

LAW AND PREJUDICE – DOES FAMILY LAW WORK FOR THE WHOLE FAMILY?

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Abstract

The Children Act 1989 stipulates that the welfare of the child shall be the court's paramount consideration when making decisions about who a child should 'live with' and 'spend time with' (collectively known as child arrangements) in England and Wales. In the context of post-separation parenting, the court is also facing increased pressure from Fathers' Rights groups to prioritize the child's contact with the father. But where does this leave mothers in the decision-making process, and how does this affect the lives of mothers beyond separation?

This paper focuses on separated mothers in England and Wales and examines whether, and to what extent, the life goals of separated mothers are impacted by orders made under Section 8 of the Children Act 1989. The author will review literature from England and Wales, Australia and the US - jurisdictions with similar approaches to post-separation parenting. Examining whether mothers can freely make decisions about their own lives when they are subjected to the obligations of a Section 8 Order, the paper argues that judicial outcomes may inadvertently have negative effects on the agency of mothers, that courts do not understand or take into consideration when making orders for their children.

This contribution is significant because it highlights the assumptions about the ethic of care made by the courts, the human poverty for mothers that can be a result of court orders relating to children, and evidences the need for mother's needs to be considered by the courts to a greater extent when they make orders under section 8 of the Children Act 1989.

Keywords: Family law; gender bias; child arrangements; Section 8 Orders; separated parents.

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Résumé

La Children Act de 1989 stipule que le bien-être de l'enfant doit être la considération primordiale du tribunal lorsqu'il s'agit de décider avec qui l'enfant doit "vivre" et "passer du temps" (ce que on appelle collectivement les dispositions relatives à l'enfant) en Angleterre et au Pays de Galles. Dans le contexte de la parentalité post-séparation, le tribunal est également confronté à une pression accrue de la part des groupes de défense des droits des pères pour qu'il donne la priorité aux contacts de l'enfant avec le père. Mais où cela laisse-t-il les mères dans le processus décisionnel et comment cela affecte-t-il la vie des mères après la séparation ?

Cet article se concentre sur les mères séparées en Angleterre et au Pays de Galles et examine si, et dans quelle mesure, les objectifs de vie des mères séparées sont influencés par les ordonnances rendues en vertu de la section 8 de la loi sur les enfants de 1989. L'auteur passe en revue la littérature de l'Angleterre et du Pays de Galles, de l'Australie et des Etats-Unis - des juridictions qui ont des approches similaires de la parentalité post-séparation. En examinant si les mères peuvent prendre librement des décisions concernant leur propre vie lorsqu'elles sont soumises aux obligations d'une ordonnance au titre de l'article 8, l'article soutient que les résultats judiciaires peuvent par inadvertance avoir des effets négatifs sur l'action des mères, que les tribunaux ne comprennent pas ou ne prennent pas en considération lorsqu'ils rendent des ordonnances pour leurs enfants.

Cette contribution est importante parce qu'elle met en lumière les hypothèses sur l'éthique des soins formulées par les tribunaux, la pauvreté humaine pour les mères qui peut résulter des ordonnances judiciaires relatives aux enfants, et met en évidence la nécessité pour les tribunaux de prendre davantage en compte les besoins des mères lorsqu'ils rendent des ordonnances en vertu de l'article 8 de Children Act de 1989.

Mots-clés : Droit de la famille ; préjugés sexistes ; arrangements pour les enfants ; ordonnances en vertu de l'article 8 ; parents séparés.

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Introduction

The popular discourse around Family Law is that family courts are biased and rule in favor of mothers in children’s proceedings. Yet research reveals that courts often grant orders stating that the child(ren) should live with the mother in such cases predominantly due to the fact that very few fathers ask the courts for an order for the child(ren) to live with them, combined with a desire by the courts to continue the status quo of pre-separation parenting as mothers usually end up caring for the child during the relationship.¹ The impact of court decisions in child arrangements cases on mothers’ lives is not widely researched. This is because most existing

¹ Michael Flood, “Separated fathers and the ‘fathers’ rights’ movement” (2012) 18:2–3 *Journal of Family Studies* 235–345, online: <<https://doi.org/10.5172/jfs.2012.18.2-3.235>>; Miranda Kaye & Julia Tolmie, “Discoursing dads: The rhetorical devices of fathers’ rights groups” (1998) 22 *Melb UL Rev* 162.

research looks only at the financial impact of single parenting, the effect of mothers being primary or sole carers on their careers, contact with children in domestic abuse cases, or is viewed from a Father's Rights perspective. There is no equivalent Mothers' Rights movement, and literature on the rights of mothers is scarce. If courts do not consider the lived experience of mothers in child arrangement hearings, then that raises the question - does family law work for mothers? This is an important topic within family law because the implications of mothers' lived experience not being considered by the courts when making Section 8 Orders could have a deep impact on gender equality beyond Family Law, including in the workplace and for domestic labor. If mothers' lives are not considered when making decisions about their children after separation, it could lead to situations where the mother suffers disadvantages that the father does not, for example, in her ability to pursue hobbies, relationships, travel, education, or enjoy free time.

This paper looks at the extent to which child arrangements made under section 8 of the Children Act 1989, applicable in England and Wales, negatively impact the lives of separated mothers. The study questions whether courts adequately consider the implications of parenting responsibilities on a mother's life and whether there is equality in the court's consideration of the mother's and father's time, personal commitments, and aspirations while deciding Section 8 applications. The legal framework outlined in this paper encompasses all heterosexual parenting relationships, whether the couples were married, cohabiting, or neither. In England and Wales, legal issues around child arrangements are separate from divorce or other financial issues the parents may be contending in court. Although these matters may, and often do, overlap, for example, in considering financial need and spousal maintenance during financial settlements, children's arrangements can – and should, in the eyes of the law – remain separate matters.

To analyze issues with child arrangements, the term ‘separated mothers’ is used to encompass mothers who have separated or divorced from their child’s father, regardless of whether the father has ongoing contact with the children and whether or not the mother has re-partnered. According to the Office for National Statistics (ONS), there are 2.9 million lone-parent families in the UK. Of these, almost 90% of single resident parents are mothers. Merely 430,000 households in the UK are headed by a separated father.² These statistics inform the arguments throughout the article, and lead this study to consider the mother as the resident parent and the father as the non-resident parent. While it is acknowledged that this is not always the case and fathers may be the resident parent in certain cases, the findings of this study are widely relevant because they scrutinize most single-parent households in the UK.

1. “Winning” and “losing” in post-separation parenting

The existing literature has conflicting perspectives on what result constitutes a ‘win’ in child arrangements, and this view has changed radically, back and forth, over time. Historically, “responsibility for care was a punishment for women’s misconduct, but legal control was a reward for ‘wronged husbands.’”³ Delorey argues that parental responsibility and custody of the children can be used by fathers to exert power over their children’s mother. Because the fathers can decide how much – or how little – involvement in the children’s lives they would like, they can control the childcare arrangement by choosing to spend less than 50% of the time with the child(ren) or by not adhering to court-ordered child arrangements.⁴ Fathers who do not adhere to court ordered time with their children face no consequences.

² ‘Families and Households in the UK - Office for National Statistics’.

³ Anne Marie Delorey, “Joint legal custody: A reversion to patriarchal power” (1989) 3 Can J Women & L 33.

