

**Timeless Considerations: An Historical analysis of the  
development of residency and contact law, gender and  
parenting**

For May and Eddie Marshall,  
daughters Lesley and Jenny  
and grandchildren Daniel, Niamh and Phoebe

[She] 'comes from a world where women are fast becoming the equal of men and ought to lead lives and have occupations and responsibilities of their own.'

**TIMELESS CONSIDERATIONS;  
AN HISTORICAL ANALYSIS OF THE DEVELOPMENT OF RESIDENCY AND  
CONTACT LAW, GENDER AND PARENTING**

**ELIZABETH ANN SINCLAIR**

**NEWCASTLE LAW SCHOOL**

**NEWCASTLE UPON TYNE UNIVERSITY**

**THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY**

**MARCH 2010.**

## **Abstract**

This thesis engages with historical issues of infant custody laws that have a particular focus in contemporary times. Over the last three decades, complex socio-economic changes have reshaped traditional employment patterns and challenged gender understandings of social relationships, parenting practices and the structure of the family. The outcomes have raised concerns about the effects of these changes on children, the stability of the family and questions of wider social cohesion. Social policies and legal reforms have reflected these changes, for example in relation to ideas of formal gender equality, and a rethinking of parental responsibility. This is particularly relevant after parental separation and the law now encourages shared parenting. However, gendered divisions relating to the roles of men and women as parents remain entrenched within many aspects of parenting cultures. This thesis adds to the contemporary debates through an exploration of the historical context of the development of the laws regulating the care of children post-separation. The methodology follows emerging ideas around the uncovering of personal experiences of separated parents and ways that might add depth of knowledge to research findings. The primary focus is on the inter-war period of the nineteen twenties and thirties. The implications of the massive socio-economic upheavals and legislative reforms following the First World War signalled a new age and a key period in women's history and struggle for formal legal equality. Despite legal reforms and social change, the evidence shows for some parents the reality was different and rooted in gender politics. Via a critical analysis of primary resources, including original and up until now, unseen testamentary evidence, the case studies provide a snapshot of the experiences of mothers and fathers after separation dealing with the contradictions in their gendered roles in the care of children. The thesis sets out to argue that in the legal regulation of the care of children post-separation the issues of parenting are timeless considerations underpinned by gender politics and need to remain within political, legal and public debates.

## Summary Contents

Abstract	i
Summary Contents	ii
Acknowledgements	v
<b>Chapter 1 The Background &amp; Contemporary Debates</b>	<b>1</b>
Introduction	1
Aims & Objectives	4
Structure	5
<b>Section 1</b>	<b>7</b>
Contemporary Contexts	7
Sociological Insights to the Family	16
Primary Concepts and Themes	29
<b>Section 2</b>	<b>30</b>
Law and Family Relations	30
Regulating the Family	32
Current Debates in Family Law	37
The Socio-Legal Approach	43
<b>Section 3</b>	<b>45</b>
Methodology	45
Literature Review	48
Primary Resources	51
Secondary Resources	52
Summary	53
<b>Chapter 2 The Historical Roots: Marriage, Divorce &amp; Infant Custody Laws</b>	<b>55</b>
Introduction	55
<b>Section 1</b>	<b>57</b>
The Origins & Development of Marriage, Divorce and Infant Custody Laws from Antiquity to the Custody of Infants Act 1839	57
Case Studies: A Need for Reform	71

	The Case of the Honourable Caroline Norton	77
<b>Section 2</b>		87
	Measured Reforms: Reforms to the Laws of Marriage, Divorce Infant & Child Custody Laws from the Mid-Nineteenth Century To the Early Twentieth Century	87
	The Narratives of Domesticity & the Public and Private Spheres	87
	The Woman Question: the Struggle for Women’s Legal Rights	91
	Legal Reforms and Case Studies 1857-1895	99
<b>Section 3</b>		114
	Socio-Legal Changes in the Early Twentieth Century Routes to Women’s Formal Legal Rights	114
	A Revolution in the Law	114
	Routes to Reforms of the Divorce Laws	118
	The First World War & Social Changes	122
<b>Chapter 3</b>	<b>Legal Equality or Bound by the Rules?</b>	
	<b>Mother’s Maternal Rights to Child Custody 1925-1958</b>	126
	Introduction	126
<b>Section 1</b>		128
	Women’s Formal Legal Equality & The Domestic Strife Bill	128
	Demographic Trends & Class Distinctions	141
	Social & Political Context of the Inter-War Period	150
	Gender Politics & Feminist Writings of the Inter-War Period	159
<b>Section 2</b>		163
	The Cases of Two Families: Annot & Sam Robinson & Kitty Trevelyan & Johann Georg Götsch	163
<b>Section 3</b>		181
	Divorce & The Children: Stabilising Society, the Debates Solving the Contradictions of Family Ideology 1945-1956	181
	Social Changes: Women & Women’s Work	181
	The Royal Commission on Marriage and Divorce 1956	185

<b>Chapter 4 Full Circle? The Legal Reconstruction of the Post-Separated Family 1958-2009.</b>	191
Introduction	191
<b>Section 1</b>	193
The Rhetoric of Social & Legal Change 1960-1989	
Social Change & Legal Changes	193
The Law Commission Working Papers: Divorce and Child Custody Laws	213
The Children Act 1989	218
<b>Section 2</b>	225
The Politics of Parenting	225
New Labour Policies & The Politics of the Family	231
The Children And Adoption Act 2006	238
<b>Section 3</b>	241
<b>The Reconstructed Post-Separated Family: Critical Questions for Fathers and Mothers</b>	241
<b>Chapter 5 Conclusion</b>	249
The Future	259
<b>Bibliography</b>	261

## **Acknowledgments**

I would like to thank my supervisors Professors Richard Collier and Ian Ward for their constructive comments, time and support; Ashley Wilton, Head of School, for his thoughtful care and Ian Dawson for his enthusiastic encouragement. For the case studies, I thank Celia Caldicot for her willingness to allow me use of her grandmothers' letters and the late Brian Caldicot for his precious time; to Robin Dower, Trustee of the Trevelyan Family Papers for permission to use the Trevelyan Papers and access to previously unseen materials. To the women in my life I am eternally grateful. I thank Professor Clare McGlynn for her lively debates in the initial stages; Dr. Alison Dunn, for her encouraging support; Linda Kelly, Law Liaison Librarian and Helen Arkwright Specialist Librarian at the Robinson Library for their guidance and interest in the thesis; Cath Dale Law Library; Irene Dunn, Inter Library Loans for her kindness and allowing me to borrow the original copies of Mrs Sarah Ellis' works; Dorothy Smith for her time to listen and provide escape corners. I acknowledge the encouragement of the unknown women I have shared a journey with, who have in conversations, have shown a keen interest in my work. I thank my three Graces: Suzanne Johnston, Gemma Hayton and Joanne Pinnock for their practical approaches to what appeared complex problems, their encouragement, love and laughter. To my daughters Lesley and Jenny for the practical help of coping with the everyday essentials of life and listening patiently to your mother, my deepest love and thanks.



## Chapter 1

### The Background and Contemporary Debates

‘You don’t have to gaze into a crystal ball when you can read an open book’<sup>1</sup>

#### Introduction

This thesis engages with the historical issues of infant and child custody law<sup>2</sup> that have a particular resonance in contemporary times.<sup>3</sup> Over the last three decades, there have been massive social and economic changes in the UK reflected in shifts in the women’s employment trends and challenges to familial and gender relationships.<sup>4</sup> Indeed, some argue that there is increasing fragility and fragmentation of adult relationships contesting ideas of parenthood and the structure of the family.<sup>5</sup>

Statistics<sup>6</sup> show increases in the numbers of applications for divorce, however they also indicate a steady rise in the numbers of remarriages. Furthermore, the decrease in the numbers of marriages has been accompanied by a striking increase in cohabitation. Attitudes to same-sex partners have shifted and the law no longer criminalises homosexuality.<sup>7</sup> The law provides effective ways to illustrate the changes and the acceptance. For example, in 1986 in the case of *Harrogate Borough Council v Simpson*<sup>8</sup> the courts dismissed an appeal for possession of the tenancy of a council house on the grounds that living together as man and wife did not include a lesbian relationship. As Bridge LJ argued, ‘If Parliament had wished homosexual relationships to be brought into the realm of the lawfully recognized state of a living

---

<sup>1</sup>Lord Stoddart of Swindon, H L Deb 1.12.1998 c 432.

<sup>2</sup>Although *The Children Act 1989* removed the term, child custody, from the statute books, it will be referenced to throughout this thesis in relation to the historical context of the law.

<sup>3</sup>That is post 1989 at the end of the 20<sup>th</sup> century and the beginning of the 21<sup>st</sup> century.

<sup>4</sup>Boyd, S.B. ‘Legal Regulation of Families in Changing Societies’ in Sarat, A., Ed. *The Blackwell Companion of Law and Society* (Blackwell Publishing, 2004) p255.

<sup>5</sup>Maclean, M., ‘Introduction: Conflicted Contact between Parents and Children after Separation’ in Maclean, M., Ed. *Parenting After Partnering* (Portland, Or.: Hart Publishing, 2007) p1.

<sup>6</sup>Hunt, J., & Roberts, C., *Child Contact with Non-Resident Parents* (Oxford: University of Oxford, 2004) p1.

<sup>7</sup>*The Sexual Offences Act (England and Wales) 1967.*

<sup>8</sup>[1986] 2 FLR 91.

together as man and wife for the purposes of the relevant legislation, it would plainly have so stated in that legislation, and it has not done so.’ In recent years however, legal changes to the law have endorsed the acceptance of same-sex partnerships. Same-sex partners can now register their relationship granting the partnership legal status<sup>9</sup> giving the same rights and responsibilities as heterosexual partners.<sup>10</sup> The law now allows same-sex couples to adopt unrelated children<sup>11</sup> or the other partner’s child.<sup>12</sup> This is contrast to the *Adoption Act 1976* that only allowed joint adoptions to be made to married couples. The *Adoption and Children Act 2002* stated that an adoption may be made to a couple if one is over 21 years or one is the child’s mother or father.<sup>13</sup> A couple, as stated in Section 144(4) means a married couple or two heterosexual people or same–sex partners. The extent of recognising same-sex partners as parents even after separation was extended in the case of *Re G (Residence: Same-Sex Partner)* in 2005. In this case, the couple had lived together in a lesbian relationship for a number of years. During the relationship, one partner, CG, had two children by assisted reproductive technologies. Although G was not the children’s parent, the courts allowed the appeal conferring parental responsibility on G. In addition, technological advances in the development of in-vitro fertilization further challenge parenthood.<sup>14</sup> Thus, other forms of family structures have emerged and the gendered role of parents has become blurred and confused.

One apparent site of confusion is within the post-separated family. This area of family law is now located within an allegedly gender-neutral legal framework. *The Children Act 1989* amongst other issues introduced a shift from the idea of parental rights to parental responsibilities. The law now advocates shared parenting post-separation as in the best interests of the child where it is safe to do so.<sup>15</sup> However, as Susan Boyd suggests, ‘using new terminology such as ‘joint custody’ or ‘parental

---

<sup>9</sup>*The Civil Partnership Act 2004.*

<sup>10</sup>*The Adoption and Children Act 2002* Ss 51 (2) and 144 (7).

<sup>11</sup>*The Adoption and Children Act 2002* S 50.

<sup>12</sup>Ss 51 (2) and 144(7).

<sup>13</sup>S 50 *Adoption and Children Act 2002.*

<sup>14</sup>Bridge, S., ‘Assisted Reproduction and the Legal Definition of Parentage’ in Bainham, A., Day Sclater, S., & Richards, M. Eds. *What is a Parent?* (Oxford: Hart Publishing, 1999) at 74; Herring J., 3<sup>rd</sup> Ed. *Family Law* (Harlow, Essex: Pearson Educational Ltd, 2007) p306.

<sup>15</sup>*The Children Act 1989 s, 1, The Child and Adoption Act 2006.*

responsibility' has not succeeded in changing behaviour or making parents share responsibilities.'<sup>16</sup>

Recent figures<sup>17</sup> show increasing numbers of separated fathers applying for court orders to resolve disputes between parents. Separated fathers are demanding equality to parenting post-separation. High profile media public demonstrations by pressure groups such as Fathers4Justice have brought these issues to the forefront of public attention. Claims have emerged that fathers' rights groups are introducing a 'new contact culture' to the core of family law.<sup>18</sup> Fathers argue that courts favour maternal presumption and evidence would appear to support this argument. Estimations suggest that more than 80%, of children live with their mother after separation and there are approximately 2million non-resident fathers in the UK.<sup>19</sup> Some fathers argue they are denied their rights to equal parenting by the 'malicious or gatekeeper mother.'<sup>20</sup>

Yet fathers are not the only stakeholder group. Mothers too are involved. Their concerns centre on opposition to residency and contact court orders. Yet the refusal of contact may also be more complicated than being the awkward mother. Groups such as Women's Aid focus their campaigns on fears of 'dangerous dads',<sup>21</sup> anxieties of domestic violence and the safety of the mother and child. It is argued that there has been a 're-ignition of a major gender struggle in this area of family law.'<sup>22</sup> As Nicholas Bala contends, 'Child residence and contact law has developed as a key site

---

<sup>16</sup>Boyd, S.B., 'Legal Regulation of Families in Changing Societies' in Sarat, A., *The Blackwell Companion to Law and Society* (Blackwell Publishing, 2004) p266.

<sup>17</sup> The courts hear some 110,000 contact and residence applications each year. Driscoll, M., 'After the split, the marrying of minds' *The Sunday Times, News Review*, 17/02/2002 at 6; Other figures show that in 2002 there were 65,912 residency and contact applications in Hunt & Roberts *ibid*, 6, at 1.

<sup>18</sup> Collier, R., 'The Outlaw Fathers Fight Back': Fathers' Rights Groups, Fathers 4 Justice and the Politics of Family Law Reform-Reflections on the UK Experience' in Collier, R., & Sheldon, S., Eds. *Father's Rights Activism & Law Reform in Comparative Perspective* (Oxford: Hart Publishing, 2006) pp62-63.

<sup>19</sup>Hunt, & Roberts *ibid*, 6, at 1; Smart, C., May, V., Wade, A. & Furniss, C., *Residence and Contact Disputes in Court*-Volume 1 (Research Series 6/03) (London: Department for Constitutional Affairs, 2003); Smart, C. 'The Ethic of Justice Strikes Back: Changing Narratives of Fatherhood' in Diduck, A., & O'Donovan, K., Eds. *Feminist Perspectives on Family Law* (Abingdon, Oxon: Routledge & Cavendish Taylor & Francis Book a Glasshouse Book, 2006) p126.

<sup>20</sup> Trinder, L., 'Dangerous Dads and Malicious Mothers: The Relevance of Gender to Contact Disputes' in Maclean, M., *op.cit*, pp82 & 91.

<sup>21</sup> Trinder, L., *op.cit*.p82.

<sup>22</sup> Smart, C., *Feminist Perspectives on Family Law* *op. cit*, p 123.

for what has been described as a “gender war”.<sup>23</sup> Therefore, conflict in cases of dispute would appear to remain unabated and arguably underpinned by gender politics.<sup>24</sup>

This first section has set out the debates in residency and contact law in the context of the contemporary period. The next part of this chapter outlines the aims and objectives of the study and offers a summary of the structure this thesis will take.

### **Aims and Objectives**

The aim of this thesis is to contribute to the understanding of contemporary gender debates around the legal regulation of the welfare of the child post separation through an analysis of the inter-war period of the nineteen twenties and thirties. This was a period of significant social upheaval and legislative reforms towards gender equality. Indeed, it is argued that the reforms undoubtedly provided a doorway for formal legal equality in the nineteen seventies.<sup>25</sup> Yet in practice, the outcomes were contradictory and paradoxical for women and men.<sup>26</sup> For some separating parents the confusion was particularly acute.

