. Moreover, it would still be necessary to set out guidelines so that the parties have some yardstick or rule of thumb

[45] *McKenzie v Storer* [2007] ACTSC 88.

[46] See Law Commission, Law Com No 307 (n 12) pt 5; Law Commission, *Marital Property, Needs and Agreements* (Law Com No 343, 2014) chs 6, 7.

by which to determine what would be a fair and acceptable arrangement. The drawback of such an approach is that the simpler the guidelines, the greater the risk of losing the nuance and individualised justice of a purely discretionary system such as that applied in litigation on financial remedies on divorce. But the infinite variety of individual families' circumstances could be a safeguard against too crude a 'formula' being applied, so long as part of the 'message' being transmitted is that arrangements have to work in the interests of *all* the relevant parties. But how could this be delivered and guaranteed? In the absence of a dramatic change in policy towards access to justice, it is clear that it will require new forms of thinking about legal assistance and forms of arbitration, as well as advice. But it should really involve a more thorough-going reassessment of what this exercise is all about. Viewing remedies as an aspect of supporting family members' *wellbeing*, through both financial and non-financial services (such as either public or privately provided insurance-based financial support, or the provision of health and welfare services) rather than narrowly focusing on relationship breakdown as a family *law* issue, might be a means of realising both the ethic of care and the ethic of justice.[47]

V. OBLIGATION *AND* COMMITMENT

The aim in writing this book was not to paint a picture of a decline in the moral standards of the family, nor to offer a conservative prescription intended to 'bring back' or impose a sense of moral rectitude. The law alone, and certainly family law alone, could not influence human behaviour in this way even if it were thought desirable. Rather, the purpose was to explore whether there has ever been a 'golden age' of family obligation, in which the law was used effectively to promote caring within the family, and, if not, to consider the reasons why. I also wanted to examine how the notion of 'commitment' has been reflected in understandings of the nature and scope of family obligations, and to reflect on whether this may have been a problematic development for family law.

Confirming that the core obligations to support and to care for each other have never been particularly effectively enforced by family (or public) law helped explain why the child support experiment has been such a spectacular failure, why clean-break settlements were so quickly adopted despite their disadvantages for many wives, and why it has proved so problematic for parents to arrive at workable post-separation arrangements for their children. These are all affected by deep-rooted social and cultural norms of

[47] See M Murch, *Supporting Children When Parents Separate: embedding crisis intervention in family justice, education and mental health policy* (Bristol, Policy Press, forthcoming 2018).

family behaviour and attitudes, which law is ill-equipped to challenge. And the rise of the romantic, or companionate or pure relationship, and the drive towards individualism are stronger influences on how people will live their intimate lives than the prescriptions of law.

The concept of personal commitment, meaning the making of active choices and allegiances which can change and be dropped in the ongoing search for emotional self-fulfilment, has come to supplant the idea of structural commitment in the sense of burdens that cannot be cast aside when they prove onerous and unsatisfying. But if we are to protect the interests of all of us who are, at some time in our lives, vulnerable or dependent, and if the values of love and caring are to be promoted, then all of the tools of social policy, and not just the law, will be required to enable people to meet their enduring family commitments as well as their demands for self-fulfilment.