⁴ *Ibid.*

Back in the early 1980s, Nancy Polikoff examined “Why Are Mothers Losing”⁵ child custody cases in the US and subsequently reviewed the situation again a decade later.⁶ The assumption throughout her articles was that ‘losing’ entailed instances where the mother was not granted sole custody of the children upon divorce. Although she does discuss the challenges of custody decisions in cases involving ‘battered women,’ there is an overarching presumption in her work that the most desirable outcome for all mothers would be custody shared proportionally to the amount of care that each parent catered to during the relationship. This would mean that women could only “win” if they were awarded the lion’s share of time with the children. This presumption is problematic because it does not consider the implications of a mother spending 50% or more of their time with the children, and disregards a mother’s other commitments such as work; time when she may be responsible for the children but not really ‘spending time with’ them.

Fathers’ Rights advocates, too, assume that mothers consider diminished time with their children a disadvantage and that all mothers want as much time with their children as possible. However, this view directly conflicts with the discourse around the lack of availability of affordable and flexible childcare that hinders so many separated mothers from pursuing careers, other interests and relationships,⁷ and contradicts the pervading complaint from separated mothers that they are “time-poor”.⁸ Research has shown that most mothers prefer that their

⁵ Nancy D Polikoff, “Why are mothers losing: A brief analysis of criteria used in child custody determinations” (1981) 7 Women’s Rts L Rep 235.

⁶ Nancy D Polikoff, “Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations” (1992) 14 Women’s Rts L Rep 175.

⁷ Simon Duncan & Rosalind Edwards, “Lone Mothers and Gendered Moral Rationalities: Orientations to Paid Work” in Simon Duncan & Rosalind Edwards, eds, *Lone Mothers, Paid Work and Gendered Moral Rationalities* (London: Palgrave Macmillan UK, 1999) 108; Simon Duncan & Rosalind Edwards, “Understanding Lone Motherhood: Competing Discourses and Positions” in Simon Duncan & Rosalind Edwards, eds, *Lone Mothers, Paid Work and Gendered Moral Rationalities* (London: Palgrave Macmillan UK, 1999) 23.

⁸ Carol Lacroix, “Freedom, desire and power: Gender processes and presumptions of shared care and responsibility after parental separation” (2006) 29:2 Women’s Studies International Forum 184–196, online: <<https://www.sciencedirect.com/science/article/pii/S0277539506000057>>; Wilma Bakker & Lia Karsten, “Balancing paid work, care and leisure in post-separation households: A comparison of single parents with co-parents” (2013) 56:2 Acta sociologica 173–187.

children spend more time with their fathers,⁹ although there is virtually no research on what a mother's ideal parenting schedule would look like in England and Wales. The proposals put forward by mothers in child arrangement applications likely reflect what they think the court and the other party will see as "reasonable"¹⁰ rather than what suits their needs. In fact, certain studies show that women often modify their proposals in court to avoid looking "unreasonable", often to their detriment in the long run.¹¹

Sole parenting models where the mother is the custodial parent are not always the most beneficial outcome for the mother. As the organization United Nations Women has noted, a mother having sole custody may prevent her from increasing her earning capacity and narrow her career options, which in turn may lead her to experience poverty.¹² Studies show that while the mothers' workforce participation in England and Wales is increasing, the fathers' domestic duties have not increased proportionally.¹³ The amount of domestic labor for a mother is higher than any other group of women, indicating that a large proportion of the labor is a direct result of children. As compared to fathers, mothers' time with their children could be more burdensome because it may increase the amount of childcare-related domestic labor mothers must complete in their limited free time.¹⁴ The study showing this also found a gender gap in stress and happiness levels: mothers with the burden of childcare felt more stressed and less happy than fathers, due to the unequal division of labor, especially because mothers tend to

⁹ Patrick Parkinson & Bruce Smyth, "Satisfaction and Dissatisfaction with Father-Child Contact Arrangements in Australia Research" (2004) 16:3 *Child & Fam L Q* 289, online: <<https://heinonline.org/HOL/P?h=hein.journals/chilflq16&i=295>>.

¹⁰ Carmen R Iglesias Martín, "Parental alienation syndrome and the 'friendly parent' concept as examples of perversion of the system" in *The Routledge International Handbook of Shared Parenting and Best Interest of the Child* (Routledge, 2021) 271; JJ (1) Harman et al, "Parents behaving badly: Gender biases in the perception of parental alienating behaviors" (2016) 30:7 *Journal of Family Psychology* 866–874, online: <<https://search.ebscohost.com/login.aspx?direct=true&db=edselc&AN=edselc.2-52.0-84989295880&site=eds-live>> 866.

¹¹ Sharon Thompson, "In Defence of the 'Gold-Digger'" (2016) 6:6.

¹² United Nations Women, *Gender Equality and Women's Rights in the Context of Child Custody and Child Maintenance: An International and Comparative Analysis*, UN Women Discussion Papers (UN, 2019).

¹³ June R Carbone, 'A Feminist Perspective on Divorce' (1994) 4 *The Future of Children* 183 <<http://www.jstor.org/stable/1602484>> accessed 11 June 2022.

¹⁴ Giacomo Vagni, 'From Me to You: Time Together and Subjective Well-Being in the UK' (2022) 56 *Sociology* 262 <<https://doi.org/10.1177/00380385211033147>> accessed 11 June 2022.

have less free time without interruptions than fathers do. Lone motherhood has been attributed to some of this disparity.¹⁵ While the law does not consider any of these factors while ruling on child arrangements or financial matters, such factors profoundly impact the resident mother's parenting burden, lack of time, and quality of parenting.¹⁶ If parenting tasks are equally shared, separated mothers could have more time for hobbies and relationships, save money on paid childcare and possibly enjoy more quality time with their children. The children, too, would benefit from spending quality time with a healthier, happier mother. This could also help the father to be meaningfully involved in his child(ren)'s lives and, in turn, set a positive example for the children about the responsibilities of fatherhood.

In the UK, the Children Act 1989 gave more fathers automatic Parental Responsibility in a legal sense by giving automatic Parental Responsibility to married fathers and unmarried fathers named on the birth certificate. However, the act has done little to equalize parenting responsibility in a practical sense. Even a "fifty-fifty sharing of time does not necessarily translate into an equal sharing of parental responsibility."¹⁷ Even fathers with equal parental responsibility often involved in making decisions about their children do not take on a proportional share of daily parenting tasks, such as supervising homework, ironing the school uniform, or driving the children to their activities. One may wonder why fathers don't apply for a larger share of custody in more cases, and why they don't take on more parenting responsibility.¹⁸ Given the high childcare costs, lack of flexible childcare options and scarcity of child-friendly well-paid employment, sole custody may not always be attractive for either parent. Women do not always want sole custody, and Susan Boyd has explained why it would be beneficial for women if men shared custody more equally:

¹⁵ *ibid* 264.

¹⁶ Giacomo Vagni, "From Me to You: Time Together and Subjective Well-Being in the UK" (2022) 56:2 *Sociology* 262–279, online: <<https://doi.org/10.1177/00380385211033147>>.

¹⁷ Lacroix, *supra* note 8.

¹⁸ Flood, *supra* note 1; Parkinson & Smyth, *supra* note 9.