The issues remain a concern despite a change in terms around the shifting narratives of motherhood, fatherhood and the needs of the child and underpinned by gender politics. The thesis will explore the broader social changes and legal reforms to child custody laws during the inter-war period the challenges to separated parents in their traditionally gendered roles the legacies of which resonate in the contemporary period. Through an historical analysis of this period, the study aims to contribute to the contemporary debates and the confusions that appear to have re-emerged in contested cases of residency and contact law.

---

<sup>23</sup>Bala, N., ‘Report From Canada’s Gender War Zone: Reforming the Child related provisions of the Divorce Act’ 16 *Canadian Journal of Family Law* p163 in Trinder, L., op.cit. p81.

<sup>24</sup>The gendered binary system that opposes male to female, masculine to feminine, science and nature, public and private in a hierarchical order embedded in Western philosophy. Underpinning this seemingly simple construction of binary opposites lies a complex cultural system where the differences between men and women inform social, legal and political hierarchical narratives and thus reinforce power relationships and gendered politics.

<sup>25</sup>Wright, D., “ Well-Behaved Women Don’t Make History” :Rethinking English Family, Law and History’ 2004 *Wisconsin Women’s Law Journal* 19 p221.

<sup>26</sup>Holtby, W., *Women in a Changing Civilisation* (London: John Lane The Bodley Head Ltd., 1934) pp103 & 113.

In addition, the thesis aims to fill a gap in a period in family law. This is not to deny that socio-legal studies have ignored this era. Robust historical studies, such as Stephen Cretney's *Family Law in the Twentieth Century*<sup>27</sup> provide detailed analysis of the reforms and political debates during this period. Further to this, a number of women academics<sup>28</sup> have contributed greatly to this era and area of family law through feminist approaches to the political debates around the *Guardianship of Infants Act 1925*. Nevertheless, little evidence would seem to exist of the reality and experiences for fractured families.<sup>29</sup> While much of the infrastructure of the inter-war is recognisable, it is a world apart from the 21<sup>st</sup> century. Class divisions in the inter-war period were decisive. Although this may no longer be a definitive issue, there continues to be a polarisation between rich and poor. Nevertheless, there are parallels between the two eras such as shifts in global economics and in the traditional gendered employment patterns.<sup>30</sup> It was a period of massive social disruption, economic change and reforms for legal equality. Both eras also followed periods of active feminist campaigns.<sup>31</sup> It is here this thesis has its genesis. Finally, the thesis is about the methodology. It is about the value of historical research methods and the analysis of testamentary evidence. This is complimentary to the subject area, period of inquiry and the data collected in this thesis. The following section outlines the structure this thesis will take.

## Structure

Each chapter will be set out in three sections. The first section of this chapter has located the debates around the regulation of the care of children post-separation in the contemporary era.<sup>32</sup> The second section will contextualise the issues in the broader socio-legal framework and at appropriate points referenced to the context of the inter-war period. The final section considers the methodology and a literature review

---

<sup>27</sup>Cretney, S., *Family Law in the Twentieth Century* (Oxford: Oxford University Press, 2003).

<sup>28</sup>This includes Carol Smart, Julia Brophy,, and Nancy Fix Anderson.

<sup>29</sup>Socio-legal studies have considered this period and area of family law, however it is generally from the broader perspectives of history.

<sup>30</sup>Beddoe, D., *Back to Home and Duty* (London: Pandora an Imprint of HarperCollins Publishers, 1989) p3.

<sup>31</sup>Beddoe, D., op.cit. p2.

<sup>32</sup>In this thesis the term 'contemporary era refers to post 1989 and the Children Act.

locates this study within recent academic debates. Throughout the chapter, references will link specific issues to relevant chapters and explored more fully.

It is critical to recognize the complexities of this area of family law and an understanding of the contemporary debates would miss a vital ingredient without a close study of the historical development of child custody law.<sup>33</sup> As such, Chapter 2 examines the broad historical development of child custody law up to the mid nineteenth century. From this point, the chapter explores the long slow struggle for reforms to give women legal rights. The chapter then considers the debates and case studies that shaped the reforms to child custody law up the *Guardianship of Infants Act 1925*. Chapter 3 will form the crux of the thesis and focus on the period following the Act. This section will examine the complex and contradictory socio-legal changes of the nineteen twenties and thirties to provide a backdrop for the case studies. The analysis of original testamentary evidence will offer a distinctive window into the experiences for separating families during this period. The conclusion of this chapter will explore the social and legal changes after the Second World War up to the Royal Commission of Marriage and Divorce 1956.

Chapter 4, will focus on the period from the nineteen sixties to the present day illustrates the rapidly changing social and economic scene, the impact of which shifted the dynamics of the gendered roles of parents. This chapter will unpack the contemporary debates that have informed legal changes and re-shaped parenthood in residency and contact law. Chapter 5 forms a conclusion reflecting on the historical chapters and drawing together the shifting interpretations of the primary themes and their relation to the laws of custody and access, residency and contact. The final part of the study will be a brief overview of recent debates that may influence future reforms to this area of family law.

---

<sup>33</sup>Boyd, S., *Child Custody, Law and Women's Work* (Ontario, Oxford University Press, 2003) Preface & Acknowledgements.

## Section 1

### Contemporary Contexts

There is increased fragility of intimate relationships between adult partners. The impact has influenced the ways individuals organise their family life. This has led to claims of ‘broken marriages to no marriage’ and the ‘death of the family.’<sup>34</sup> This next section provides an overview of the demographic trends of marriage, cohabitation and divorce to identify the extent if any of shifts in adult relationships and as such the structure of the family.

#### Demographic Trends: Marriage, Cohabitation & Divorce

The figures here relate to the trends since the nineteen sixties. The appropriate historical chapters discuss earlier figures. Statistics show that in 1961, there were 330,000 first time marriages, and 50,000 remarriages.<sup>35</sup> During this period, the age of marriage dropped considerably and teenage marriages were common. The number of marriages peaked in 1972, to 480,300. In 2001, the figure had fallen to 286,000, although there was a rise to 308,600 marriages in 2003. Indeed, between 1972 and 1998, the numbers of marriages fell by 40%.<sup>36</sup> By 2001, first time marriages declined to 148,642 while second or further marriages had increased to 100,585.<sup>37</sup> The numbers of unmarried men over 16 marrying per 1,000 in 2004 was 27.5 while for women per 1,000 the rate was 24.4.<sup>38</sup> From the figures, it is clear marriage is an important concept. Yet, what is marriage? And why is it so important? A definition is not straightforward. The most commonly acknowledged legal definition of marriage is from *Hyde v Hyde and Woodhouse*<sup>39</sup>, ‘the voluntary union for life of one man and one woman to the exclusion of all others.’ However as Jonathan Herring

---

<sup>34</sup>Diduck, Alison & Kaganas, Felicity 2<sup>nd</sup> Ed. *Family Law, Gender and the State* (Portland, USA: Hart Publishing, 2006) at 33; Morgan, P., *Farewell to the Family* (London: IEA Health and Welfare Unit, 1995)p3.

<sup>35</sup>Eden, R., *Traditional Family Life ‘is in decline’* (London: Family Policies Studies Centre, 2000) in Herring, J., op.cit., p34.

<sup>36</sup>Barton, C., ‘White Paper weddings-The Beginnings, muddles and the ends of wedlock’ *Family Law* 2002 Vol. 32 at 124 discussed in Herring, ibid, 11, at 34.

<sup>37</sup>Eden, ibid, 33, in Herring, J., op.cit p34.

<sup>38</sup>As discussed in Herring, J., ibid, p34 fn. 8.

<sup>39</sup>[1866] LR 1 PD 130 at 133.

argues this is an ideal advocated by the law as opposed to a definition.<sup>40</sup> He contends, ‘The law on marriage merely provides parameters within which the couple are free to develop the content of their marriage as they wish.’<sup>41</sup>

For some couples marriage can be a religious commitment and a ‘spiritual union’ between couples. Marriage and civil partnerships provide the opportunity for couples to state their commitment to each other. The social institution of marriage signifies important landmarks in the lives of individuals and symbolizes the rite of passage into adulthood, setting up a home and raising children.<sup>42</sup> However, marriage is not just a personal matter but also a public matter. The act of marriage involves a legally bound tie. The importance of marriage is such that those parties legally excluded from marriage make the argument that their exclusion contravenes their basic human rights.<sup>43</sup> As such, the introduction of the *Civil Partnership Act 2004* was a significant step. The Act allows same-sex partners to register their relationship with all the legal rights and responsibilities of civil marriage.<sup>44</sup> Thus, despite claims of the ‘death’ of marriage,<sup>45</sup> the institution of marriage continues to be popular and an important social status that cuts across sexuality.<sup>46</sup>

Marriage was just as popular during the 1920s and 1930s. Despite ideas of moral freedom,<sup>47</sup> in these ‘men-depleted’ years following the First World War, marriage was important. For working-class women the institution of marriage awarded a higher status than spinsterhood and being ‘left on the shelf’.<sup>48</sup> The upper classes had a more laissez-faire attitude towards marriage, perhaps in some part due to more lenient divorce laws.<sup>49</sup> Chapter 3 will provide the opportunity to consider the social background of these issues in more detail

---

<sup>40</sup>Herring, J., op.cit. p37.

<sup>41</sup>Herring, J., p38.

<sup>42</sup>Diduck, A., & Kaganas, F., op. cit. p34.

<sup>43</sup>Anderson, M., ‘Registered Personal Relationships’ 1997 174 at *Family Law* 176 discussed in Diduck, A., & Kaganas, F., ibid, p33.

<sup>44</sup>Herring, J., op. cit. p61.

<sup>45</sup>Diduck, A., & Kaganas, F., op.cit. p33.

<sup>46</sup>Diduck, A., & Kaganas, F., ibid, p34.

<sup>47</sup>Russell, B., *Marriage and Morals* (New York, USA: Liveright PaperBound Edition 1970 Copyright C R 1957 by B Russell 1929 by Horace Liveright Inc. Manufactured in the USA) at 84.

<sup>48</sup>Beddoe, D., op.cit. p99; Lewis, J., *Women in England 1870-1950* (Sussex: Wheatsheaf Books Ltd., 1984) pp3-4.

<sup>49</sup>*The Matrimonial Causes Act 1923* made adultery by either spouse grounds for divorce. Horn, P., *Women in the 1920s* (Stroud, Gloucestershire: Alan Sutton Publishing Ltd., 1995) at 41.



Yet then and now marriage has been and is a political entity, a means of government through legal regulation and social policies. Marriage also provides a social legality to the ideology of the 'family' that other partnerships do not hold.<sup>50</sup> As Diduck and Kaganas contend, 'Marriage is both central and peripheral to family law but arguably remains at the heart of family ideology'<sup>51</sup> an argument that could be applied as much to the inter-war period as the present day. However, this is not to deny that those who do not marry cannot hold the same commitment to one another and provide stable relationships to raise a family<sup>52</sup> and the next section turns to examine recent trends in cohabiting relationships.

### Cohabitation

Over the last thirty years, there has been a significant rise in the numbers of couples who choose to cohabit. Between 1986 and 1999, this figure increased from 5% to 15%. The balance between married and unmarried adults is now nearly level. In 2001/02, figures show that 29% of women below the age of 60 were cohabiting<sup>53</sup> and 80% of couples cohabit prior to marriage.<sup>54</sup> Over 25% of children born are born to cohabiting parents<sup>55</sup> and one in sixteen children now live in stable cohabiting relationships.

*The Family Law Act 1996* defines cohabitation as, 'two persons who, although not married to each other, are living together as husband and wife or (if of the same sex) in an equivalent relationship.'<sup>56</sup> Although a number of statutes treat married and unmarried couples the same, generally the law treats unmarried couples as separate persons.<sup>57</sup> There are also different forms of cohabitation. The term can include a group of people living together, heterosexual couples or same-sex couples living

---

<sup>50</sup>Diduck A., & Kaganas, F., op.cit. p33.

<sup>51</sup>Diduck, A., & Kaganas, F., ibid, p30.

<sup>52</sup>Diduck, A., & Kaganas, F., ibid, p36.

<sup>53</sup>Barlow, A., Duncan, S., James, G., & Park, A., *Cohabitation, Marriage and the Law Social Change and Legal Reform in the 21<sup>st</sup> Century* (Oxford: Hart Publishing, 2005) p1.

<sup>54</sup> Haskey, J., 'Demographic aspects of cohabitation I Great Britain' 2001 *International Journal of Law, Policy and Family* 15 p51

<sup>55</sup>*National Statistics 2004* discussed in Barlow, A., et al, op.cit. p1.

<sup>56</sup>*Family Law Act 1996*, s 62(1) (a) (as amended by the *Domestic Violence, Crimes and Victims Act 2004*).

<sup>57</sup>As discussed in Herring, J., op.cit. p71.

together before marriage or a civil partnership.<sup>58</sup> Alternatively, cohabiting couples may choose not to marry but form a committed stable relationship.<sup>59</sup> Other couples cohabit as an alternative to either the institution of marriage as reinforcing patriarchy or disenchantment of marriage.<sup>60</sup> Irene Théry describes the shift away from marriage as *démariage*. That is a ‘disengagement’ of the symbolism of marriage from institutional regulation. *Démariage* then is a private relationship between couples that can allow uncomplicated entry and exit from the relationship.<sup>61</sup> It is predicted that cohabitation will continue as a common experience and an accepted way of family life.<sup>62</sup> Yet cohabitation is not a new phenomenon. As Chapter 2 will show historically ‘informal’ or ‘irregular’ marriages were customary in England and Wales. Nevertheless, during the inter-war period there was a social stigma of shame attached to unmarried couples and even more so unmarried parents. Recent evidence illustrates cohabitation or ‘irregular marriages’ were, in some areas, an accepted practice up until 1939.<sup>63</sup>

The increase in cohabitation over the last three decades reflects attitudes that are more liberal. Society no longer considers cohabitation as immoral either before marriage or in place of a formal legal marriage. Indeed, academic opinion suggests that parenting, intimacy and sexual intimacy are no longer the sole territory of the traditional family<sup>64</sup> and marriage is no longer a necessary element in parenthood. There has been, as John Dewar suggests, a decentring of marriage as a legal theory that has raised the legal status of parenthood.<sup>65</sup>

---

<sup>58</sup>As in the cases of *Fitzpatrick v Sterling Housing Association Ltd.* [2000] 1 FCR 21; *Ghaidan v Godin-Mendoza* [2006] 1 FCR 497 at para 506.

<sup>59</sup>Herring, J., *op.cit.*p71

<sup>60</sup>Barlow, A., *et al op.cit* p72.

<sup>61</sup>Théry, I., *Le Démariage* (Paris Editions: Odile Jacob, 1993) at 13-14 in Maclean, M., & Eekelaar, J., *The Parental Obligation* (Oxford: Hart Publishing, 1997) p8.

<sup>62</sup>Barlow, A., *et al op.cit.* pp15-6 & 26.

<sup>63</sup>Kelin, J., ‘Irregular Marriages: Unorthodox Working-Class Domestic Life in Liverpool, Birmingham and Manchester, 1900-1939’ April 2005 *Journal of Family History* 30 2 pp210-229.

<sup>64</sup>Gibson, C., ‘Changing Family Patterns in England and Wales over The Last Fifty Years’ in Sandford, N. Katz, Eekelaar, J., & Maclean, M., *op.cit.* p34.

<sup>65</sup>Dewar, J., ‘Family Law and Its Discontents’, 2000 *International Journal of Law, Policy and the Family* 14 p62.

## Divorce

Statistics show a striking rise in divorce figures. In 1961, there were 31,124 petitions filed for divorce, 17,803 of them by wives. By 1965 there were 42,070 petitions filed for divorce, in 1971 this had risen to 110,017 applications.<sup>66</sup> After that, the number of petitions never fell below 100,000.<sup>67</sup> For example, statistics show that per 1,000 divorces per year, rose from 4.7 in 1970 to 13.7 in 1999.<sup>68</sup> This has balanced at 14.0 in 2005. Divorce in the 21st century is commonplace. Figures in 2004 indicate that there were 167,116 divorce cases an increase of 0.2% from 2003 and the highest since 1996; 69% of the applications granted to wives.<sup>69</sup> Nevertheless, in 2004, 31% of divorces were amongst parties who had already been divorced. Divorce figures in 2005 reached 143,393, a decline from 2004.<sup>70</sup> Recent figures however reveal that divorce rates have fallen to 11.2 per 1000 marriages from 11.8 in 2007. One in five divorces in 2008 had been previously married and wives applied for 67% of divorce petitions.<sup>71</sup>

Figures show that in 2001 146,914 children in England and Wales experienced their parents' divorce. Of these children, 68% were under the age of ten and 25% under 5 years old. Estimations show that around one in three children will be involved with parental separation by the time they are 16.<sup>72</sup> As noted above more than 80%, of children live with their mother and post-separation and there are approximately 2million non-resident fathers in the UK.<sup>73</sup> Contact is essentially a private concern between the parents. While figures show that only one in ten parents applied for court orders to resolve contact arrangements, in 2002 the courts handled 65,192 contact applications.<sup>74</sup> Figures reveal that between 75 % and 86% of applications were from fathers and between 9 and 16% from mothers. Although national statistical data on

---

<sup>66</sup>*Marriage, Divorce and Adoption Statistics Series FM 2 no. 28* and discussed in Cretney, S., op.cit. p377 fn 379.

<sup>67</sup>*Marriage, Divorce and Adoption Statistics Series FM 2 no. 28* and discussed in Cretney, S., ibid p377.

<sup>68</sup>*National Statistics Population Trends, Spring* (London: ONS: 2006).

<sup>69</sup>*Office for National Statistics 2004.*

<sup>70</sup>*Department of Constitutional Affairs, Judicial Statistics*, (London: TSO, 2006)

<sup>71</sup>*National Statistics Social Trends* (Hampshire: Palgrave Macmillan, 2009).

<sup>72</sup>*Office for National Statistics Omnibus Survey* (London: ONS, 2002).

<sup>73</sup>Hunt & Roberts *op cit* 6, at 1; Smart, C., May, V., Wade, A. & Furniss, C., *Residence and Contact Disputes in Court*-Volume 1 (Research Series 6/03) (London: Department for Constitutional Affairs, 2003); Smart, C., *Feminist Perspectives on Family Law* op.cit. p126.

<sup>74</sup>Hunt, J., & Roberts, C., *op cit* 6, p1.

precise figures is unknown, suggestions are that over half of the applications were from couples who had been previously married.<sup>75</sup>

Legal reforms mean that divorce is no longer the prerogative of the wealthy and Chapter 2 will examine the historical development of the laws relating to divorce more closely. Divorce in the inter-war period was expensive.. Figures show in 1936 that there were only 5,750 petitions for divorce. Furthermore, there were two systems of separation. The wealthy could afford lawyers and the divorce courts, while the magistrates' courts provided a cheaper means of legal separation for the working and poorer classes. Attitudes to divorce were different then. There was a social stigma of shame attached to divorce or legal separation. Yet divorce was comparatively common among the some of the aristocracy, it was a mere procedure before remarriage.<sup>76</sup> For the poorer and working classes there was little choice. Husbands and wives either stayed together or separated and faced the threat of shame and poverty. Chapter 3 will expand on these topics in more detail and the case studies provide evidence of the experiences.

Just as after the First World War, there was a dramatic rise in the numbers of divorce petitions after the Second World War. However, the introduction of the legal aid scheme made divorce more accessible to a wider population<sup>77</sup> thus further increasing the numbers of divorce petitions and instigating calls for a revision of the system of the divorce courts. It was not however until the nineteen sixties that reforms to the laws of divorce entered the statute books. The Divorce Reform Bill set out to make divorce more consensual to remove the fault and guilt factors and collusion between the parties. The Bill proposed the irretrievable breakdown of marriage as the sole

---

<sup>75</sup>National statistical evidence is unknown this evidence is drawn from research samples. Hunt, J., & Roberts, C., op cit p 1; Maclean, M., op cit p1.

<sup>76</sup>For example, socialite Idina Sackville divorced 4 times and married 5. Osborne, F., *The Bolter* (Great Britain: Virago Press, 2008) p6.

<sup>77</sup>*The Legal Aid and Advice Act 1949* published following the Rushcliffe Committee Report May 1945 Cmd.6641. Cretney traces the origins of legal aid from *The Suing in forma pauperis* Act 1495, 11 Hen7 c.12, removed in 1973 by the Statute Law (Repeals) Act that provided exemption for the poor of court fees. According to Cretney, "This fact may be regarded as providing some support for the notion that unimpeded access to the courts is a common law constitutional right... The demand for Poor Persons' Procedure grew and by 1918, the rise in the number of divorces after WWI put particular strain on the provisions. A Committee in 1919 and again in 1924 'the latter assumed that the legal profession had a 'moral obligation' to render 'gratuitous legal assistance [and in return for the monopoly in the practice of the law which it enjoys.' In 1925, the Committee reported that the Poor Persons' Scheme should be dealt with through the Law Society and the costs of divorce for the poor. Cretney,S., op.cit. pp306-312 fn:229 230 & 256.

grounds for divorce on the evidence if one or more of five facts three of which were the matrimonial offences of adultery, cruelty and desertion. At the same time, the Bill also encouraged reconciliation.<sup>78</sup> Therefore, fault was not entirely removed from the Bill. A fuller discussion of the debates around this Act will be discussed in Chapter 4. Since the *Divorce Reform Act 1969*, there has been a striking rise in the numbers of applications for divorce. However, there are a number of other factors contributing to the increase in the number of divorce petitions. The conceptualisation of marriage is now different.<sup>79</sup> There is also ‘a higher degree of satisfaction’ expected from marriage.<sup>80</sup> Work patterns have shifted and the ‘long hours’ culture and dual career marriages give less time to spend with partners that can cause tensions within the marriage. There is also the possibility that women’s financial independence has had an impact on separation and divorce.<sup>81</sup>

Yet the suggestion that the divorce rate is higher as a direct result of increased breakdown of marriages fails to take into account the increase in the number of remarriages. Therefore, divorce figures are to an extent, distorted. In the twenty-first century, the divorce rate for marriages that have lasted at least eight years is the same as in 1970. Thus, long-term marriages remain as stable as they were thirty years ago.<sup>82</sup> Therefore, despite the commonality of divorce and arguments of the ‘death’ of marriage as figures for second and further marriage indicate marriage remains popular.<sup>83</sup> Figures also show 7 out of 10 children live with their married parents.<sup>84</sup> Similarly, the majority of cohabiting couples do marry or bring up families in stable relationships. As Clare McGlynn argues, the trends that indicate diversity also illustrate the stability of family life.<sup>85</sup> Thus far, this section has outlined the demographic trends that indicate a shift in the organisation of family life. The trends have been located within a brief synopsis of the wider social context that has

---

<sup>78</sup>*The Report of the Committee on One-Parent Families* (Finer Report) 1974, Cmnd.5629 discussed in Cretney, S., op.cit p365-7; Diduck, A., & Kaganas, F., op.cit. p513.

<sup>79</sup>Herring, J., op.cit p95-6.

<sup>80</sup>Gibson, C., *Dissolving Wedlock*, (London: Routledge, 1994) at 214 discussed in Herring, J., *ibid*, pp95-6.

<sup>81</sup>Hochschild, A., ‘The Emotional Geography of Work and Family Life’ in Morris, L., & Lyons, S. Eds. *Gender Relations in Public and Private: Changing Research Perspectives* (London: Macmillan, 1996) as discussed in Herring, J., op.cit. p96.

<sup>82</sup>Herring, J., *ibid*, p 93.

<sup>83</sup>Herring, J., *ibid*, p33.

<sup>84</sup>Lewis, J., op.cit. p100.

<sup>85</sup>McGlynn, C., *Families and The European Union*, (Cambridge: Cambridge University Press, 2006) pp29-30.

influenced changes. However, the trends have raised concerns amongst politicians, fuelled media reports and instigated debates amongst legal and social policy makers. This next section outlines recent changes to social policies in this field and issues of parenting.

### Political Narratives and Family Policy Changes

The shifts in demographic trends of marriage divorce and cohabitation have raised anxiety amongst politicians regards the demise of the nuclear family. The ‘family’ is at the forefront of political debate, legal and social policy change. In due course, Chapter 4 will unpack the contemporary debates more fully however, here the aim is briefly look at the debates and ground them in the inter-war period. Since New Labour came into government in 1997 ‘the family’ and parenting practises have been a major factor in their political agenda.<sup>86</sup> In an ever-shifting global market, the relationship of the state with the family is more intense as the basis of economic stability and social cohesion. The Labour Government has sought to encourage parents to meet the responsibilities for the well-being and upbringing of their children.<sup>87</sup> There has been a significant drive by the Government for more involvement of fathers with their children and an active ‘hands on’ fathering as a shared carer.<sup>88</sup> New Labour has brought fathers and fatherhood onto the political agenda and into the home.<sup>89</sup> In contrast, social policies actively encourage mothers into the formal economy. Indeed social policies encourage mothers, married, cohabiting and single to enter the workforce. As Colin Gibson contends, motherhood

---

<sup>86</sup>Barlow, A., *et al* op.cit p115.

<sup>87</sup>*Balancing Work and family life: enhancing choice and support for parents* (London: HMSO; 1998) Home Office, *Supporting Families: A Consultation Document*, London: The Stationery Office; *Meeting the Child Care Challenge: A Framework and Consultation Document*, Secretary of State for Education and Employment, The Secretary of State for Social Security and Minister for Women; H.M. Treasury & Department of Trade and Industry (2003).

<sup>88</sup>A number of academic debates have focused on the inclusion of fathers into family policy including: Barlow, A., & Duncan, S., New Labour’s communitarianism, supporting families and the ‘rationality mistake’ Part II, 2007 *Journal of Social Welfare and Family Law.*, 22, 2, pp129-143; Featherstone, B., ‘Taking Fathers Seriously’ 2003 *British Journal of Social Work*, 33 pp 239-54; Featherstone, B., ‘Fathers Matter: A Research Review’, 2004, *Children & Society* 18 pp312-319; Kilkey, M., ‘New Labour and Reconciling Work and Family Life: Making It Fathers’ Business’, 2006 *Social Policy & Society*, 5 2 pp167-175; Lewis, J., op.cit <http://www.jrf.org.uk/knowledge/social-policy/333>; Scourfield, J., & Drakeford, M., 2002 ‘New Labour and the ‘problem of men’ *Critical Social Policy*, 22 p619

<sup>89</sup>Featherstone, B., and Trinder, L., ‘New Labour, families and fathers’ 2001 *Critical Social Policy*, 21 4 pp534-536; Kilkey *ibid*, p167.

is not an impediment to their inclusion in formal employment.<sup>90</sup> In addition, the European Union's Social Chapter<sup>91</sup> instigated policy changes and a new politicised language advocating a work/life balance.<sup>92</sup> It is within this broader picture of political debates and social policy changes that parenting post-separation is located. Government policies now advocate that children should have 'the stability by a loving relationship with both parents, even if they separate.'<sup>93</sup>

Central administration had been developing since the early nineteenth century and during the nineteen twenties and thirties was not to the same extent as the contemporary era. There were fewer legal separations and divorces than today, thus the state did not consider the circumstances of separating families as so critical. Nevertheless, family policies did exist; only the emphasis was different. It was the physical 'health' of the family and the 'health' of the nation that was crucial to the state. Chapter 3 will explore these issues in the historical context more fully.

### The Family in Crisis

New Labour has initiated, through the Home Office a number of consultation papers to deal with post-separated families in crisis and have set out to deal questions of parental responsibility, the welfare of the child, issues of contact and concerns of domestic violence.<sup>94</sup> Recommended changes to the judiciary system have initiated Children's and Families Court Advisory Support Service (CAFCASS) to ensure prompter action on resolving dispute cases. The *Children and Adoption Act 2006* allows courts to enforce contact. This is a far removed from the family in crisis during the inter-war period. As suggested, families with matrimonial problems relied on informal advice from magistrates and probation officers in the police courts. Children were despite the introduction of the welfare principle, not central to the legal separation.

---

<sup>90</sup>Gibson, C., op.cit.53.

<sup>91</sup>The Charter implemented directives on maternity and paternity leave, emergency leave and working time.(The UK had the longest working hours in Europe cite .); The White Paper *Fairness at Work*.Cm

<sup>92</sup>Collier, R., "Feminising" the Workplace? Law, the Good Parent' and the 'Problem of Men' in Morris A., & O'Donnell, T Eds. *Feminist Perspectives in Employment Law* (London: Cavendish, 1998.)

<sup>93</sup> Maclean, M., *Together and Apart*, (Joseph Rowntree Foundation: York, 2004) p7.

<sup>94</sup>*Parental Separation: Children's Needs and Parental Responsibilities* Cm 6273; *Parental Separation Children's Needs and Parental Responsibilities* Cm 6452.

Thus far, this section has set out the modern day context of the debates in residency and contact law. The issues have been located within the wider shifts of the socio-economic and cultural framework and changing social policies. The following section considers what is meant by the term 'family' and gives an overview of the principle sociological theories to explain changes in family life. This section concludes by identifying the key themes and concepts.

### **Sociological Insights to the Family**

As indicated above the apparently changing structure of the family is a major concern to Government and social and legal policy makers. It is suggested that over the last three decades, there is increasing fluidity to family life.<sup>95</sup> Therefore, defining the concept of the family must take account of the diversity of the family and it is to this the next section turns.

#### Defining the Family

The family would appear to be a simple term that is common to the vast majority of individuals. The overarching idea is of the traditional nuclear or 'cornflakes'<sup>96</sup> family and consisted of married heterosexual parents, the mother, father and two children with the husband as the principal breadwinner and the wife the primary carer at home servicing the needs of the family. This ideal family remains central to politicians and lawmakers in seeking to maintain social cohesion and an economically stable society.<sup>97</sup> As Diana Gittens argues 'Family ideology is not something 'in the air,' it influences and determines material life as well.'<sup>98</sup>

Yet the idea of the nuclear family fails to take into account the complex family relationships of contemporary times.<sup>99</sup> Defining the concept of the family must account for the diversity of the family and different meanings. In the broader definitions, the family can be a number of people linked by marriage, 'blood'

---

<sup>95</sup>Gibson, C., op cit p 55; Lewis, J., op.cit p49.

<sup>96</sup>Slater Day, S., *Families* (Abingdon, Oxon: Hodder & Stoughton, 2000) p9.

<sup>97</sup>Gittens, D., 2<sup>nd</sup> Ed. *The Family in Question* (Basingstoke, Hampshire, 1993) p3; O'Donovan, K., *Family Law Matters*, (London: Pluto Press, 1993) p39.

<sup>98</sup>Gittens, D., *ibid*, p3.