“It is not insignificant either that for *some* women, shared custody may have freed them from the very onerous conditions of single-parenting, or may be preferable to losing custody altogether. However, the way in which joint custody has entered the realm of child custody law is not necessarily meaningful in terms of shifting the sexual division of labour in families or in shifting structures that influence parenting, such as workplaces premised on a male wage-earner with a dependent woman, backed up by laws on parental (actually largely maternal) leave or policies on (inadequate compensation for) part time work.”¹⁹

In essence, some women see shared custody as a means of minimizing the domestic load of single parenting and the impact single parenting can have on their personal and professional lives. Research shows that through their lack of involvement in day-to-day parenting, fathers do not face the same constraints as mothers in their careers and, as such, lack the impetus to change the situation.²⁰ What is missing from discussions about men and social change is “a serious recognition of the central role men’s material interests play in their motivation to defend the status quo.”²¹ Lacroix summarises how the constraints parents face while parenting differ significantly due to the choices available to fathers that are not available to mothers in the same way:

“The advantage that fathers receive is the benefits that accrue from not having to perform (his half) of that work. In the case of these particular men, the advantages manifested in various material ways. Most obvious was the ability to engage in paid work of preference, unconstrained by the limitations of childcare labour... Seemingly, negotiations for the division of childcare labour are driven by the unequal nature of responsibility and, in particular, men’s freedom to define the nature of their responsibility at any given point in time.”²²

2. The costs and sacrifices of single parenting

The cost of being a separated, resident parent has been researched at length: the price is high and impacts beyond financial, housing and childcare costs; affecting social relationships, career satisfaction, and education. Being a single parent, thus, has physical and mental health

¹⁹ Susan Boyd, “Some postmodernist challenges to feminist analyses of law, family and State: Ideology and discourse in child custody law” (1991) 10 Can J Fam L 79.

²⁰ Parkinson & Smyth, *supra* note 9; Lacroix, *supra* note 8.

²¹ Anthony McMahon, *Taking care of men: Sexual politics in the public mind* (Cambridge University Press, 1999).

²² Lacroix, *supra* note 8.

outcomes. The Child Poverty Action Group reports that in 2021 the cost of raising a child to the age of 18 in the UK, including housing and childcare, was £193,801.²³ Further, finding and sustaining well-paid employment as a single mother is difficult,²⁴ especially because of several challenges in accessing education to continue their studies or retrain for a new career path.²⁵ Such challenges include restrictions on relocation, which can significantly impact the parent's personal life and career progression.²⁶ Thus, the economic impact of parenting can be vast, due to which single-parent households are more likely to experience poverty.²⁷

Financial hearings during divorce proceedings consider the mother's capacity to increase her earning potential while assessing her future needs.²⁸ Typically, courts in England and Wales encourage women to increase their earning potential by minimizing the amount or the term of spousal maintenance. This is done so that any financial reliance on their ex-husbands through periodical payments is limited, and women can reach financial independence quickly, in line with the 'clean break' principle of s25a of the Matrimonial Causes Act 1973, outlining that the court must consider the advantages of a clean break. The court is not obligated to order a clean break, but it must consider whether it is fair and appropriate on a case by case basis. In contrast, fathers are not really expected to increase their earning potential to maximize

²³ 'The Cost of a Child in 2021' (CPAG, 13 December 2021) <<https://cpag.org.uk/policy-and-campaigns/report/cost-child-2021>> accessed 11 June 2022.

²⁴ Simon Duncan and Rosalind Edwards, 'Lone Mothers and Gendered Moral Rationalities: Orientations to Paid Work' in Simon Duncan and Rosalind Edwards (eds), *Lone Mothers, Paid Work and Gendered Moral Rationalities* (Palgrave Macmillan UK 1999) <https://doi.org/10.1057/9780230509689_4> accessed 6 June 2022.

²⁵ Sajida Nawaz, *Understanding the Lives and Labours of Lone-Mother Students* (Liverpool John Moores University (United Kingdom) 2016) 'Understanding the Lives and Labours of Lone-Mother Students - ProQuest' <https://www.proquest.com/openview/33acfb1ceda306681a86640997b16a9b/1?pq-origsite=gscholar&cbl=51922&casa_token=ws23ENM0FPoAAAAA:wsabyMGyn_BwXpYJWf1PFHaS-QDt7S5p72yYQsibmA-Wyd4QoVev4CTh4OX97s2qVSm6fMIMShKY> accessed 6 June 2022; Sajida Nawaz, *Understanding the Lives and Labours of Lone-Mother Students* (Liverpool John Moores University (United Kingdom) 2016).

²⁶ George, 'The International Relocation Debate'; Herring and Taylor, 'Relocating Relocation'.

²⁷ Patrick Parkinson, *Family Law and the Indissolubility of Parenthood* (Cambridge University Press 2011) <<http://ebookcentral.proquest.com/lib/portsmouth-ebooks/detail.action?docID=691861>> accessed 5 June 2022; Skinner, Cook and Sinclair (n 19); Laura Bernardi, Dimitri Mortelmans and Ornella Larenza, 'Changing Lone Parents, Changing Life Courses' in Laura Bernardi and Dimitri Mortelmans (eds), *Lone parenthood in the life course.*, vol 8 (Springer International Publishing/Springer Nature 2018)

<<https://search.ebscohost.com/login.aspx?direct=true&db=psyh&AN=2018-54482-001&site=eds-live>>.

²⁸ 'Kim Waggott v William H Waggott', online: <<https://justis.vlex.com/#vid/839921507>>.

child maintenance contributions or spousal maintenance. An example of such a practice is the case of *Waggot v Waggot*, which addresses financial remedies upon divorce. In this case, it was ruled that the husband's future earning potential as the higher earner is not a marital asset that could be shared. This would seem to suggest that while the wife cannot benefit financially from the husband's possible future earnings, the husband can benefit financially from reduced periodic payments based on the wife's possible future earnings.

The move towards reduced amounts and terms of periodic spousal maintenance payments in England and Wales can result in separated mothers experiencing poverty after separation, especially if they worked part-time or not at all during the relationship. This is akin to the concept of 'feminization of poverty,'²⁹ which refers to the phenomenon that women experience poverty more often than men do and to greater extremes. Gender inequality makes eradicating poverty in women and children challenging to achieve. It is, thus, no surprise that poverty is a prevalent issue within single-parent households.³⁰ It has been argued that the 'feminization of poverty' is not only about financial poverty and should be considered using the conceptual framework of "human poverty."³¹ This argument states, "poverty of choices and opportunities can be more relevant than income for policy-makers and others in taking action to eradicate poverty for they focus on the deep-seated structural causes of poverty and lead directly to strategies of empowerment."³² Mothers are, thus, deprived of both access to future earning potential of their ex husbands, and also of the opportunity to build their own wealth

²⁹ Diane Pearce, "The Feminization of Poverty: Women, Work, and Welfare" (1978) 11:1–2 *Urban and Social Change Review* 1, online:

<<https://search.ebscohost.com/login.aspx?direct=true&db=eric&AN=EJ182487&site=eds-live>>.

³⁰ Christine Skinner, Kay Cook & Sarah Sinclair, "The potential of child support to reduce lone mother poverty: comparing population survey data in Australia and the UK" (2017) 25:1 *Journal of Poverty and Social Justice* 79–94, online: <<https://bristoluniversitypressdigital.com/view/journals/jpsj/25/1/article-p79.xml>>; Mia Hakovirta, "Child maintenance and child poverty: a comparative analysis" (2011) 19:3 *Journal of Poverty and Social Justice* 249–262, online: <<https://bristoluniversitypressdigital.com/view/journals/jpsj/19/3/article-p249.xml>>.

³¹ Sakiko Fukuda-Parr, "What does feminization of poverty mean? It isn't just lack of income" (1999) 5:2 *Feminist economics* 99–103.

³² *Ibid.*

due to the restraints and costs that being the parent with whom the child normally lives brings. United Nations Women sees this as a critical issue for feminists.³³

Although limited in number, studies show that the impact of single parenting goes beyond financial consequences and depletes the ‘time budget’³⁴ of separated mothers. Time budget refers to the amount of child-free time available to separated mothers. As a consequence of single parenting, women end up with less available time budget to work because they have to undertake a significant amount of unpaid domestic labor. They often end up with higher levels of exhaustion than mothers who have not separated from their child’s father.³⁵ A recent Centre for Progressive Policy (CPP) report shows that unpaid caring tasks have impacted women’s ability to work as much as they want to which can affect women’s career satisfaction and earnings.³⁶ Further, a 2016 Office for National Statistics (ONS) report shows that women, on average, undertake 26 hours of unpaid work per week, in contrast to men, on average, who only undertake 16 hours.³⁷ This unpaid work is neither recognized nor compensated for by family law when making Child Arrangement Orders or financial orders, although it is essential to ensure that children are raised free of neglect. Notably, gainful employment is among the most significant factors in single-parent life satisfaction.³⁸ Thus, separated mothers’ life satisfaction is diminished by conditions that make it challenging to pursue meaningful employment. Gainful employment is also likely to result in stable income, which could

³³ United Nations Women, *supra* note 12.

³⁴ Ed Spruijt & Helga Kormos, *Handboek scheiden en de kinderen: voor de beroepskracht die met scheidingskinderen te maken heeft* (Springer, 2014).

³⁵ Laura Bernardi, Dimitri Mortelmans & Ornella Larenza, “Changing lone parents, changing life courses” in Laura Bernardi & Dimitri Mortelmans, eds, *Lone parenthood in the life course* Life course research and social policies; Vol 8; ISSN: 2211-7776 (Print), 2211-7784 (Electronic) (Cham: Springer International Publishing/Springer Nature, 2018) 1.

³⁶ ‘What Women Want’ (CPP) <<https://www.progressive-policy.net/publications/what-women-want>> accessed 11 June 2022.

³⁷ “Women shoulder the responsibility of ‘unpaid work’ - Office for National Statistics”, online: <<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/women-shouldertheresponsibilityofunpaidwork/2016-11-10>>.

³⁸ Mo-yee Lee, Chi-kwong Law & Kwok-kwan Tam, “Parenthood and life satisfaction: A comparison of single-and dual-parent families in Hong Kong” (1999) 42:2 *International Social Work* 139–162.

decrease a single mother's dependency on welfare provisions and, as a result, increase positive life outcomes for her children.

Although the number of applications for 'lives with' or 'shared parenting' orders by fathers remains low, there is increased pressure from Fathers' Rights groups on the courts to award 50/50 parenting time as the default.³⁹ Martha Fineman refers to this as the 'equality fetish in family law of a presumption of joint custody'.⁴⁰ Referring to equality in parenting as a fetish, however, dismisses the struggle of separated mothers who want their co-parent to take on more parenting responsibilities (as opposed to *legal* parental responsibility), which will enable mothers to have more freedom and exercise more agency over their own lives.⁴¹ Fineman's argument that custody should be split in proportion to the parents' care roles before separation does not solve the problems arising from situations where women leave relationships precisely *because* the household and family labor is split unequally along traditional gender lines. She also fails to consider the difficulties that separated mothers face when they lose the financial security of a dual-income household – such women may need to begin or take on increased levels of paid employment, which usually results in more childcare expenses. Fineman asks:

“What is the logic or the justice in the position that women who live up to the expectations of motherhood (as well as the men who mother) should be denied the reward (as well as the responsibility) of continued custody or care of their children?”⁴²

The real challenges of the day-to-day parenting burden are minimized by viewing time with the children as a 'reward' for being the primary carer or 'punishment' for making the decision to end a relationship. Over two decades have passed since Fineman wrote the article, and the

³⁹ Jonathan Alshech & Michael Saini, ““Fathers' Rights” Activism, Discourse, Groups and Impacts: Findings from a Scoping Review of the Literature” (2019) 60:5 *Journal of Divorce & Remarriage* 362–388, online: <<https://doi.org/10.1080/10502556.2018.1546505>>; Susan B Boyd, “Demonizing mothers: Fathers' rights discourses in child custody law reform processes” (2004) *Journal of the Motherhood Initiative for Research and Community Involvement*.

⁴⁰ Martha Albertson Fineman, “Fatherhood, feminism and family law” (2000) 32 *McGeorge L Rev* 1031.

⁴¹ Lacroix, *supra* note 8; Parkinson & Smyth, *supra* note 9.

⁴² Fineman, *supra* note 41.

parenting landscape has changed significantly. With the pervasiveness of social media, there is a significant rise in honest accounts of motherhood and its associated challenges. There have also been increased discussions on social media about business, leisure, and travel which could inspire women to engage in work or leisure pursuits that previous generations may not have had access to⁴³. As such, one can expect that women's views on custody as a reward may have changed significantly.

Child arrangements largely shape parents' lives in a co-parenting relationship. According to Bakker & Karsten, a comparison between separated mothers who do not have a co-parenting relationship with the father and those who do reveals that the impact of child arrangements can be disruptive for the mother's pursuits outside of parenting:

“The commuting rhythm of the children can be regarded as the main underlying structure of post-separation life. The parents arrange their commitments and related activities in accordance with the commuting schedule of the children... This rhythm has considerable consequences for the time demands of the care domain in particular, but also for the scheduling of activities in the work and leisure domain.”⁴⁴

This rhythm disproportionately affects mothers because they are more often the resident parent and, therefore, face the challenge of arranging their lives around the children for more days than the non-resident parent. The legal obligation of these arrangements means that mothers have limited freedom in their life to make decisions that impact the child arrangements, such as taking on new employment or spontaneous events such as holidays. The same study shows that when children are not with their mothers, the mothers feel compelled to make themselves available ‘just in case’ the other parent lets them down, or if there is a medical emergency with the children. This compulsion continues when mothers are at work or enjoying self-care time and, consequently, their leisure time is minimized. This often results in separated mothers suffering from the stress of conflicting priorities and responsibilities more than in cases where

⁴³ Successful mums, “The rise of the female entrepreneur”, online: <<https://successfulmums.co.uk/blog/the-rise-of-the-female-entrepreneur/>>; Amazing if, *Data to support your career development*.

⁴⁴ Bakker & Karsten, *supra* note 8.

the mothers are in relationships.⁴⁵ Considering this, it is no surprise that fathers apply to the courts for the child(ren) to live with them in very few cases.

3. The legal framework for post-separation parenting

The Children Act 1989⁴⁶ has brought a “radical reconceptualization of post-separation parenting” in England and Wales by focusing on practical parenting issues rather than allocating custody to one of the parents.⁴⁷ The Act has codified parental responsibility for married fathers (who acquire it naturally) and unmarried fathers (who acquire parental responsibility legally by the Act). When a parental relationship breaks down, the Act encourages parents to make arrangements for the children between themselves by mandating mediation before applying to the court for an order to be made. The prevailing belief is that any agreement between the parents must be preferable to any court-imposed order and, thus, would likely be adhered to by both parties.⁴⁸ Mediation is intended to help couples who are unable to agree. Most couples are required to attend a Mediation and Information Assessment Meeting (MIAM)⁴⁹ before applying to court as a last resort. However, sometimes the couples are exempt from such a requirement, such as in cases of domestic abuse. The following sections will discuss what happens when out of court remedies have not been successful and one of the parties makes an application to court for an Order to be made for them.

⁴⁵ *Ibid.*

⁴⁶ “Children Act 1989”, online: <<https://justis.vlex.com/#vid/808257445>>.