<sup>99</sup>Davidoff, L., *et al* *The Family Story* (Harlow: Addison Wesley Longman Ltd., 1999) p4.



relationships, and adoption that must include surrogacy.<sup>100</sup> The ‘family’ may include other relationships. The extended family includes relationships such as grandparents, and the network of other family blood relationships. Reconstituted families post-separation bring in stepparents and stepchildren into the equation, not to mention other step-relatives. Kinship conveys another meaning and refers to the (legal) duty of the moral obligations and rights, members of the family have to one another.<sup>101</sup> Yet families also classify the roles of individuals within this group, the mother and the father. Families are consequently also about the division of the roles and duties in the family power relationships.<sup>102</sup> The diversity of the definition of the family may also change over time and correlate with societal change.<sup>103</sup> As Diduck and Kaganas point out, defining the family continues to be ‘part of common sense’ yet at the same time not particularly simple to define.<sup>104</sup>

### Contemporary Family Practices: A Picture of Diversity

A shift towards more liberal attitudes to marriage, divorce, cohabitation and sexuality has undoubtedly influenced changes to the ways people organise their family lives. There is no longer a social stigma on non-traditional family life. The increased numbers themselves are a defining point by acknowledgment of such trends.<sup>105</sup> Alongside this, social policy papers recognise and accept the changes, indeed the law now encourages the reconstruction of families post-separation. Other forms of family are emerging that includes cohabiting heterosexual couples and single parent families. Gay and lesbian families are creating families of choice. These other forms of family are generally accepted, institutionally, legally, socially and culturally.<sup>106</sup> Alongside this there are claims larger groups of people living together based on a diversity of

---

<sup>100</sup>Davidoff, L., *et al* op.cit. p4.

<sup>101</sup>Finch, J., *Family Obligations and Social Change*, (Cambridge: Polity Press, 1989); Slclater Day, op.cit. p 7.

<sup>102</sup>Slclater Day *ibid*, p8.

<sup>103</sup>Diduck, A., & Kaganas, F., op.cit. p5.

<sup>104</sup>Diduck, A., & Kaganas, F., *ibid*, p12.

<sup>105</sup>Bala, N., op cit pp148-9. .McGlynn, C., op cit p28.

<sup>106</sup>Diduck, A., & Kanagas, F., op cit, pp11 7 28; Gibson, C. *op cit*, p55; Lewis, J., op.cit. p100; Weeks, J., Donovan, C., & Heaphy, B., ‘Everyday Experiments: Narratives of Non-Heterosexual relationships’ in Silva, E.B., & Smart, C.Eds. *the new family?* (London: Sage Publications, 1999) pp83-4; Weston, K., *Families we Choose: Lesbian, Gays and Kinship* (New York: Columbia University Press, 1991) discussed in Smart, C., *Personal Life* (Cambridge: Polity Press, 2007) p27.

relationships should be acceptable.<sup>107</sup> As Jeffrey Weeks *et al* suggest this opens other definitions of the family that can include people who are emotionally close to each other rather than blood relations.<sup>108</sup> In contrast, there are increasing numbers of people who choose to live alone and move between relationships. Couples may have a monogamous marriage or relationship, but choose to live apart.<sup>109</sup>

Attitudes towards non-traditional families during the 1920s and 1930s were generally different. Single parents, particularly single mothers suffered the social stigma of shame. There was strong condemnation of same-sex relationships.<sup>110</sup> Lesbianism was legal, yet the courts decided Radclyffe Hall's novel *Well of Loneliness*, based on a lesbian relationship was obscene. Homosexuality was a criminal offence. Lord Buckmaster commented that homosexual acts were 'surely one of the darkest shadows that blackens the face of man.'<sup>111</sup> Yet same-sex relationships have always existed as have single parent families. Thus, non-traditionalist families were as much a part of how families lived as the case studies in Chapter 3 will show.

## Family Practises

David Morgan<sup>112</sup> offers a different understanding of the family. Rather than attempting to define a concept that is complex and has a plurality of meanings he contends that the notion of 'family practices' is more recognisable.<sup>113</sup> In this way, Morgan refers to family practices as a means of dealing with the obligations of relationships, marriage, kinship and parenthood, within the family structure.<sup>114</sup> He suggests the idea of family practices is what families do in the day-to day dealings within the family regardless of marriage.<sup>115</sup> As Carol Smart points out this allows a 'freeing' of the ways families are organised.<sup>116</sup> The broad concept of the 'family'

---

<sup>107</sup>Barrett, M., & McIntosh, M., *The Anti-Social Family* (London: Verso, 1991).

<sup>108</sup> Weeks, J., Donovan, C., Heaphy, B., *Same Sex Intimacies: Families of Choice and Other Life Experiments* (London: Routledge, 2001).

<sup>109</sup>Carling, A., 'Family Policy, Social Theory and the State' in Carling, A., Duncan, S., & Edwards, R., Eds., *Analysing Families* (London: Routledge, 2002).

<sup>110</sup>Beddoe, D., *op.cit* pp28-31.

<sup>111</sup>Lord Buckmaster in a speech to the House of Lords in relation to the Bill to reform the divorce laws.

<sup>112</sup>Morgan, D.H.J., *Family Connections* (Cambridge, Polity Press, 1996).

<sup>113</sup>Herring, J., *op.cit*. p3.

<sup>114</sup>Morgan, P., *op.cit*. p11. .

<sup>115</sup>Morgan, P., *ibid*, pp100-4.

<sup>116</sup>Smart, C., the new family? *op.cit*. 33.

appears therefore as complex, fluid and diverse as the definition of the family and must too account for different meanings. Yet as Diana Gittens argues:

The symbolic importance of the family cannot be underestimated, for it goes beyond political allegiances of left or right and has arguably come to be seen as the most important institution of modern industrial society.<sup>117</sup>

The idea of the nuclear family remains a central theory of social policy. Thus, there is a particular type of family that links with marriage that the state and the law privilege.<sup>118</sup> Nevertheless, the ways families are defined and structured may be different to the ways theorists understand the family. This next section provides an overview of the primary sociological insights that have emerged to explain how the structure of family life has changed. The theories are located within the context of the structure of the inter-war family.

## Family Debates

It is clear that one of the pressing debates in the 21<sup>st</sup> century is the changing structure of the family. A major factor, as noted above is the significant rise in women's increasing inclusion in formal employment. Yet there are conflicting ideas of explanations of the changes in family practises, from different standpoints and methodologies. Here the focus will be on the principal theories that have emerged and applied, albeit briefly, retrospectively to the structure of the family in the inter-war period.

## Functionalism

In the nineteenth century, Frederick Engels argued (from a Marxist perspective) that the increase in private property, the capitalist economy, and men's authority over

---

<sup>117</sup>Gittens, D., op.cit. p59.

<sup>118</sup>Diduck, A., & Kaganas, F., op.cit. p32.

women shifted the structure of the family.<sup>119</sup> Indeed, for some sociologists, industrialisation unquestionably produced conditions for a shift in the structure of the family and the emergence of a particular typology of the family. Talcott Parsons and Robert Bales in the nineteen forties and nineteen fifties were the strongest advocates of functionalism.<sup>120</sup> They argued that the nuclear family was a compulsory aspect of a capitalist economy. With fewer children and a clear gender division of labour, the nuclear family had fewer obligations. Thus, this family structure was more stable and efficient than the extended family of pre-industrial times. Furthermore, the nuclear family was a unit of consumption to maintain the capitalism economy as opposed to a unit of production.<sup>121</sup> Yet within the same scholarship of functionalism, Wilmot and Young's empirical study of families in the East End of London in the nineteen fifties showed that extended family practices and cross-generational support continued to exist after industrialisation. There was, the authors argued, a trend towards equality and the idea of the symmetrical family.<sup>122</sup>

In the context of this thesis, engaging with Engels' theories or structural functionalism offers a straightforward explanation of the broader ideas of family structure during the inter-war period. This was significantly so in rebuilding social and economic stability after the First World War. The state through the law reinforced the idea of the nuclear and hierarchal family with clear gender divisions of labour.<sup>123</sup> Legislation and social policies actively discouraged married women from professions, such as teaching. The media reinforced these ideas and promoted the home as the 'woman's workshop.'<sup>124</sup> Yet claims suggest this era was a period of contradictions.<sup>125</sup> Changing employment patterns for women suggest that the idea of the nuclear family was perhaps not as clear-cut as has been understood. In some areas, there was an economic growth with

---

<sup>119</sup>Engels, F., *The Origin of the Family, Private Property and the State* (London: Penguin Books, 1986) First published in 1884.

<sup>120</sup>Parsons T., 'The Social Structure of the Family' in Ashen, R., Ed. *The Family: Its Function and Destiny* (New York: Harper, 1949).

<sup>121</sup>Discussed in Davidoff *et al* op cit p21; Diduck, A., & Kanagas, F., op. cit. p 6.

<sup>122</sup>Young, M. & Wilmott, P., *Family and Kinship in East London* (Harmondsworth:Penguin, 1957) discussed in Scalter Day op. cit. p23.

<sup>123</sup>Brophy, J., 'Parental Rights and Children's Welfare: Some Problems of Feminists' Strategy in the 1920s' 1982 *International Journal of the Sociology of Law* 10 p158.

<sup>124</sup>Beddoe, D., op.cit. p89;Lewis, J., op.cit. pp32-40 & 75-7.

<sup>125</sup>Gittens, D., *Fair Sex* (London: Hutchinson Publishing Group, 1982).

the development of the lighter industries<sup>126</sup> and clerical work providing employment opportunities for women. Thus, it would seem for some mothers that work and motherhood were part of the picture of family life. Indeed, for poorer and working class women, there was little choice but to be part of the formal or more likely informal workforce. Chapter 3 will explore the contradictions in more detail.

### Historical Approaches

Comprehensive analysis by historical sociologists offers other perspectives to explain ideas of change to the structure of the family. Lawrence Stone argued that across history there were three distinct changes in the structure of the family. Firstly, the ‘open lineage family’ followed by a move to the ‘restricted patriarchal nuclear family’ then a shift to the ‘closed domesticated nuclear family’.<sup>127</sup> However, evidence suggests that the nuclear family existed long before the industrial revolution.<sup>128</sup> Furthermore, Michael Anderson argued that straightforward shifts are not definitive and geographical regions and local backgrounds influenced change or continuity in family practices.<sup>129</sup>

An historical approach to the family challenges ideas of the ‘golden age’ of the family. They suggest the insular nuclear family to be a cultural myth. Others such as friends, kinsfolk and employees were vital to uphold the ideal. Indeed, as Leonore Davidoff *et al* point out historians are able to identify continuities in the structure of the family throughout history that remain in the modern era.<sup>130</sup> Historical perspectives also have relevance to the structure of the family in the inter-war period. Lawrence Stone’s claim of the nuclear family most certainly chimes with the ideology of the nuclear family structure at that period. Alongside this, high unemployment in other areas would mean the structure of families would be more likely to follow the extended family pattern. The case studies, analysed in Chapter 3 will support this

---

<sup>126</sup>This industry includes household goods such as refrigerators, cookers and radios. Beddoe, D., *op.cit.* p55.

<sup>127</sup>Stone, L., *The Family, Sex and Marriage in England 1500-1800* (Harmondsworth: Pelican, 1977) and discussed in Sclater Day *op.cit* pp38-9.

<sup>128</sup>Laslette, P., with assistance Wall, R., *Household and Family in Past Times*, (London, Cambridge University Press, 1972).

<sup>129</sup>Anderson, M., *Family Structure in the 19<sup>th</sup> Century Lancashire* (London, Cambridge University Press, 1971) as discussed in Sclater Day *op.cit* pp34-41.

<sup>130</sup>Davidoff, L., *et al op.cit*, pp4-20.

argument. Historical perspectives also offer a number of theories on other aspects of the family that undoubtedly have influenced changes in the ways individuals organise their family lives. Emerging from the mid eighteenth century and the early nineteenth century individualisation influenced ideas towards companionate marriages, contracted by free choice, equality between partners and based on romantic love.<sup>131</sup> For example, Edward Shorter's historical analysis identified a shift from marriage as an economical contract between families to companionate marriage based on physical and sexual attraction and complementary roles. It is suggested that there was a resurgence of companionate marriage in the nineteen twenties as a means to 'legalize birth control and divorce by mutual consent for childless couples.'<sup>132</sup> Furthermore, companionate marriage was a class concept.<sup>133</sup> The introduction of the *Matrimonial Causes Act 1923* certainly made divorce easier for the wealthy and thus more open to companionate marriages and other family structures.<sup>134</sup> Yet there is another perspective if viewed from the state's concerns of a dwindling population. High maternal mortality rates<sup>135</sup> during the nineteen thirties meant single parenthood for some fathers. Thus, companionate (re)marriage after the death of a spouse would be a preferred option and consequently form other family structures.

In addition, an historical approach has been significant in providing insights into the shifting interpretations of the child and childhood. The child has become central to 'intact' and post-separated families. This is implicit in contemporary social policies and the legal regulation of separating families. Historically, there are conflicting ideas of the concept of the child and childhood. Philippe Airés argues that childhood was non-existent until the Middle Ages. Nicolas Orme takes a different viewpoint.

---

<sup>131</sup>Parker, S., *Informal Marriage, Cohabitation and the Law 1750-1989* (Basingstoke: Macmillan, 1990) p43; Stone, L., *The Family, Sex and Marriage in England 1500-1800*, (London: Penguin Books 1977) p165.

<sup>132</sup>American judge Ben Lindsay *The Companionate Marriage* (Brentanos' 1928) as discussed in Davidoff *et al* op cit p190. The same idea was argued to have risen again in the 1950s, this is explicit in the Morton Report. Also in Finch, J., & Summerfield, P., 'Social Reconstruction and the Emergence of Companionship Marriage, 1945-1959 in Clark, D., Ed. *Marriage, Domestic Life and Social Change* (London: Routledge, 1991) discussed in Smart, C., *Personal Life* op.cit. pp11-2.

<sup>133</sup>Smart, C., *Personal Life*, op.cit. p11.

<sup>134</sup>The case of Idina Sackville illustrates this argument. Idina Sackville married 5 times. After she left her first husband Euan Wallace and their two sons he married Barbie Lutyens and they had 3 further sons. Osbourne, F., *The Bolter* (Great Britain: Virago Press, 2008).

<sup>135</sup>Branson, N., & Heinemann, M., *Britain in the Nineteen Thirties* (St Albans, Herts: Granada Publishing Ltd., 1971) at 243-4 & 247-8; Per thousand live births between 1923-1933 was from 4.83 to 5.94, an increase of 22% discussed in Spring, Rice, M., *Working Class Wives* (Harmomdswoth, Middlesex, 1939) p19.

He suggests that there is evidence through the law and religion, cultural artefacts and art that the child and childhood were distinctive identifiable phases in family life.<sup>136</sup>

The inter-war period arguably forms a central part of the argument of a shift in understanding the child and childhood. The emerging scientific sciences dominated narratives of parenthood with theories of the importance of the mother/child bond as in the best interests of the development of the child.<sup>137</sup> Thus, the inter-war period was a watershed in formally bringing the child to the centre of the family structure specifically post-separation. Yet there were contradictions as demonstrated in the case of *R v Thain*<sup>138</sup> by the dismissive attitude of the court towards the child. Chapter 3 will revisit these issues.

### Feminist Perspectives

In the broader context, feminism is a holistic theory that relates to the suppression and discrimination of women because of their sex, to men.<sup>139</sup> Feminist thought has challenged these ideas. Feminism is about understanding the experiences of women's lives and the ways women are culturally symbolised and symbolise themselves.<sup>140</sup> Yet feminism as a political standpoint has shifted over time and 'takes its meaning from the moment.'<sup>141</sup>

The genesis of feminism is regarded as having emerged from the French Revolution and the radical and political writings of Mary Wollstonecraft.<sup>142</sup> In the nineteenth century, first wave feminists concentrated their efforts on gaining women's legal rights through the medium of literature and included campaigners such as Harriet

---

<sup>136</sup>Crawford, S., *Childhood in Anglo-Saxon England* (Stroud, Sutton, 2000) Shahar Shulasmith *Childhood in the Middle Ages* (London: Routledge, 1990) both discussed in Orme, N., *Medieval Childhood* (New Haven & London, Yale University Press, 2001) pp2-5.

<sup>137</sup>The developing sciences of education, medicine and psychology discussed in Hendrick, H., 'Constructions of British Childhood: An Interpretive Survey, 1800 to the Present' in James, A., & Prout, A., 2<sup>nd</sup> Ed. *Constructing and Reconstructing Childhood* (London: Falmer Press, 1997) pp59-60.