⁴⁷ Patrick Parkinson, *Family Law and the Indissolubility of Parenthood* (New York, UNITED STATES: Cambridge University Press, 2011).

⁴⁸ Rebecca Bailey-Harris, Jacqueline Barron and Julia Pearce, “Settlement Culture and the Use of the No Order Principle under the Children Act 1989” (1999) 11 *Child and Family Law Quarterly* 53

⁴⁹ Although attending a MIAM is a requirement for most couples, there are limited exceptions outlined in Family Procedure Rules 3.8(1).

a. Section 8 Orders

Section 8 of the Children Act gives courts the power to make three different types of Orders: Child Arrangement Orders, Prohibited Steps Orders, and Specific Issue Orders. The Welfare Principle remains the paramount consideration when making Section 8 Orders⁵⁰ which means that the best interests of the child, and not the parents, must be the paramount consideration when family courts make any order relating to the children. The Children Act also changed the terminology used in such cases. The terms ‘custody’ and ‘contact’ have been replaced with ‘lives with’ and ‘spends time with’ in Child Arrangement Orders.

i. Child arrangement Orders – who will they live with, and who should they spend time with?

If a private agreement cannot be made between parents about where their child should live, who they should spend time with and when, and mediation has not been successful, either party can apply to court. Child Arrangements Orders (CAOs) set out who the child should live with and who they should spend time with. Liz Trinder notes, in response to the Lord Chancellor’s Department report ‘Making Contact Work,’⁵¹ “Resident parents (and children) can be forced into contact (although, interestingly, neither report addresses the question of forcing non-resident parents into contact.)”⁵² The CAO puts the onus on the resident parent; they must make the child(ren) available for contact with the non-resident parent at the time and location specified in the Order. They are expected to ensure children spend time with their non-resident parent even if the children do not want to. Non-resident parents have powers of enforcement under Section 11J of the Children Act to ensure that the children are made available for contact as outlined in the Order. Yet, no similar enforcement powers are available to the resident parent to ensure the non-resident parent takes up the contact they have been granted by the Order,

⁵⁰ Children Act 1989, s 1(1) and s1(3)

⁵¹ *Making Contact Work: A Report to the Lord Chancellor on the Facilitation of Arrangements for Contact Between Children and their Non-Residential Parents and the Enforcement of Court Orders for Contact*, by Lord Chancellor’s Department (2002).

⁵² Liz Trinder, *Working and not working contact after divorce* (Hart, 2004).

creating a disparity between both parents. There is extensive existing research into this disparity:

“The general trend was that fathers felt and acted upon a *desire* that they had to participate equally in the lives of their children and share responsibility with their coparents. Yet, only when a father experienced that responsibility as *obligation* rather than as desire, and on the same terms as mothers, did equal sharing become practice. The sexual division of childcare labour is inextricably linked to, and cannot be separated from men’s freedom of choice.”⁵³

Helen Rhoades further elaborates on the difference between a mother’s obligation to participate in the children’s lives and the father’s choice arising from the obligations of contact orders (now known as Child Arrangement Orders.) She discusses the lack of enforcement powers for non-resident parents, and how this disproportionately impacts mothers:

“Thus it seems that non-resident parents can and do breach the terms of contact orders with impunity, and are permitted a capacity for ambivalence in relation to their parenting that is not equally available to the primary caregiver.”⁵⁴

Phyllis Chesler⁵⁵ further describes this disparity by stating that “mothers have obligations without reciprocal rights. Fathers have rights without reciprocal obligations.” Although Child Arrangement Orders do not intend to treat mothers and fathers differently, applying the law results differently in practice. Rhoades identifies this resultant power imbalance and how it has the impact of oppressing women:

“The Law does not ‘give’ power to men over women in the family, rather it legitimises the preconditions which create an unequal power structure... But this appearance of neutrality and arbitration conceals almost as much as it reveals about the relationship between law and the oppression of women.”⁵⁶

An Australian Family Law Council inquiry found that non-resident parents showed dissatisfaction with the enforceability of contact orders; the inquiry found contact was still

⁵³ Lacroix, *supra* note 8.

⁵⁴ Helen Rhoades, “The ‘No Contact Mother’: Reconstructions of Motherhood in the Era of the ‘New Father’” (2002) 16:1 *International Journal of Law, Policy and the Family* 71–94, online: <<https://doi.org/10.1093/lawfam/16.1.71>>.

⁵⁵ Phyllis Chesler, *Mothers on trial: The battle for children and custody* (Chicago Review Press, 2011).

⁵⁶ Carol Smart, *The Ties That Bind (Routledge Revivals): Law, Marriage and the Reproduction of Patriarchal Relations* (London: Routledge, 2012).

being denied.⁵⁷ This led to pressure on the courts from fathers' rights groups, and resulted in enforcement powers being enhanced. This allowed those who showed serious disregard for their court orders to be penalized.⁵⁸ There is little research or literature analysing the resident mothers' satisfaction with their contact arrangements from a practical or emotional perspective. Barely any research can be found into the effect of contact arrangements on time and financial disparity between the parents. It is important to undertake such research because facilitating indirect contact, such as phone or video calls or emails, may be an additional time burden on mothers who already face pressures from their status as a separated parent. This is especially true if the children are young and need help setting up phone or video calls with the non-resident parent. This can be burdensome when children start school and participate in after-school activities with reading and homework to focus on, with the resident mothers being obligated to comply with the CAO because it is 'in the best interests of the children.'

ii. Prohibited Steps Orders – exercise of parental responsibility or an act of control?

Prohibited Steps Orders prevent either parent from taking a particular action regarding their child (for example, changing the child's name, moving schools, or relocating). The abundant literature on relocation indicates that it is an important and challenging topic within family law.⁵⁹ Within non-separated families, relocation may happen several times throughout a child's youth for myriad reasons: because of a parent's job, to move nearer to extended family, or just because the parents want to live somewhere new. When parents are separated, relocation often means that the non-resident parent will see the children less, making contact arrangements

⁵⁷ Helen Rhoades, 'The "No Contact Mother": Reconstructions of Motherhood in the Era of the "New Father"' (2002) 16 *International Journal of Law, Policy and the Family* 71 <<https://doi.org/10.1093/lawfam/16.1.71>> accessed 6 September 2022.

⁵⁸ Parkinson & Smyth, *supra* note 9.s

⁵⁹ Rob George, 'The International Relocation Debate' (2012) 34 *Journal of Social Welfare and Family Law* 141 <<https://doi.org/10.1080/09649069.2012.675471>> accessed 6 June 2022; Rob George, *Relocation Disputes: Law and Practice in England and New Zealand* (Bloomsbury Publishing 2014); Jonathan Herring and Rachel Taylor, 'Relocating Relocation' (2006) 18 *Child and Family Law Quarterly* 517 <<https://heinonline.org/HOL/P?h=hein.journals/chilflq18&i=525>> accessed 6 June 2022.

more complicated. It can often be impossible for both parents to agree in such a situation, so the courts may be asked to intervene. Notably, the impact of prohibiting relocation is largely gendered – it affects women more than men. A study showed that 95% of the applicants in international relocation cases were women; of these, 70% were foreign nationals in the UK, mainly seeking permission to move back to their home country.⁶⁰ This is because women are more likely to have relocated at the point of beginning cohabitation with their partner than men, often because they are the economically weaker party obligated to move near the male partner's workplace.⁶¹ This is often a decision they may have no natural choice about.⁶² This could ultimately have negative consequences, as mothers may be unable to relocate later for better work prospects or to be near to family who could provide childcare, which would decrease the burden of childcare costs for such women.