<sup>138</sup>[1926] 1 Ch.676.

<sup>139</sup>Delmar, R., 'What is feminism?' in Mitchell, J., & Oakley, A., Eds. *What is Feminism?* (Oxford: Blackwell, 1986) p8.

<sup>140</sup>Jackson, S., & Jones, J., Eds. *Contemporary Feminist Theories* (Edinburgh: Edinburgh University Press, 1998) p1.

<sup>141</sup>Jackson, S., & Jones, J., op.cit. pp2-4; Mitchell, J., & Oakley, A., op cit p4.

<sup>142</sup>Wollstonecraft, M., 1792 *A Vindication of the Rights of Women* (London: J.M.Dent, 1995, First Published in Everymans 1929).

Martineau, and Frances Power Cobbe. Often ridiculed and ostracised from mainstream publishing they established their own journals to allow them a voice and a 'Literature of their own'.<sup>143</sup> However, not all women agreed with their views for example, Margaret Oliphant and Eliza Lynn Linton. Caroline Norton certainly did not agree with women's formal equality yet her name is synonymous with the struggle for women's legal rights. Men too campaigned for women's legal rights, early supporters such as Samuel Smiles and later John Stuart Mill gave their demands a political voice.<sup>144</sup> Chapter 2 will explore this area more fully. The establishment of a women's movement shifted the emphasis of women's campaigns. One group under the leadership of Millicent Garrett Fawcett took a peaceful approach while Emmeline Pankhurst led a more militant group. However, it was not until after the First World War that legislation introduced a measure of formal legal equality. Feminism then appeared to fade from the public forum and an anti-progressive stage.<sup>145</sup> Yet feminist writers, such as Virginia Woolf and Winifred Holtby, continued to argue against women's inequality<sup>146</sup> and Chapter 3 will consider their works in more detail. In the late 1940s, Simone de Beauvoir, instigated a re-surfacing of feminism into the public debate. Yet, there was a shift of emphasis. The second wave focused their campaigns to expose women's subordination in employment, politics and the family. As Hilaire Barnett argues, feminism and feminist scholarship in the nineteen sixties and seventies brought the personal into the political.<sup>147</sup> In Chapter 4, there will be opportunity to consider further this period of feminist history.

Feminist scholarship identified the nuclear family as a site of oppression through power relationships of men over women. Indeed, it was the separate sphere theory that rationalised women's historical exclusion from the public sphere and reinforce

---

<sup>143</sup>From a quote by John Stuart Mill 'If women lived in a different country from men, and had never read any of their writings, they would have a literature of their own.' Mill, John Stuart *The Subjection of Women* 1869 and the title of Showalter, E., Expanded and Revised Edition *A Literature of Their Own* (London: Virago, 1999). Also discussed in Hamilton, S., *Criminal, Idiots, Women and Minors* (Canada: Broadview Press, 1996) p9. This included *The English Woman's Journal* 1858; *Englishwomen's Review* 1984; *The Woman's Gazette* 1875, Hamilton, S., *Criminal, Idiots, Women and Minors* (Canada: Broadview Press, 1996) p9.

<sup>144</sup>Mill, John Stuart *ibid*, 141; Tyrrell, A., 'Samuel Smiles and the Woman Question in Early Victorian Britain' 2000 *The Journal of British Studies* 39 2 pp185-216.

<sup>145</sup>Rowbotham, S., 3<sup>rd</sup> Ed. *Hidden From History* (London, Pluto Press, 1977) pp122-7.

<sup>146</sup>The feminist polemic works of Eleanor Rathbone, Virginia Woolf, Ray Strachey, Vera Britten and Winifred Holtby were important in the inter-war period.

<sup>147</sup>Barnett, H., *Introduction to Feminist Jurisprudence* (London: Cavendish Publishing) p4.



the exclusiveness of men's role in the public sphere.<sup>148</sup> This is particularly relevant to the Victorian period and the ideology of domesticity. This perspective is deep rooted in Western philosophy and argued in the philosophies of Plato, Aristotle.<sup>149</sup> Feminist thought has since developed and it has recognised the diversity of women, their sexuality and race.<sup>150</sup> There are different perspectives and emphasis of feminism such as Marxist, liberal, historical and socialist feminism.<sup>151</sup> However, similar to the nineteen thirties from the nineteen eighties there appeared to be a backlash against feminism. Women have formal gender equality through the law. Nevertheless, the reality is often far from the ideology, as shall be demonstrated.

Notwithstanding the changes, the family raises problems for feminist theorists. Feminist thought identifies the family as a group maintained through the dynamics of cultural practices, economics and power relationships and feminist theorists have found it useful to engage with the thinking of Michael Foucault to examine power and power relationships. Jacques Donzelot follows a similar argument through his theory of the 'tutelary complex.'<sup>152</sup> Foucault dismissed the 'grand theories' which argue that power rests with the state. He suggested that power is capillary in that the 'state' governs through policy agendas, legal reforms and social change that allows other forms of change emerge from different avenues of power.<sup>153</sup> Consequently, the law

---

<sup>148</sup> Abrams, L., Gordon, E., Simonton, D., & Yeo, E.J., *Gender in Scottish History since 1700* (Edinburgh, Edinburgh University Press, 2006) at 4; Tonnies also used the ideas of in his theories *Gemeinschaft and Gelleschaft* as a means of explaining the dichotomy of the community as against individualisation. The former represented the idea of a pre-modern society symbolised by duty and love of the community and the latter a modern society tempered with individualism and competition. Tonnies, F., in Slattery, M., *Key Ideas in Sociology* (Walton-on-Thames, Thomas Nelson and Sons Ltd., 1991) pp292-296; and in Diduck, A., & Kaganas, P., pp13.

<sup>149</sup> Located within the *polis* and *oikos* of Greek philosophy. Although John Stuart Mill advocated gender equality, he did not suggest the integration of the two rather the parameter legitimately contrasted. Freeman, M.D.A., 'Towards a Critical Theory of Family Law' *1985 Current Legal Problems* 38 p153; Rose, N., 'Beyond the Public/Private Division: Law, Power and the Family', *1987 Spring Journal of Law and Society* 14 1 p64; Okin, S.M., *Justice, Gender and The Family*, (London: HarperCollins, 1989) p7; Diduck, A., & Kaganas, F., p13.

<sup>150</sup> Jackson, S., & Jones, J., op.cit p6.

<sup>151</sup> Smart, C., *The Ties That Bind* (London: Routledge & Kegan Paul plc, 1984) p6.

<sup>152</sup> Donzelot, J., & Hurley R. (tr) *The Policing of Families* (London: Hutchison, 1980); Diduck, A., & Kaganas, F., op.cit. 339.

<sup>153</sup> Collier, R., *Masculinity, Law and the Family* (London: Routledge, 1995) p75; Foucault, M., *Space, Knowledge and Power* in Rabinow, P., (Ed.) *The Foucault Reader, An Introduction to Foucault's Thoughts*, (London: Penguin Books, 1981) p256; also in Hunt, A., & Wickham, G., *Foucault and the Law Towards a Sociology of Law as Governance* (London: Pluto Press, 1994) p24.

as an agency of power (the state) reinforces dominant beliefs.<sup>154</sup> It is within this brief overview of feminist critical approaches that a number of feminist authors argue the law and the state privilege certain forms of family to maintain that power and authority.<sup>155</sup> Nevertheless, there are other perspectives that offer other theories regarding the changing structure of the family.

### Individualisation

Individualisation has, according to Carol Smart, ‘injected debate and excitement into the fields of families, intimacy and relationships’<sup>156</sup> Individualisation, democracy and equality debatably underpin the new conceptual ideas of the shifting relationships in contemporary time<sup>157</sup> and the works of Anthony Giddens,<sup>158</sup> Ulrich Beck and Elisabeth Beck-Gernsheim<sup>159</sup> are central to this position.

Giddens argues that there has been ‘transformation’ in intimacy in gender relationships and a shift to the ‘project of the self.’ In a society of constant social and economic change, the individual has become the agency of change in search for stability.<sup>160</sup> This he argues has resulted in a shift in approaches to contemporary intimate relationships. He suggests that intimate relationships are now fluid and ‘entered into for its own sake, for what can be deprived by each person from a sustained association with another’ and thus ‘pure relationships.’ In this relationship, autonomy of the self allows individuals to be ‘self-reflective and self-determining’ and the capacity to ‘determine and regulate the conditions of their association.’<sup>161</sup> Ulrich Beck and Elisabeth Beck Gernsheim<sup>162</sup> also recognise the transformations of intimacy, the family and individual relationships. They argue the economic and social changes have brought a shift away from community cohesion to instability. The

---

<sup>154</sup> Foucault, M., in *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* C. Gordon Ed. (Brighton: Harvester Press, 1980) p141 in Hunt, A., & Wickham, G., *Foucault and Law Towards a Sociology of Law as Governance* (London: Pluto Press, 1994) p41.

<sup>155</sup> Diduck, A., & Kaganas, F., op.cit. p32; O’Donovan, K., op.cit. p39; Smart, C., *The Ties That Bind* op.cit. pxiii.

<sup>156</sup> Smart, C., *the new family?* p24.

<sup>157</sup> McGlynn, C., op. cit. pp30-5.

<sup>158</sup> Giddens, A., *The Transformation of Intimacy* (Cambridge: Polity Press, 1992).

<sup>159</sup> Beck, U., & Beck-Gernsheim, E., *The Normal Chaos of Love* (Cambridge: Polity Press, 1995).

<sup>160</sup> Giddens, A., *ibid*, p156

<sup>161</sup> Giddens, A., *ibid*, p58, and discussed in Diduck, A., *Law’s Families*, (UK: Lexis Nexis, 2003) p5 and in McGlynn, C., op.cit. pp30-1.

<sup>162</sup> Beck, U., & Beck-Gernsheim, E., op.cit. p5.

authors argue that interpretations of what family, marriage and sexuality mean are no longer possible. The meanings are dependent on negotiation and fluctuate from individual to individual. There are, they suggest, no 'standard biographies' or rules to regulate behaviour. Individuals have the independence to create their sets of rules or behaviour. Nevertheless, as they contend, 'The mixture of new attitudes and old conditions is an explosive one in a double sense.'<sup>163</sup>

Yet there are challenges to individualisation. While applauding individualisation Carol Smart also suggests there is a deficiency between how theorists of individualisation understand family practices and the reality of contemporary family life revealed by closer studies of specific family groups.<sup>164</sup> Clare McGlynn also points out difficulties, the root of which she argues lies in gender politics. McGlynn suggests that Giddens' standpoint relies on gender equality and the ability to challenge inequality. Yet there is, she contends, a difference between the ideal and the reality.<sup>165</sup> As such, the continuity of gender differences and the idea of the traditional family persist albeit in a more complex form.<sup>166</sup> The relevance of individualisation to the family in the inter-war period is, in retrospect, significant within the 'mixture of new attitudes and old conditions.' The case studies will provide a unique insight to this argument illustrating the outcomes in relation to the structure of families. Nevertheless, new ways of explaining arrangements of family life continue to emerge and this next section offers a brief outline.

### Contemporary Family Theories

Smart suggests that the theories of individualisation do not reveal the vibrancy of family life. Recently she argued that she wanted to shift away from the 'flat world of most sociological accounts of relationships and families.'<sup>167</sup> Smart has drawn on the works of David Morgan and his idea of family practices, Janet Finch and Jennifer Mason and their notion of including kinship relationships into family life, another

---

<sup>163</sup>Beck, U., & Beck-Gernsheim, E., *ibid*, p14.

<sup>164</sup>Smart, C., *Personal Life* op.cit. p17.

<sup>165</sup>Jamieson, L., 'Intimacy Transformed? A Critical Look at the "Pure" Relationship' *Sociology*, 1999 (33) at 477-94 as discussed in McGlynn, C., op.cit. p33.

<sup>166</sup>McGlynn, C., *ibid*, p33

<sup>167</sup> Smart, C., *Personal Life* op.cit. p3.

move away from the strict ideal of the nuclear family.<sup>168</sup> Smart argues that as ‘the sociological imagination stretches and reconfigures in order to better grasp and reflect the complexities of contemporary personal life’<sup>169</sup> there is a new development and broader scope of explaining family change. Thus, she is developing the concept of ‘personal life’ that can encompass the traditional families, other family structures and kinship systems that widens the narrow idea of the family.<sup>170</sup> Engaging with the significance of memory, shared possessions, positive and negative emotions, she points out all play a significant way to formulate another approach to understand the family and family practices.<sup>171</sup>

Although not specifically identified in Smart’s study, the sociological imagination reflects the work of C. Wright Mills in the 1970s. Wright Mills pointed out that the sociological imagination ‘enables us to grasp history and biography and the relations between the two within society.’<sup>172</sup> While the approach is generally criticised for not being scientific, Smart contends this perspective does give a depth that statistical evidence fails to provide. This is a notable shift away from the scientific empirical and ‘flat world’ of sociological statistical analysis that has dominated sociology at least in the past decade. An approach that Smart has actively engaged in with thought provoking outcomes.

This part of Section 1 has outlined the principal sociological theories and highlighted emerging approaches to explain changes in the family structure. From reading the broader social context of the inter-war period, each of these perspectives has some relevance, as Chapter 3 will uncover. Consequently, different approaches can be applied to the ways families appear to arrange their lives. Just as there is no one-way to define the family there is equally no single way

---

<sup>168</sup> Finch, J., & Mason, J., *Negotiating Family Responsibilities* (London: Tavistock/Routledge, 1993); Finch, J., & Mason, J., *Passing On: Kinship and Inheritance in England* (London: Routledge, 2000) and discussed in Smart, C., *Personal Life* ibid, p33.

<sup>169</sup> Smart, C., *Personal Life* ibid p27.

<sup>170</sup> Smart, C., *Personal Life* pp27-31.

<sup>171</sup> Kuhn, A., ‘Family Secrets: Acts of Memory and Imagination’ (London: verso, 1995) Steedman, C., *Landscape for a Good Woman* (London: Virago) 1986; Steedman, C., *Past Tenses: Essays on Writing, Autobiography and History* (London: Rivers Oram Press, 1992) as discussed in Smart, C., *Personal Life* pp1-5.

<sup>172</sup> Wright Mills, C., *The Sociological Imagination* (Harmondsworth, Penguin, 1970) p6.

to analyse the family and the changing structure of the family. However, as John Eekelaar argues 'The difference lies only in the interpretation of the facts.'<sup>173</sup>

### **Primary Concepts and Themes.**

Indications show that the ways a vast number of individuals now organise their family lives challenges the ideology of the nuclear family. Parenthood is now blurred and its origins the impact of a number of shifting trends and ideas. In this, the second wave of feminism and women's demands for autonomy and their increasing involvement in the workforce, as noted earlier in this chapter, have challenged the traditional ideas of gendered parenthood. Feminist thought also, as will be discussed further in Chapter 4, raised questions for men, their family and their sexuality through the emergence of the study of masculinities, and demonstrated through fathers' rights groups. The state has also played a role in reinforcing blurred parenthood through the impact of socio-economic changes and ideas of functionalism are now reflected in family social policy. Chapter 4 will explore this argument in more detail.

The shifts have influenced changes to the concept of gendered parenthood. New prescriptions of parenthood have emerged that raise contradictions for both fathers and mothers that are visible in post-separated families and acute in cases of dispute in residency and contact law. Alongside this, clearly there has been a shift in the interpretation of childhood that links with the concepts of motherhood and fatherhood around the care of the child. This signifies a shift in the relationship between the father and the child.<sup>174</sup> As statistics show, fathers are claiming their rights to be involved with parenting post-separation. The state through the law and social policy advocates a similar stance. However, the shifts in the concepts of fatherhood and childhood must include a comparable shift in the concept of motherhood. This raises questions on the discourses of motherhood.<sup>175</sup> Historically the mother/child bond has been inseparable; one concept could not be understood without reference to the other. There are now challenges to ideas of motherhood. Thus, the principal concepts of inquiry form around gendered parenting: motherhood, fatherhood and childhood

---

<sup>173</sup>Eekelaar, J., 2<sup>nd</sup> Ed. *Family Law and Social Policy* (London: Weidenfeld and Nicholson, 1984) p16.

<sup>174</sup>Collier, R., op.cit. p69.

<sup>175</sup>Boyd, S., op.cit. 497; Smart, C., 'The Legal and Moral Ordering of Child Custody' 1991, *Journal of Law and Society* 18 4 pp585-500.

within the changing structure of family law. Section 2 sets out to examine the relationship of the family within the context of the law. While the law and the family now incorporate a broad area, the focus will be on the governance of legal responsibilities within intimate relationships of family life.

## **Section 2**

### **Law and Family Relations**

#### Family Law

Family law is a relatively recent area in the legal field. Nevertheless, this is not to say that the law did not deal with family relationships in the past. However, as the historical analysis will show the system was eclectic in its development emerging from ancient history, Roman law and the needs of the dynastic landed gentry. Today, family law generally concerns the laws governing a wide spectrum of family life. Taxation, immigration, welfare and social security, crime, education and human rights laws also affect family life.<sup>176</sup> Yet family law also governs close relationships between adults, parents and children. The law deals with contentious issues of family life. This raises questions as to the extent the state intervenes in the intimate lives of individuals. As Alison Diduck and Felicity Kaganas contend, as in other disciplines, dealing with these issues ‘often reflect a judgement about the value of the family unit in question relative to the dominant ideology of the family at any given historical moment.’<sup>177</sup>

#### The Legal Family

Just as there is no clear definition of the sociological understanding of the family, how the law defines families is also fluid.<sup>178</sup> Katherine O’Donovan argues that the ‘test’ of what a family is in law relies on what the ‘ordinary man’ would say and provides the

---

<sup>176</sup>O’Donovan, K., op.cit. pp10-2; Diduck, A., & Kaganas, F., op.cit.p18; Herring, J., op.cit. pp10-2.

<sup>177</sup>Diduck, A., & Kaganas, F., op.cit pp17-8.

<sup>178</sup>Dewar, J., op.cit p18.

opportunity for societal shifts in moral issues.<sup>179</sup> A number of cases under the Rent Act are illustrative of this point. *The Rent Act 1977* para 7 of Part 1 of Sch1. states that a statutory tenancy passes automatically on the death of the first tenant to a member of that tenant's family who was residing with him or her at that time. In the 1950s case *Gammans v Ekins*<sup>180</sup> the courts decided that a cohabitating heterosexual couple were certainly not within the 'ordinary' understanding of a family.<sup>181</sup> Nevertheless, by 1976, in the case of *Dyson Holdings v Fox*<sup>182</sup>.the situation had changed. Lord Denning argued: 'we should hold that a couple who live together as man and wife for 20 years are members of the same family, whether they have children or not.'<sup>183</sup> Yet, in *Sefton Holdings v Cairn*<sup>184</sup> two women who had lived together as sisters for a considerable length of time most certainly did not in the eyes of the law constitute a legal family. Likewise, in the case of *Harrogate Borough Council v Simpson*<sup>185</sup> two women in a lesbian relationship made the same appeal. In 2000<sup>186</sup> the House of Lords by a majority of three to two recognised a long-term homosexual relationship as a family unit, although not as a spouse in the case of *Fitzpatrick v Sterling Housing Association*<sup>187</sup>. The term 'family' it was argued could include individuals not bound by marriage or blood. Family life should be 'a degree of mutual inter-dependence, of the sharing of lives, of caring and love, or commitment and support.'<sup>188</sup> This argument contrasts with the idea that a 'family' should rest on a sexual relationship or the likelihood of such a relationship.<sup>189</sup>

In the wider context, the European Court of Human Rights recognises the diversity of family structures and the right to protect such families as well as single parents who have never lived together although not same-sex families. However, in English law the House of Lords, offers the same protection to same-sex couples on the grounds of discrimination under Article 14A as demonstrated in the case of *Ghaidan v*

---

<sup>179</sup>O'Donovan, K., op.cit. p34.

<sup>180</sup>[1950] 2 KB 328.

<sup>181</sup>[1950] 2 KB at 512 G.

<sup>182</sup>[1975] 3 All ER 1030.

<sup>183</sup>Lord Denning MR in *Dyson Holdings v Fox* [1975] 3 All ER 1030.

<sup>184</sup>[1988] 2 FLR 109

<sup>185</sup>[1986] 2 FLR 91

<sup>186</sup>[2000] 1 FCR 21 HL.

<sup>187</sup>[1986] 2 FLR 91

<sup>188</sup>[2000] 1 FCR 21 at 35.

<sup>189</sup>Herring, J., op.cit. p5.

*Mendoz.*<sup>190</sup> In this case, Baroness Hale argued that same-sex couples have the same inter-dependency as heterosexual couples. The deciding factor she added was the stability of a sexual relationship that defined the family. Therefore, it would appear that English law now accepts a widening understanding of the legal family.<sup>191</sup>

Nevertheless, following separation, the idea of the nuclear family still holds. According to Diduck and Kaganas, the idea of marriage and the nuclear family remains a central tenet of the law and social policy despite the laws' acceptance of the diversity of family units.<sup>192</sup> Dominant narratives continue to pursue a legal conformity of the family albeit through the idea of stability. The regulation of the post-separated family illustrates this argument. As Katherine O'Donovan contends, the law leaves open a definition of the family as 'framed in terms of public opinion and individual choice.'<sup>193</sup> Consequently as a number of feminist authors argue, it is perhaps not marriage that the law privileges but a 'superior, lawful form of family life.'<sup>194</sup> This part of Section 2 has considered the relationship between the family and the fluidity of how the law defines families. It is within these shifting interpretations of the legal family, the next section offers an overview of the relationship between the law and the family.

## **Regulating the Family**

There are different approaches to examine the relationship of the law and the family. This section will focus on the principal methodologies that offer an understanding as to what the law does for the family.

### Functionalism

Functionalism is acceptable through its simplicity as an attraction to the complex area of family law.<sup>195</sup> According to John Eekelaar there are three aspects of the function of

---

<sup>190</sup>[2004] 3 All ER 411;[2004] UKHL 23

<sup>191</sup> Baroness Hale, as discussed in Diduck, A., & Kaganas, F., op cit pp23-6.

<sup>192</sup>Diduck, A., & Kaganas, F., ibid, p23.

<sup>193</sup>O'Donovan, K., op. cit. p27.

<sup>194</sup>Smart, C., *The Ties that Bind* op. cit. pxii; O'Donovan, K., ibid, p 39;Diduck, A., & Kaganas, F., op. cit. p32.

<sup>195</sup>Collier, R., op cit p58.



family law. Firstly, to protect a member of the family from physical, emotional and economic harm; secondly, to support fractured families post-separation and thirdly, to promote and support family life.<sup>196</sup> Yet the law can be contradictory. For example, as Jonathan Herring points out, the *Family Law Act 1996* both advocates marriage and provides the legal mechanisms to make divorce less acrimonious and less expensive. Yet while the law has made legal separation easier, where there are children it also underlines the necessity for continued contact particularly where there is dispute between the parties.

In the broadest sense, during the nineteen twenties and thirties legislation reinforced the gendered division of labour to support family life albeit a specifically gendered family model. Regarding legal separation, divorce and child custody laws there was, as indicated, no formal system of support. Reported contested child custody cases were few. The magistrates' courts provided informal advice to the poor and working class parents with matrimonial difficulties.<sup>197</sup> The lower courts dealt with legal separation and maintenance orders. Thus, help for the families in crisis was limited. Chapter 3 will explore this area in more detail.

### The Public and Private Divide

In law, the public and private divisions have implications for the family regarding the extent to which the state and the law can support and/or intervene.<sup>198</sup> The difficulties lie in the blurred boundaries between the public powers and private freedoms. While the law simultaneously constitutes the divisions, the law also engages with the divisions to rationalise or criticise where legally state interventions have been set. As Diduck and Kaganas argue, the division between a public and private life have 'enormous repercussions for what we believe to be the state's responsibility for assisting families.'<sup>199</sup> This raises the question as to what extent can the state through the law intercede in the private sphere of family life?

---

<sup>196</sup>Eekelaar, J., op. cit. pp 24-6; Eekelaar, J., 'Family Law and Social Control' in Eekelaar, J., & Bell, J., Eds. *Oxford Essays of Jurisprudence* (Oxford: Oxford University Press, 1987) discussed in Herring, J., op. cit. p14.

<sup>197</sup>Behlmer, G.K. *Friends of the Family* (Stanford, California: Stanford University Press, 1998) p194.

<sup>198</sup>Herring, J., op. cit. pp16-8.

<sup>199</sup>Diduck, A., & Kaganas, F., op. cit. pp13-4.

The idea of the divisions of the public and private spheres offers an understanding of the historical reluctance to intervene in the private sphere of family life. For example, until recently there has been an unwillingness by the police to intervene in situations of domestic violence.<sup>200</sup> Nevertheless, in cases of domestic violence intervention by the public sphere must encroach on the private sphere of the home to allow individuals to have the right to freedom of their choice. Yet, justices of the peace and police magistrates' courts had a history from the eighteenth played a significant role in the intervention of family life. Albeit on an informal basis, the police courts, magistrates and later probation officers did intervene where there were matrimonial difficulties.<sup>201</sup> From another perspective, raising children is another area where the divisions between the public and private are difficult. Since the nineteenth century, there has been a growing intervention of family life through increasing legislation in relation to the education and safety of children. Thus, while children are the 'private' responsibility of the parents it is also a public matter in that the state's standards set out to parents.<sup>202</sup>

Nicholas Rose contends that the public/private divide is a theoretical message designed to justify legal decisions. The family in the public sphere 'has been distinguished from political life, yet defined by law and permeable to both compulsory and voluntary interventions.'<sup>203</sup> The power of the state through the law (and other profession institutions) 'polices' or advocates a particular direction according to dominant narratives.<sup>204</sup> This links with the thinking of Michel Foucault and Jacques Donzelot. Despite the idea of the privacy of the family, the state through legal intervention supports particular normative values. Thus, the exclusion of public intervention and legal regulation on the private family is a myth.<sup>205</sup> This is explicit in the reconstruction of the family post-separation particularly where there are contestations around issues of parenthood.

---

<sup>200</sup> Diduck, A., & Kaganas, F., *ibid*, p14.

<sup>201</sup> Behlmer, G. K., *op. cit.* p181-207.

<sup>202</sup> Bainham, A., 'The privatisation of the public interest in children' 1990 *Modern Law Review*, 53, p458 discussed in Herring, J., *op.cit.* p18.

<sup>203</sup> Rose, N., *op.cit.* p70; Herring, J., *ibid*, p18.

<sup>204</sup> Rose, N., *ibid*, p66.

<sup>205</sup> Rose, N., *ibid*, p65.

The next part turns to outline another major perspective in relation to the law and the family. Feminist perspectives in family law have played a significant role in challenging the law and it is to this the next section now turns.

### Feminist Perspectives in Family Law

Feminist thought and strategy has challenged the legal framework. Indeed, as indicated above this was the principal aim of the ‘first wave’ of feminism. The emphasis of the ‘second wave’ of feminism centred on the ways law and the social structure maintained the gender inequalities at work and in the family.<sup>206</sup> There are suggestions that women ‘have it all’ and are (again) ‘darlings of the law.’<sup>207</sup> Through a raft of legal reforms throughout the last three decades, women have achieved a measure of formal legal equality. For example, the *Equal Pay Act 1970*, and the *Sex Discrimination Act 1975*. More recently, European Union directives have widened the opportunities for gender equality with maternal and paternal leave and policies to balance work and family life. Together this is an impressive list. Yet in reality, contradictions remain.

Feminist perspectives uncover underlying subtle dynamics, which allow the law to maintain power and women’s biased position. For example, the introduction of the *Abortion Act 1967* allows women choice and autonomy of their bodies. Yet, as Carol Smart contends, the law retains power and merely sanctions the medical profession to deal more compassionately with abortion.<sup>208</sup> Legal feminists contend that the law does not overtly serve to uphold men’s interest since it operates in an uneven fashion. However, this does shroud the subtle ways law and society regulates patriarchal authority. The law, Carol Smart argues, ‘is gendered.’<sup>209</sup> She suggests, ‘legislation does not create patriarchal relations but it does in a complex and often contradictory fashion reproduce the material and ideological conditions under which these relations survive.’<sup>210</sup> The law, ‘*legitimises*’ the conditions that allow inequality of power

---

<sup>206</sup>Barnett, H., op. cit. p3.

<sup>207</sup>The idea of women as the ‘darling of the law’ emerged during the late 19<sup>th</sup> century and has been employed number of times throughout the 20<sup>th</sup> century by legal commentators and the judiciary. The term will be referred to and analysed at relevant points throughout the study.

<sup>208</sup>Barnett, H., op. cit. p7.

<sup>209</sup>Smart, C., *Law, Crime and Sexuality* (London: Sage Publication Ltd., 1995) p187.

<sup>210</sup>Smart, C., *The Ties that Bind* op.cit. pp 19-20 also discussed in Barnett, H., op.cit. p7.

relations in the family.<sup>211</sup> Thus, feminist thought has exposed the ways that marriage maintains women's economic dependence perpetrating women's subjective role within the family.<sup>212</sup> For feminists the family is a contested site of power relationships.

A clear example in relation to this thesis is the use of the scientific truths of the welfare of the child to reinforce shifting dominant narratives in the field of child custody law.<sup>213</sup> Legislative changes and social policies have reinforced this concept in residency and contact law and fathers' rights groups captured that same idea. Children then become even more a part of the power relations within the family.<sup>214</sup> This is evident in social and legal policy that encourages the reconstruction of the nuclear family post-separation and the threat of repercussions if not met. As Carol Smart argues, there would appear to be increasing intervention by the law and consequently increases in the power of the law.<sup>215</sup> In the contemporary era, the 'third phase' of feminism would appear to have little to be concerned with the law. Yet other issues have emerged such as rape, abortion, domestic violence and the sexual abuse of children. Through a feminist approach to the law, these concerns have highlighted the inadequacies of the law to protect vulnerable women and children.<sup>216</sup> Therefore, the law operates within shifting narratives and changing family structures. Consequently, what the law does for the family is constantly varying.<sup>217</sup> The law's relationship with the family is not straightforward and is constantly reshaping itself through other narratives.

---

<sup>211</sup> Smart, C., *ibid*, p5.

<sup>212</sup> Smart, C., *ibid*, pxi-xii.

<sup>213</sup> Smart, C., *Feminism and The Power of Law* (London: Routledge, 1989) pp9-10.

<sup>214</sup> Smart, C., 'Power and the Politics of Child Custody' in Smart, C., & Sevenhuijsen, S., Eds. *Child Custody and the Politics of Gender* (London: Routledge, 1989) p1.

<sup>215</sup> Smart, C., *The Ties That Bind op cit* p14.

<sup>216</sup> Smart, C., & Brophy, J., 'Locating the law: a discussion of the place of law in feminist politics' in Smart, C., & Brophy, J., Eds. *Women in Law Exploitations in law family and sexuality* (London: Routledge, 1985) p16.

<sup>217</sup> Such as the autopoietic theory advocated by Michael King. King suggests that the law is only one system of communication within society and has a particular way of looking and communicating with society and differences between each system. King, M., 'Future uncertainty as a challenge to law's programmes: the dilemma of parental disputes 2000 *Modern Law Review* 63 p523 and discussed in Herring, J., *op.cit.* p19.