Further, re-partnering is an essential factor in overcoming single-parent poverty.⁶³ If relocation is prohibited, it may prevent a separated mother from cohabiting with a new partner, which could negatively impact her financial position and life satisfaction. Research has shown that social relationships are of “pivotal importance” for separated mothers,⁶⁴ especially female friendships and relationships between mothers and daughters,⁶⁵ or sisters, who can provide financial and childcare help. This proves to be the case even when the mothers have re-partnered and may rely on their partner's family and relatives for care. These relatives are

⁶⁰ Rob George, *Relocation Disputes: Law and Practice in England and New Zealand* (Bloomsbury Publishing, 2014) Google-Books-ID: N4rqAwAAQBAJ.

⁶¹ Maria Brandén and Karen Haandrikman, ‘Who Moves to Whom? Gender Differences in the Distance Moved to a Shared Residence’ (2019) 35 *European Journal of Population* 435 .

⁶² Ortal Slobodin ED1 - Ingrid Muenstermann, ‘The Voice of Trailing Women in the Decision to Relocate: Is It Really a Choice?’, *People's Movements in the 21st Century* (IntechOpen 2017) <<https://doi.org/10.5772/66949>> accessed 11 June 2022.

⁶³ Hayley Fisher and Anna Zhu, ‘The Effect of Changing Financial Incentives on Repartnering*’ (2019) 129 *The Economic Journal* 2833 <<https://doi.org/10.1093/ej/uez011>> accessed 11 June 2022; Bernardi, Mortelmans and Larenza (n 27).

⁶⁴ Wendy Mitchell & Eileen Green, “I don't know what I'd do without our mam'motherhood, identity and support networks” (2002) 50:1 *The sociological review* 1–22.

⁶⁵ Gretchen Lussier et al, “Support across two generations: Children's closeness to grandparents following parental divorce and remarriage.” (2002) 16:3 *Journal of family psychology* 363.

usually women.⁶⁶ Preventing separated mothers from relocating near family and friends could, thus, deprive them of a vital support network that benefits children as much as the mothers.⁶⁷

The case law in the area of relocation has evolved, moving away from considering the impact on the mother. This evolution has effectively allowed fathers to exert control over the mother's life regardless of the consequences to her. In *Payne v Payne*,⁶⁸ Thorpe LJ explicitly directed that the courts should ask “what would be the impact on the mother, either as a single parent or as a new wife, of a refusal of her realistic proposal?”⁶⁹ in relocation cases where a mother is requesting permission to relocate has proposed an alternative contact schedule. Judges in subsequent cases criticized this approach for placing too much emphasis on the well-being of the mother. The paramountcy of the welfare of the child in deciding whether to allow the children to relocate was reaffirmed⁷⁰ meaning that the impact on of the decision on the life of mother is no longer a deciding factor in relocation cases.

While Prohibited Steps orders may appear gender-neutral, their application can have gendered consequences. For example, a non-resident parent can apply for a Prohibited Steps Order to prevent a relocation or school change. This will disproportionately impact the resident parent, often the mother, because they are the ones who will need to enact the terms of the order. For example, it is the burden of the resident mother to take the child to a school they have been ordered to attend. A resident mother may also miss opportunities including employment, childcare assistance from family or repartnering resulting from a refusal to allow a child to relocate.

⁶⁶ Mitchell & Green, *supra* note 65.

⁶⁷ “Of course, it could be argued that it is valuable to maintain a relationship with the paternal family and support network after separation, but in cases where the child(ren) spend the majority of their time with the mother it is the maternal family that will most likely be relied upon for help and support.” There is also no guarantee that the paternal family live close to the father, so relocation may not impact the child(ren)'s relationship with the paternal family.

⁶⁸ *Payne v Payne* [2001] EWCA Civ 166 [2001] Fm 473 at [40]

⁶⁹ “Payne v Payne”, online: <<https://justis.vlex.com/#search/jurisdiction:GB/payne+v+payne/WW/vid/793066281>>.

⁷⁰ *K v K (Children: Permanent Removal from Jurisdiction)*, 2011 EWCA Civ 793; *Re C (Relocation: Appeal)* [2019] EWHC 131 (*Fam*), .

iii. Specific Issue Orders – positive actions with potentially negative consequences

Specific Issue Orders allow a parent to take certain positive actions regarding a child's upbringing when the other parent disagrees. This may include determining which school a child should attend, whether they should be vaccinated, or whether they can receive a particular religious education. While Specific Issue Orders can appear gender neutral as either parent can apply for them, the real-life impact of such cases also often falls on the parent with whom the children live – usually the mother. The impact of such orders on the mother is broadly considered as a part of the child's best interests as outlined in the Welfare Principle⁷¹ by considering whether she was so distressed that her ability to parent is impacted.⁷² However, the mother's health, well-being or other commitments are not a deciding factor in the court's decision-making for Specific Issue Orders. This can be problematic because there is a high chance that the children may suffer adverse consequences of the court ignoring the primary carer's needs. This could include a breakdown of the contact arrangement as a result of conflict between the parents arising from the Specific Issue Order, the mother suffering from ill mental health or a being pushed into poverty by being unable to relocate to pursue better-paid work or to live near her family and friends for support. If a decision is made in the child's best interests, the resident mother has no choice but to deal with the consequences despite being heavily influenced the decision. For example, if children get sick after receiving vaccines insisted on by the father against the resident mother's will, the father is not required to take time off work to look after them. It will fall on the resident mother must make that sacrifice.

⁷¹ note 47.

⁷² Jonathan Herring, "The Human Rights Act and the Welfare Principle in Family Law — Conflicting or Complementary?" (2000) *Human Rights for the New Millennium* 133–154, online: <https://brill.com/view/book/edcoll/9789004478800/B9789004478800_s010.xml>.

b. Criticism of Section 8 Orders

Research shows that parenting arrangements work best when they are flexible and when they focus on the child's needs.⁷³ Section 8 Orders can be inflexible if the parents involved are unwilling to compromise, which is likely to be the case if the parents need court intervention to reach an agreement. Inflexibility has the most significant effect on the resident parent, usually the mother, because she is the one burdened with day to day parenting responsibility. This is especially true because the resident mother is often required to complete time-specific actions, such as making the children available for contact with the non-resident parent at a particular place and time.⁷⁴

When living separately, resident parents have multiple, often conflicting, responsibilities that are made increasingly challenging by their status as a single person,⁷⁵ without the support of another parent to share the parenting burden. As such, separated parents often need to be creative and flexible about solving some of the logistical, practical and financial problems that single parenting creates, such as planning employment around available childcare, working multiple jobs to support a family on a single adult's income and enlisting help to get multiple children to various commitments at the same time. Yet separated mothers face additional, often conflicting obligations considering their status as a separated parent when compared to non-separated families who have two adults to share childcare and travel arrangements. Further responsibilities arising from Section 8 Orders may prevent a resident mother from making the best decisions for her family because separated mothers need flexibility to meet their obligations. Still, Section 8 Orders do not allow that flexibility:

“Yet, in order to juggle the responsibility of childcare, housework, and lack of monetary support, a single parent probably needs more autonomy and flexibility than does a

⁷³ Rhoades, *supra* note 55; Bruce Smyth, “A 5-year retrospective of post-separation shared care research in Australia” (2009) 15:1 *Journal of Family Studies* 36–59, online: <<https://doi.org/10.5172/jfs.327.15.1.36>>; Parkinson & Smyth, *supra* note 9.