## Current Debates in Family Law

There are a number of current debates between the law and the family. These include such issues as the deregulation of family law. Government policy encourages separating couples to use mediation services to settle disputes, financial or arrangements for the care of children to replace lawyers and court proceedings. This, as Jonathan Herring points out, is paradoxical where there are calls for a more open family court.<sup>218</sup> The infrastructure of court support was not to the same extent during the nineteen twenties and thirties. As indicated above, there was a measure of support through magistrates and probation officers in the police courts.<sup>219</sup> Therefore, while de-regulation was not an overt consideration perhaps there were subtle discretions. Alongside this the idea of ‘moral fitness’ to parent appears to have resurfaced. This was a significant factor in deciding custody cases in the late nineteenth century, particularly the moral fitness of mothers. By the 1920s, the judiciary took a more compassionate view, and a number of cases demonstrate this for example, in the case of *B v B*<sup>220</sup> and the case of *R v Carroll*.<sup>221</sup> Chapters 2 and 3 will explore these debates in more detail. However, there is now perhaps a more complex and covert approach towards ‘moral fitness’. There is an increasing reluctance by judges to make such decisions of fitness to parent and a ‘settlement culture’ is emerging.<sup>222</sup> Separating parties are encouraged to settle their arrangements outside the courts.<sup>223</sup> Yet, as Janet Finch contends, it is ‘not the proper role of governments to presume that certain outcomes would be more desirable than others.’<sup>224</sup> However, the unwillingness to make such a judgment suggests an argument as to whether there is a

---

<sup>218</sup>Herring, J., *ibid*, pp20-1.

<sup>219</sup>Cretney, S., *op.cit.* p570.

<sup>220</sup>[1924] P. 176-94.

<sup>221</sup>(*no 2*) [1931] 1 K B 317. In this case the rights of a single mother ‘of so bad character and has so neglected her duty’ maintains the legal right to bring her child up in the religion she chooses. *R v Carroll* (No 2) [1931] 1 KB 317.

<sup>222</sup>Herring, J., *op.cit.* p22.

<sup>223</sup>Bailey-Harris, R., Barron, J., and Pearce, J., ‘Settlement culture and the use of the “No Order” Principle under the Children Act 1989’ 1999 *Child and Family Law Quarterly* 11 p54 discussed in Herring, J., *ibid*, p23.

<sup>224</sup>Finch, J., *The State and the Family, lecture to inaugurate the Institute’s annual theme for 1996-7*, 30 October 1996, Edinburgh: International Social Sciences Institute at 13 as discussed in Smart, C., & Neale, B., *family fragments?* (Cambridge: Polity Press, 1999) p24.

common body of moral standards in society.<sup>225</sup> As Regan points out, not making a moral judgment could in fact convey a moral stance by its very denial.<sup>226</sup>

The reduction of legal aid is also a current issue of debate. The increasing numbers of divorce petitions and economics have driven moves to curtail the costs of legal aid. In addition, it is increasingly difficult to find legal practitioners who will accept legal aid work. Thus, while reforms have given wider access to the law it would seem that the practicality of financial resources could restrict access to the law. Another debate focuses on the semiotic impact of law. As Galanter suggests, the modern law functions through “‘indirect symbolic controls’ and by ‘radiating messages’.”<sup>227</sup> The Children Act 1989 is a clear example, as are the Law Commission’s Discussion Papers. Both send clear messages that reinforce dominant narratives and inform social policies and legal reforms. This links with the viewpoints of Foucault and Doznelot, and feminist perspectives of the use of power to maintain dominant narratives. However, this is not a new practice. Parliamentary Committee Reports sent out clear statements of their visions on matters of marriage, divorce and fractured families, as Chapters 3 and 4 will illustrate. Although these issues are *current*, it is debatable as to whether the majority of the issues are new and have a measure of relevance between the family and the law in previous periods.

## Rights to Responsibilities

The shift from rights to responsibilities is probably one of the most contentious contemporary debates in family law. Over the last two centuries, there have been dramatic changes relating to the rights and responsibilities towards children. Indeed, as Susan Boyd argues, since the nineteenth century, there has been a swing full circle and half way round again in the rights and now responsibilities of post-separation parenting<sup>228</sup>

---

<sup>225</sup>Munby, J., ‘Access to and Reporting of family proceedings’ 2005 *FamilyLaw* 35 p945 as discussed in Herring, J., op.cit. p23.

<sup>226</sup>Regan, M., ‘Morality, Fault and Divorce Law’ in King White, M., *Marriage in America* (Lanham, Md.: Roman & Littlefield, 2000) discussed in Herring, J., ibid, p23 fn 172.

<sup>227</sup>Galanter, M., ‘Law Abounding: Legislation around the North Atlantic’ 1992 *Modern Law Review* 55 p1 and discussed in Dewar, J., op.cit. p474.

<sup>228</sup>Boyd, S., op.cit.p2.

Historically, up until the beginning of the nineteenth century, by law a father's legal rights of custody of his legitimate children were virtually absolute. A father had sole rights of custody and control over his children their possessions and property. A married mother had no legal rights over her children either during the father's lifetime or after his death. The case of *R v De Manneville*<sup>229</sup>, to be discussed in Chapter 2, demonstrated the extent of fathers' rights over their children. In this case the child, a baby, was forcibly removed from the mother. Indeed the strength of father's rights was such that the courts had no power to grant a mother the legal rights to access or custody of her children unless the father agreed. Nevertheless, legal reforms introduced during the nineteenth century gradually gave mothers the right on separation, to apply for access and custody of their children. By the end of the century, the courts had the power to apply such an order 'having regard to the welfare of the infant'.<sup>230</sup> Nevertheless, in the case of *Re Agar-Ellis*<sup>231</sup> the father's rights were upheld against the mother's and the child's wishes. The *Guardianship of Infants Act 1925*<sup>232</sup> did however introduce formal equal rights to both parents to apply for custody of their children following separation. However, this did not give separated or married mothers legal rights to custody of their children, after separation the mother had the legal right to *apply* for custody. Thus, equality of legal rights to their children has been the struggle of mothers. The struggle for legal parental rights was a mother's struggle. Indeed, it was not until the *Guardianship of Infants Act 1973*<sup>233</sup> that gave married mothers equality with fathers of rights over their children. Nevertheless, during the twentieth century there was a gradual shift towards maternal presumption reinforced by ideas of the wellbeing of the child and the mother/child bond. However, during the nineteen seventies, fathers' rights groups emerged demanding their rights to shared parenting post-separation. Yet, historically fathers have always had legal rights of custody to their children, in marriage and following separation as the natural guardian of legitimate children.<sup>234</sup> Alongside the claims of

---

<sup>229</sup>[1804] 5 East 221.

<sup>230</sup>s 5.

<sup>231</sup>1878] 10 Ch D 49 (CA); (No. 2) (1883) 24 Ch D 317.

<sup>232</sup>s 2.

<sup>233</sup>S 1 (1).

<sup>234</sup>Diduck, A., & Kaganas, F., 2<sup>nd</sup> Ed. op.cit. p279.

separated fathers, wider political, legal, and social policy debates instigated reviews of the laws of child custody and guardianship.<sup>235</sup>

The introduction of the *Children Act 1989* revolutionised this area of family law. The Act finally gave married mothers and fathers legal equality in their responsibilities to their children. The Act also introduced a new language and a different approach to child custody law. The concepts of ‘responsibilities’ and ‘residency and contact’ replaced the historical ideas of ‘custody’ and ‘rights’ of legal possession.<sup>236</sup> The Act reinforced the principle of the welfare of the child as paramount and the wishes of the child (depending of age and understanding) to be considered and the responsibility of the care of children post-separation lay with both parents. The Act stated that ‘parental responsibility means all the rights, duties, powers and responsibilities which by law a parent of a child has in relation to the child and his property’.<sup>237</sup> Thus, in shift to responsibilities the concept of rights remains and the complex issues would seem to lie in the execution in cases of contested cases between post-separated parents. In Chapter 4, the implementation of the Act, the controversies and difficulties will be explored more fully.

## Rights of the Child

At the heart of the shifts from rights to responsibilities is the welfare of the child. The courts must ensure parents have made suitable arrangements to ensure the child’s welfare and best interests. In recent years, claims have suggested the concept has become politicised.<sup>238</sup> Indeed, the principle has become a powerful language in public policy, judicial decisions and the ‘rights’ argument between separated parents particularly fathers. Yet children now also have legal rights. This is clear in the UN Convention on the Rights of the Child (UNCRC), (ratified by the UK in December 1991) the EU Charter and the European Constitution. Every child in the UK is now entitled to certain rights that include a child’s right to a life survival and development; the right to have their views respected, and to have their best interests considered at

---

<sup>235</sup>*The Law Commission Family Law Review of Child Law: Guardianship and Custody Working Paper No 91* (London: HMSO, 1985).

<sup>236</sup>*The Children Act 1989*, S. 1.

<sup>237</sup> s 3.

<sup>238</sup>Eekelaar, J., op. cit. pp122-3.



all time; the right to live in a family environment or alternative care, and to have contact with both parents wherever possible.<sup>239</sup> UK, Government policy has stated that a child has, ‘the right to the best possible start in life and parents have a clear responsibility to protect and provide for their children so that children can make the most of their lives.’<sup>240</sup> Alongside this England has a Children’s Commissioner, promoting children’s views and the Children’s Rights Alliance for England. The latter a non-governmental organisation reviews how well the government reacts to the Committee’s findings and recommendation. Thus, there are legal rights versus policy rights and an added factor, in this case the rights of the child, into the debates around the legal reforms and shifts from rights to responsibilities that raise questions of who holds responsibilities. This is a particularly complex in light of the blurring of the gender roles of parenthood. The next part of this section considers briefly the changes that have emerged in this area.

### Legal Responsibilities

The woman who gives birth is legally the mother and has automatic responsibility towards her child. Only if a number of legal requirements are met does a father have parental responsibility such as being married to the mother. Unmarried fathers on the other hand can only have parental responsibility if registered, with the permission of the mother, as the father of the child.<sup>241</sup> A father can however obtain parental responsibility through a court order.<sup>242</sup> Thus, the law has the power to control which fathers gain parental responsibility. Heterosexual or non-heterosexual partners who live together in a stable relationship can adopt and thus obtain legal responsibility for the child.<sup>243</sup> Indeed, in the case of *Re G (children) (residence: same-sex partner)*<sup>244</sup> (discussed more fully earlier in this chapter) the courts granted a non-biological same-sex parent a shared residence order primarily to confer step-parent/carer status. The law thus sent out a clear message that in a society where families can include step-parents, married or cohabiting or same-sex couples the relationship children develop

---

<sup>239</sup>Articles 6, 7, and 13 as discussed in Herring, J., op.cit. p31

<sup>240</sup>*Children Rights and Parental Responsibilities* (London: Department of Social Security, 2000) p1

<sup>241</sup>CA 1989, s 4, amended by the *Adoption and Children Act 2002*.

<sup>242</sup>CA 1989, s 4.

<sup>243</sup>*Adoption and Children Act 2002* s 144 (4) b.

<sup>244</sup>[2006] All ER (D) 71.

with a step-parent, either heterosexual or same-sex remains important and should not be dismissed on the event of separation of the parties.<sup>245</sup>

Advances in reproduction technologies raise further complex issues of parental responsibilities.<sup>246</sup> It is now possible for a woman to give birth to a child not genetically related to her.<sup>247</sup> However, an adoption order or parental order will allow a woman who is not the birth mother, to obtain legal responsibility. For fathers the law is more complicated. In an assisted reproduction birth, the husband is the father and has legal responsibilities for the child unless he did not consent to the insemination.<sup>248</sup> The *Human Fertilisation and Embryology Act 1990* states that donors do not have legal responsibilities towards any children born, since the donation is given and used with the donor's consent as stipulated by a licensed clinic. If the mother is unmarried, and the licensed clinic provides AID to her and her male partner the law recognises the male partner as the father.<sup>249</sup> The cases of *R v Human Fertilisation and Embryology Authority Ex p. Blood* [1999] Fam 151<sup>250</sup> and *Evans v UK* [2006] 43 EHCR 21<sup>251</sup> add to the complexities.

Other parties can obtain parental responsibilities, if appointed as guardian or they obtain a residence or emergency protection orders. However, parental responsibility here does not include parental rights. As Andrew Bainham argues, legal parental responsibility is fraught with complexities and differences between 'having genetic parentage established, being a legal parent and possessing legal responsibility.'<sup>252</sup> From this overview, current debates within family law are complex. Consequently, there would be a need for a multifaceted approach to understand the intricate and rapidly shifting relationships between the law and the family. The emergence and

---

<sup>245</sup> Arnot, L., & Harte, E., 'Shared Parenting-The Clear Message From *Re G*' 2005 *Family Law* September p718-21.

<sup>246</sup> Davidoff, L., *et al* op.cit. p4.

<sup>247</sup> Bridge, S., 'Assisted Reproduction and the Legal Definition of Parentage' in Bainham, A., *et al* op.cit. p74; Herring, J., op.cit p306.

<sup>248</sup> *Family Law Reform Act 1986*, S 27 as discussed in Diduck, A., & Kaganas, F., op.cit. p157.

<sup>249</sup> *Human Fertilisation Embryology Act 1990*, S 28 as discussed in Diduck, A., & Kaganas, F., op.cit. p157.

<sup>250</sup> In this case after separation of the parties the male donor withdrew his consent to the use of sperm. The courts decided that the rights of the male donor were no less worthy of protection than the female recipient.

<sup>251</sup> Diane Blood sought permission to be inseminated with sperm from her dead husband, the UK courts refused, but the case was upheld in the ECHR and she received IVF treatment in Belgium.

<sup>252</sup> Bainham, A., 'Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions' in Bainham, A., *et al* op.cit. p30-1.

constantly developing socio-legal approach provides such a framework. This next section briefly outlines the history and development of this methodology.

### **The Socio-Legal Approach**

Up until the nineteen seventies, positivist or black letter doctrine dominated the legal academy. However, these approaches provided an appropriate framework to address the complex debates around the family and the law, particularly after the *Divorce Act 1969* that made divorce easier.<sup>253</sup> During the nineteen seventies, the first socio-legal studies emerged.

McGregor, Blom-Cooper and Gibson carried out one of the first socio-legal studies in the field of family law. This innovative research focused on the mechanics of the court systems within the matrimonial jurisdiction and their social effects. The quantitative survey was conducted through questionnaires to Justices' Clerks from 46 courts. The researchers also sought the opinions of separating spouses coming to court.<sup>254</sup> One of the major findings showed that the majority of court records were inadequate and indicating failings in the system and true calculations of maintenance orders. The data also revealed that the majority of magistrates' considered their province 'the Cinderella of their work'<sup>255</sup> and the court system continued to retain a 'criminal atmosphere' in the field of matrimonial law.<sup>256</sup>

Another early study was John Eekelaar's analysis *Family Law and Social Policy*.<sup>257</sup> Eekelaar's focused on the primary functions of family law and the limited scope for study of area within law schools. There was he argued, no attention paid to the social background in which the legal rules operated and even less to the empirical data that indicated the consequences. In the second edition, Eekelaar shifted his emphasis towards a theoretical approach of what he considered were major problems between

---

<sup>253</sup>Boyd, S., op.cit.p256; Jolly, S. 'Family Law' in Thomas, P.A.,Ed. *Socio-Legal Studies* (Aldershot, Hants, 1997) p344.

<sup>254</sup>Here the authors demonstrated great creativity by contacting the *News of the World* and asking their readers for their help. As a result, 1,300 letters arrived from men and women documenting their experiences of the court system. McGregor, O.R., Blom-Cooper, L., & Gibson, C., *Separated Spouses*, London: Gerald Duckworth & Co., Ltd., 1970) at 48.

<sup>255</sup>McGregor, O.R., *et al* ibid, p207.

<sup>256</sup>McGregor, O.R., *et al* ibid, p207.

<sup>257</sup>In 1978 and a 2<sup>nd</sup> Edition in 1984.

the law and the family. He argued that fundamental issues of concern emerged from the role of the family as the primary provider of childcare. Thus, theoretically seeking a solution must concentrate on children, the care of children and children's rights.<sup>258</sup> In their contrasting approaches, both studies are indicative of the diversity the route socio-legal studies would develop.