⁷⁴ Lacroix, *supra* note 8.

⁷⁵ Bakker & Karsten, *supra* note 8.

woman who has more resources. This may require the woman to find a job and daycare arrangements that fit the children's routines and her budget not her own needs."⁷⁶

In private childcare arrangements made between the parents without court intervention, the conflicting needs of the children, both parents, the extended family and the social circle are usually considered, and everyone's needs are carefully balanced. However, when families cannot make decisions by themselves and need the help of the court, the outcomes can often fail to "capture the lived experience of the children and their parents and siblings."⁷⁷

Child Arrangement Orders do not attempt to address and rebalance the gendered parenting labor divisions that are prevalent throughout most heterosexual relationships. As such, these gendered divisions could continue throughout the co-parenting relationship.⁷⁸ CAOs, thus, can legally obligate the separated mother to undertake a more significant share of parenting tasks than she is willing or realistically able to do. CAOs also do not consider that, in the UK policy context, women are perceived "as mothers and fathers as workers, favoring unequal gendered family practices."⁷⁹ Until policy and law in areas such as employment and childcare adequately value the fathers' childcare responsibilities as equal to those of the mother, it will be difficult for fathers to undertake an equal split of parenting responsibilities in the way that mothers do, for example by working part-time and increasing their involvement in childcare and other unpaid domestic labor. As a result of CAOs, separated mothers may have to sacrifice sleep, rest, and personal care to meet the competing demands of single parenting and paid work.⁸⁰

⁷⁶ Delorey, *supra* note 3.

⁷⁷ Hayley Davies, "Shared Parenting or Shared Care? Learning from Children's Experiences of a Post-Divorce Shared Care Arrangement" (2015) 29:1 *Children & Society* 1–14.

⁷⁸ Lacroix, *supra* note 8.

⁷⁹ Davies, *supra* note 78.

⁸⁰ Margaret Mietus Sanik & Teresa Mauldin, "Single versus Two Parent Families: A Comparison of Mothers' Time" (1986) 35:1 *Family Relations* 53–56, online: <<http://www.jstor.org/stable/584282>>; Rosanna Hertz & Faith I Ferguson, "Only one pair of hands: Ways that single mothers stretch work and family resources" (1998) 1:1 *Community, Work & Family* 13–37, online: <<https://doi.org/10.1080/13668809808414695>>; Sarah M Kendig & Suzanne M Bianchi, "Single, Cohabiting, and Married Mothers' Time With Children" (2008) 70:5 *Journal of Marriage and Family* 1228–1240, online: <<https://doi.org/10.1111/j.1741-3737.2008.00562.x>>.

CAOs are often awarded at the beginning of a family's post-separation parenting journey. Although parents can apply to the court to have them varied, the process is costly and time-consuming, and if initiated frequently, will likely be frowned upon by the courts. This can lead to a situation where a CAO no longer meets the family's needs. In cases involving high levels of conflict, the Order could create new problems that could not be foreseen. For example, when children grow up, they could want to make their own decisions about how to spend their time. This could be complicated if one or both parents are unwilling to allow this and want to enforce contact as outlined in the order.

Not all CAOs are created equally, as developing a standardized formula that works for all families is impossible. Some can be too prescriptive or vague, which can exacerbate any dissatisfaction with the terms of the order.⁸¹ In England and Wales, a CAO typically lasts until the child reaches the age of 16. In cases where parents separate when their children are infants, such an order could bind the parents for 16 years with no revisions except through a costly court application. While the courts may do their best to gauge the child's future needs, it is doubtful that a CAO suitable during childhood will benefit a child in their later years. In such cases, the court cannot consider the child's choices and preferences until they are older.

Katherine Bartlett believes that sparsely detailed Child Arrangement Orders are outdated, and more detailed parenting plans are better suited to the needs of the modern family. According to her, "The need for greater specificity comes from the increasing complexity of family life, with both parents likely to be working, children involved in a greater number of after-school activities, and higher expectations for family, social and intellectual life."⁸² Although she is not explicitly referring to the mother having higher expectations for her family, it is reasonable to assume that in the twenty years since she wrote this, mothers have increased

⁸¹ Katherine Bartlett, 'US Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution'.

⁸² *Ibid.*

their expectations for their children's lives such as travelling with her children and wanting the children to engage in extra – curricular activities.

4. The Fathers' Rights movement

It is impossible to look at the impact of Section 8 Orders without examining the motivations of the fathers who apply for them. The discourse around fathers in relation to post-separation parenting is focuses on the parental rights of fathers,⁸³ and the exercise of their parental rights in decision-making as opposed to their involvement in their children's day to day lives. Carol Smart notes that the extent to which parental responsibility is used to share the upbringing of children, rather than as a symbolic gesture, depends on the father's attitude.⁸⁴ There is no statutory requirement for a father to share the act of parenting to any degree. Moreover, it has been observed that the fathers' rights movement may not always have the children as its priority and may instead use their parental responsibility as a means of establishing or maintaining control of their children and ex-partner. As Michael Flood asserts:

“The fathers' rights movement prioritizes formal principles of equality over positive parenting and the well-being of women and children. Some groups seem more concerned with re-establishing paternal authority and fathers' decision-making related to their children's and ex-partners' lives than with actual involvements with children.”⁸⁵

Fathers involved in the fathers' rights movement often depict mothers as “vindictive and uninhibited in their willingness” to have full custody over the children while forcing the separated fathers to pay as much child support as possible.⁸⁶ However, research shows that most separated mothers want their children to have more contact with their fathers,⁸⁷ and that

⁸³ Miranda Kaye and Julia Tolmie, ‘Discoursing Dads: The Rhetorical Devices of Fathers' Rights Groups’ (1998) 22 *Melb. UL Rev.* 162.

⁸⁴ Smart, ‘Wishful Thinking and Harmful Tinkering?’; Smart, *The Ties That Bind (Routledge Revivals)*.

⁸⁵ Flood (n 44); Jonathan Alshech and Michael Saini, “‘Fathers' Rights’ Activism, Discourse, Groups and Impacts: Findings from a Scoping Review of the Literature’ (2019) 60 *Journal of Divorce & Remarriage* 362 <<https://doi.org/10.1080/10502556.2018.1546505>>.

⁸⁶ Alshech & Saini, “‘Fathers' Rights’ Activism, Discourse, Groups and Impacts”, *supra* note 40.

⁸⁷ Parkinson & Smyth, *supra* note 9.

lone parenting may have negative consequences for the mother.⁸⁸ This contradicts the argument of the fathers' rights movement.

By its very nature, the primary concern of the fathers' rights movement is the exertion of their paternal rights. It has been argued by Delorey that since the public has become more aware of domestic abuse, fathers have sought other ways to control their families and that one means of control may well be through child arrangements.⁸⁹ The literature is silent on whether the fathers intend to share the burdens of childcare if awarded a more significant share of parenting time. The fathers' rights activists talk solely about wanting to spend more time with the children and reducing childcare payments, but they have not proposed any commitment by fathers to take an equitable parenting share. The Human Rights and Equal Opportunity Commission asserts that fathers do not establish shared care or build strong relationships with their children during their relationship, yet expect to transition to a significant role in caring for the child after separation.⁹⁰

Researchers have studied the effect of sole-mother custody arrangements on the father and children,⁹¹ but studies have yet to consider the impact on the mother taking on the entire parenting burden. There is no "mothers' rights movement." This is likely because mothers have prioritized their efforts on ensuring the safety of children during contact with the fathers rather than prioritizing contact arrangements that are favorable for themselves or because they feel that they are expected to make sacrifices as mothers.⁹² It is suggested that "mothers' supporters simply do not express the kind of pervasive bitterness about custody outcomes."⁹³

⁸⁸ Bernardi, Mortelmans and Larenza (n 27); Land (n 13); Duncan and Edwards, 'Lone Mothers and Gendered Moral Rationalities' (n 24); Hakovirta (n 20); Skinner, Cook and Sinclair (n 19).

⁸⁹ Delorey, *supra* note 3.

⁹⁰ Human Rights and Equal Opportunity Commission 2003, p12

⁹¹ Lucy Thompson, Bridgette Rickett & Katy Day, "Feminist relational discourse analysis: Putting the personal in the political in feminist research" (2018) 15:1 Qualitative Research in Psychology 93–115.

⁹² Lacroix, *supra* note 8.

⁹³ *Ibid.*

Women are more likely to be perceived by society and by legal professionals as “alienators” in general.⁹⁴ This means that when women engage in “benign” forms of parental alienation, they are “rated as more alienating than when men allegedly perform the same actions”⁹⁵ and yet, conversely, are likely to face criticism for desiring or enjoying time without children.⁹⁶ This puts women in the position of facing criticism for both wanting to spend more time with the children as well as for enjoying time without them. In one study, a father refused to accept ‘part-time’ fatherhood, which he described as “minimal input while giving his ex-wife ample opportunity to lead a degenerate lifestyle free from childcare responsibilities.”⁹⁷ This is one of the more extreme examples, but it is certainly not atypical; fathers have described women in other studies as “alimony drones”,⁹⁸ “mendacious”, “vindictive” and “unruly”.⁹⁹ The perception is that single mothers live lives of luxury “at the expense of men who are living in poverty”¹⁰⁰ or “leave their children with babysitters while they go out to various clubs, sometimes up to 4 times a week”.¹⁰¹ The hypocritical narrative around loving fathers and an “underclass” of lone mothers does not match the evidence of separated mothers and their economic and time-related challenges, as well as a desire for their co-parent to take on more parenting responsibilities.¹⁰²

On the face of it, the father’s rights movement is about fathers playing a more significant part in their children’s lives through equally shared parenting. Still, the literature

⁹⁴ Rhoades, *supra* note 55.

⁹⁵ TM Marques, I Narciso & LC Ferreira, “Empirical research on parental alienation: A descriptive literature review” (2020) 119 *Children and Youth Services Review* 105572, online: <<https://www.sciencedirect.com/science/article/pii/S0190740920319952>>.

⁹⁶ Elizabeth Bortolaia Silva, *Good Enough Mothering* (Routledge London 1996).

⁹⁷ Rebecca Bailey-Harris, Jacqueline Barron & Julia Pearce, “Settlement Culture and the Use of the No Order Principle under the Children Act 1989” (1999) 11:1 *Child and Family Law Quarterly* 53–62, online: <<https://search.ebscohost.com/login.aspx?direct=true&db=edshol&AN=edshol.hein.journals.chilflq11.9&site=eds-live>>.

⁹⁸ Kaye & Tolmie, *supra* note 1.

⁹⁹ Richard Collier, “‘Coming together?’: Post-heterosexuality, masculine crisis and the new men’s movement” (1996) 4:1 *Feminist Legal Studies* 3–48, online: <<https://doi.org/10.1007/BF02167601>>.

¹⁰⁰ Kaye & Tolmie, *supra* note 1.

¹⁰¹ *Ibid.*

¹⁰² Parkinson & Smyth, *supra* note 9.

shows that the movement may not have such wholesome or wholehearted intentions.¹⁰³ Most separated parents can make childcare agreements between themselves and do not need court interventions. As such, fathers who affiliate themselves with the movement likely fall into the minority who cannot agree on such arrangements without a court order and are likely to be a part of higher conflict couples. We do not have data on why fathers are unable to reach an agreement in such cases; there may have been allegations of domestic abuse in some of these cases, which further frustrates an agreement, but it may also be possible that the arrangements that suit the fathers do not fit the rest of the family and the mothers disagree with the father's proposals. The fathers' rights movement is inextricable from any discussion around the impact of Section 8 Orders on mothers because of its unique stance in family law, prioritizing the 'rights' rather than the responsibilities of the fathers.

Conclusion

This paper embarked on an inquiry into whether family law serves the interests of mothers, addressing this question through a narrative review of existing literature. The analysis concludes that family law safeguards the child's best interests, leading to arrangements that facilitate fathers' engagement on a flexible, unenforceable basis; it, however, fails to consider mothers adequately. The Children Act 1989, designed to provide a legal framework for making decisions concerning children post-separation, prioritizes the child's welfare as the paramount consideration in Section 8 Orders. The law is worded in a gender-neutral way, equally applicable to either parent. However, in the context of pervasive societal beliefs and gender norms, the law in its application has a gendered impact. This bias mandates mothers to shoulder

¹⁰³ Kaye & Tolmie, *supra* note 1; Alschech & Saini, "'Fathers' Rights' Activism, Discourse, Groups and Impacts", *supra* note 40; Boyd, *supra* note 40; Carl Bertoia & Janice Drakich, "The fathers' rights movement: Contradictions in rhetoric and practice" (1993) 14:4 *Journal of family issues* 592–615; Molly Dragiewicz, "Patriarchy Reasserted: Fathers' Rights and Anti-VAWA Activism" (2008) 3:2 *Feminist Criminology* 121–144, online: <<http://journals.sagepub.com/doi/10.1177/1557085108316731>>.

the bulk of daily parenting responsibilities and family financial support, and to adhere to Section 8 Orders, often facing legal consequences for non-compliance. The restrictions and obligations arising from Section 8 Orders (in particular Prohibited Steps Orders and, to a lesser extent, Child Arrangement Orders) lead to separated mothers facing poverty of choice and opportunity. In contrast, non-resident fathers typically interact with their children at their convenience and are free from the constraints and enforcement measures imposed on resident mothers.

This paper also discussed whether courts consider the implications of parenting responsibilities arising from Section 8 Orders on a mother's life during section 8 cases and whether the courts value the mother's and father's time, personal commitments and aspirations equally. The findings suggest a significant oversight in considering the ramifications of parenting responsibilities on separated mothers. The obligations arising from Section 8 Orders encroach upon the mothers' employment, other caregiving duties, and personal interests, with the expectation being an adjustment of their schedules to accommodate court-ordered parenting time. Conversely, non-resident fathers typically are not required to alter their work schedules, and court-ordered contact times are conveniently arranged without impinging on their other commitments.

The literature review leads me to conclude that the court does not consider the implications of parenting responsibilities on the lives of separated mothers to any meaningful extent, even though Section 8 Orders affect their employment, leisure activities, possibilities for new partnerships, familial relationships, and overall well-being. Future research could beneficially compare the consequences of Section 8 Orders on separated mothers versus fathers and explore mechanisms for a more equitable distribution of parenting responsibilities post-separation. Courts in England and Wales have the option to include clauses within CAOs outlining particular parenting activities that either must or should not happen within each

parent's time (for example, clauses stating that fathers do not have to allow children to do their homework on their weekend contact time, or clauses stating that activities and birthday parties should be facilitated during contact with the father). The potential for including such clauses in Child Arrangement Orders (CAOs) to evenly allocate parenting duties would make an interesting topic for future research, particularly in terms of their usage and compliance, to enhance the active involvement of non-resident parents in their children's lives, thereby aligning with the Children Act's objective of increasing paternal responsibility.