Family law has shifted considerably since these studies the range of socio-legal research has reflected this. Indeed, the diversity of socio-legal studies incorporating other methodologies is a fundamental strength. Within academia, law courses now accept socio-legal studies as part of the curriculum. The Law Commission, an agency of legal reform, has actively encouraged socio-legal research as part of that change. Yet, as Simon Jolly contends, socio-legal research need not necessarily set out to change the law but to challenge the law through a wide spectrum of approaches.<sup>259</sup> Socio-legal methodologies provide a broader perspective with which to understand relationships between the state, law and the family. This approach allows sociological methods to engage with other aspects of familial relationships such as gender and sexuality and offer a more complex understanding to the study of the law. Consequently, this approach not only contributes much to understanding the social effects of the legal rules but also challenges the narratives the law reinforces.<sup>260</sup> It is within the socio-legal approach this study is located.

Section 2 has focused on the relationship between the law and the family. It has reflected on how the law defines the family and what the law does for the family. This section has also considered current debates within family law that has included the shift from rights to responsibilities. The final part has outlined the socio-legal approach, its emergence, and progress. This has located the contemporary debates of family law within the modern context of the law. Yet this is an historical study. Thus, there have been references to the inter-war period grounding the contemporary debates within the socio-legal framework of that era. The aim of the thesis is to explore and uncover these issues in more depth and the chosen methodology is set out and analysed in the following section.

---

<sup>258</sup>Eekelaar, J., op.cit. p170.

<sup>259</sup>Jolly, S., op.cit.pp342-3.

<sup>260</sup>Boyd, S., op.cit.p256.

### Section 3

#### Methodology

##### Historical Research Methods

This final section of Chapter 1 considers the chosen methodology. The first part outlines the practicalities of the approach while the second part offers an overview of the strengths and criticisms of the method. Since the focus of the thesis is on the nineteen twenties and thirties, the area of study lends itself to historical analysis. Yet as a research method, it is often referred to as supportive and in studies of sociological methods relegated under such titles as ‘unobtrusive measures.’<sup>261</sup> Yet this approach is free from the conscious and sub-conscious influences of an interviewer in a qualitative approach and the limitations of a quantitative methodology. As a method of analysis, it can provide a tool for identifying social patterns and a basis of critical reflexivity. In addition, historical methodologies are useful in that they can disturb certainties.<sup>262</sup> As Anthony Giddens argues, ‘human beings do make their own history [and] (an) understanding of that allow us to change it.’<sup>263</sup>

Historical analysis is fundamentally concerned with locating, selecting and evaluating documentary evidence. However, locating and gaining access to the materials can be frustrating.<sup>264</sup> There are also two different ways of engaging with historical research methods. Firstly, the ‘source orientated’ method that allows the character of the evidence to drive the questions of the project. Secondly, the ‘problem-orientated’ method calls for drawing the principal enquiry from secondary sources then following through with the appropriate primary sources allowing more issues to be drawn.<sup>265</sup>

---

<sup>261</sup>Platt, J., ‘Evidence and Proof in Documentary Research: Some Specific Problems of Documentary Research’ 1981*Sociological Review* 29 1 pp31-52.

<sup>262</sup>Rose, N., op.cit. p61. ,

<sup>263</sup>Giddens, A., 2<sup>nd</sup> Ed *Sociology*, (London: Macmillan Press Ltd., 1986) p166.

<sup>264</sup>Johnson, D., ‘Planning Small-Scale Research’ in Bell, J., Bush, T., & Fox, A. *et al* in *Conducting Small-Scale Investigations in Educational Management* (London: Harper & Row, 1984) p23 discussed in Duffy, B., ‘The Analysis of Documentary Evidence’ in Bell, J., 4<sup>th</sup> Ed. *Doing Your Research Project* (Maidenhead: Oxford University Press,) p22.

<sup>265</sup>Tosh, J., 3<sup>rd</sup> Ed. *The Pursuit of History Revised* (London: Longman, Pearson Education, 2002) at Ch. 4.

Primary resources refer to the materials produced at the period of research such as testamentary evidence. This could include diaries, letters and autobiographies as employed in this thesis. This approach chimes with Carol Smart's recent arguments of the need to include personal knowledge that can add a deeper dimension to the knowledge.<sup>266</sup> Secondary resources relate to other research studies and findings.

The critical analysis of testamentary evidence falls into two segments, external and internal. External criticism sets out to verify the authenticity of the evidence while internal criticism is a more suitable approach in smaller studies in which the documents are critically analysed. This could involve reading government documents or committee reports written during the period under inquiry and understanding the language used. As Brendan Duffy argues, it is important to study the texts carefully. For example, analysing private letters requires learning how to interpret different handwriting. It also involves the ability not to dismiss bias as of little value. In some cases, bias can expose the 'true views' of the individuals involved.<sup>267</sup> It is argued that analysis of documentary evidence is 'common sense' yet historical evidence can produce valuable knowledge and insights.<sup>268</sup> They can provide an understanding of social concerns and inequalities that remain as problematic in social practices and legal rules in the present day.<sup>269</sup>

Utilising the collective skills of historical and sociological methods and theories presents an opportunity that may limit disparities that are apparent where each discipline sets out to seek a 'truth.' Joseph Bryant and John Hall, point out:

history is possible only because it is socially enacted, arising out of the deeds and stories of culturally constituted actors [and] the social is possible only because it is lived and experience temporally, in the flow of historical processes.<sup>270</sup>

---

<sup>266</sup>Smart, C., *Personal Life* .

<sup>267</sup>Duffy, B., op.cit. p132; Tosh, J., op.cit. p169 uses the quote from Raphael Samuel's work of Raphael Samuel Ed. *People's History and Socialist Theory* (London: Routledge & Kegan Paul, 1981) pXLV.

<sup>268</sup>Tosh, J., op.cit. p105.

<sup>269</sup>Hill, M.R., *Archival Strategies and Techniques* (London: Sage Publishers Ltd, 1993) pp 3-7 & 79.

<sup>270</sup>Bryant, J.M. & Hall, J.A., 'Towards Integration and Unity in the Human Sciences: The Project of Historical Sociology' in Hall, J.A. & Bryant, J.M. (Eds.) *Historical Methods in the Social Sciences* Vol. 1 (London: Sage Publications, 2005) pXX1-XXV11.

Each historical period was, they argue, ‘contemporary’ at a specific time. As such, sociological approaches should look beyond the transient contemporary period and trace the origins that informed and shaped the construction of what is now the contemporary period. Thus, in the context of this thesis there is the potential to identify trends and patterns and ascertain whether these were transitory or timeless, general or confined to a narrow area.<sup>271</sup>

The primary criticism of this approach lies in the argument that it is subjective and the antithesis of scientific social research methods.<sup>272</sup> In addition, historical research can often focus on specific event rather than on the broader general picture thus making it more difficult to crosscheck data. There is also the possibility of selectiveness thus a misrepresentation of the facts.<sup>273</sup> Furthermore, there are criticisms on how much a case study can relate to a generalisation. Yet as Bassey contends, the idea of ‘reliability’ is of more importance than ‘generalizability’ provided it is undertaken methodically and critically.<sup>274</sup> There is also the risk that primary resources may be incomplete. This could be through deliberate destruction of the material or of accidental loss. The incompleteness may also be due in the inability to record everything that happened. As John Tosh argues, ‘No historical character, however prominent and articulate, has ever set down more than a tiny proportion of his or her thoughts and assumptions.’<sup>275</sup> While Danaya Wright points out however incomplete, the evidence is valuable and at times all that remains. Thus, there is a need to interrelate with evidence from other sources such as articles, debates and literature set within the context of the time to support the evidence.<sup>276</sup>

---

<sup>271</sup>Bryant, J.M., & Hall, J.A.. op.cit.ppXX1-XXV11.

<sup>272</sup> Plummer, K., (1983) *Documents of Life*, London: George Allen & Unwin Publishers Ltd., p11.

<sup>273</sup>Bell, J., op.cit. p11.

<sup>274</sup>Bassey, M., ‘Pedagogic research; on the relative merits of the search for generalization and study of single events’ *Oxford Review of Education* 7 1 at 85 discussed in Bell, J., 4<sup>th</sup> Ed. *Doing Your Research Project* (Maidenhead: Oxford University Press, 2005) p11.

<sup>275</sup>Tosh, J., op.cit. pp168-9.

<sup>276</sup>Wright, C., op.cit. p219.

## Literature Review

This part of Section 3 looks at a review of feminist literature situated within historical approach to the field of child custody law. The work of Susan Maidment<sup>277</sup> is essential to any study of the historical development of child custody law. This work is a detailed socio-legal study of the historical development of child custody law through an analysis of legal reforms, political debates and case law. Maidment argues that an historical perspective is vital in unravelling the complex issues of the regulation of the care of children post-separation in contemporary times. At the same time, she points out, understanding the legal constitution of divorce and child custody issues must be located within the social context of the changing structure of the family unit and parenting.<sup>278</sup> Julie Brophy also follows an historical approach. However, her focus is on the political debates around the passage of the Guardianship of Infants Act 1925. With Carol Smart she analysed the dynamics of power relationships within child custody laws and the wider agenda of the state. In addition, her analysis of the strategies of the nineteen twenties drew parallels with the legislative reforms regulating the care of children post-separation during the nineteen eighties.<sup>279</sup> She concluded that many of the issues of the power dynamics between the state and the law to maintain a specific family in the earlier period continued.<sup>280</sup>

Recent studies, particularly from Canadian and US authors, have re-introduced the historical development of child custody law as a means of relating to the current debates in this area of family law.<sup>281</sup> Susan Boyd emphasises the importance of an historical approach to the study of child custody law in the study of contemporary debates. In *Child Custody, Law, and Women's Work*,<sup>282</sup> Boyd creates a framework around the socio-economic context of the value of women's work in the private and

---

<sup>277</sup>Maidment, S., *Divorce and Child Custody*, (London: Croom Helm, 1984)

<sup>278</sup>Maidment, S., *ibid*, p1.

<sup>279</sup>With Smart, C., Brophy, J., co-edited the study *Women in Law Explorations in Law, Family and Sexuality* (London: Routledge, 1985). The arguments here focused on the engagement of the law in feminist politics in the late 20<sup>th</sup> century.

<sup>280</sup>Brophy, J., 'Parental Rights and Children's Welfare: Some Problems of Feminists' strategy in the 1920s' *op.cit.* p165; Brophy, J., *Law State and the Family The Politics of Child Custody Law* (PhD. Thesis Sheffield University, 1985); Brophy, Julia, 'Custody law, child care and inequality in Britain' in Smart, C., & Sevenjuisen, S. Eds. *Child Custody and the Politics of Gender* (London: Routledge, Chapman & Hall, 1989).

<sup>281</sup>With Helen Rhoades For example: Boyd, S., *Child Custody, Law, and Women's Work* (Oxford: Oxford University Press, 2003).

<sup>282</sup>Child custody is a term that Susan Boyd chooses to use throughout her study.



public spheres to examine the power relationships between women and men and the inequalities that continue. Martha Bailey comes from an historical perspective of child custody law. Bailey examines the contemporary issues of child access in English law through the historical background of child custody law.<sup>283</sup> Katarina Winton follows a similar route and concentrates on Canadian case studies during the post war period 1945-1960 through the shifting discourses on motherhood.<sup>284</sup> From the US Ann Sumner Holmes examines the period 1886-1925 that is valuable in relation to this thesis.<sup>285</sup> Following the same approach as Winton, Sumner Holmes considers the changing narratives of motherhood and the subtle shifts of attitudes towards adulterous mothers. However, Danaya Wright<sup>286</sup> takes a step further back in the historical context. She analyses the development of child custody laws in the 19<sup>th</sup> century. Her methodology undertakes an analysis of legislation, political commentaries and case studies. Wright traces the history of child custody law to the passage of the *Custody of Infants Act 1839* and the establishment of the *Divorce and Matrimonial Courts in 1857*. In each of her studies, she analyses the ways the state has regulated through the law through the welfare principle and located mothers in a disempowered role, a practice, she contends that continues in the modern era. Wright argues:

Understanding how the history of family law has been written may encourage us to think more critically about the project of writing history in a period which nearly every historical truth we have clung to has been questioned. It may also encourage us to think more critically about family law and the continuing disempowerment of women.<sup>287</sup>

---

<sup>283</sup>Bailey, M., *A Comparative Study of Child Access* (PhD Thesis Oxford University Pembroke College, 1997).

<sup>284</sup>Winton, K., 'The Spoilt Darling of the Law: Women and Canadian Child Custody Law in the Post-war Period (1945-1960)' 2002 *Canadian Journal of Family Law* 2002 19 at 193.

<sup>285</sup>Holmes Sumner A., "'Fallen Mothers' Maternal adultery and Child Custody in England, 1886-1925" in *Maternal Instincts: Visions of Motherhood and Sexuality*, (New York: St Martins, 1997).

<sup>286</sup>Wright D., C., 'The Crisis Of Child Custody: A History Of The Birth Of Family Law In England' *Columbia Journal of Gender and Law*, 2002 11 175; Wright, D., 'Well-Behaved Women Don't Make History' op.cit. p224.

<sup>287</sup>Wright, D., *ibid*, p224.

These recent studies expose the ways that the law has historically maintained post-separated mothers' unequal status. They all argue that this approach continues, if in a more subtle and unobtrusive way.<sup>288</sup>

Feminists in the nineteen seventies turned to women's histories to uncover the inequalities of women's lives. However, a shift in the nineteen nineties to a post-structuralism and postmodernism approach to feminist studies resulted in this approach becoming isolated. It is now argued that there is a need to preserve feminist women's history.<sup>289</sup> As June Purvis argues, 'Finding out about women's daily experiences and therefore, where possible, finding women's own words in the past is a critical aspect of 'feminist' research.'<sup>290</sup> This thesis follows this historical feminist methodology and employs testamentary evidence of women's experiences as a primary resource.

In recent years, analysis of testamentary evidence has proved a means to add valuable insights into the experiences of both men and women. John Tosh's<sup>291</sup> study of masculinities in the Victorian period is a clear example. Tosh analysed diaries and personal documents, to examine the experiences of Victorian men and the ways they negotiated their roles in family life. Tosh argues testamentary evidence is a useful strategy of 'giving voice' to missing history. Yet much of the missing history is women's history. Recent women's studies have shown a revival of this approach uncovering women's experiences. Kaartinen<sup>292</sup> demonstrates this approach through her use of testamentary evidence in relation to women's health in the 17<sup>th</sup> century. In addition, Eleanor Gordon and Gwyneth Nair employed the same methods. Here the researchers drew evidence from personal diaries, correspondence inventories and wills to uncover the roles of middle-class Victorian women in Glasgow.<sup>293</sup> Recently

---

<sup>288</sup> Ann Sumner Holmes, Katerine Winterton and Danaya Wright.

<sup>289</sup> Maynard, M., & Purvis, J., *Researching Women's Lives from a Feminist Perspective* (London: Taylor & Francis Ltd., 1994).

<sup>290</sup> Purvis, J., 'Doing Feminist Women's History: Researching the Lives of Women in the Suffragette Movement in Edwardian England' in Maynard, M., & Purvis, J., *ibid*, p167.

<sup>291</sup> Tosh, J., *A Man's Place* (New Haven: Yale University Press, 1999).

<sup>292</sup> Kaartinen, M., 'Women's Metropolis-Elite Women in London' *Early Modern, 2006 Women's History Magazine*; 53 and 'Women's Illness in 17<sup>th</sup> Century England' *2007 Women's History Magazine* Issue 56.

<sup>293</sup> Far from being restricted to the private sphere of the home their analysis found middle-class women played a significant role in public and civic life in Gordon, E., & Nair, G., *Public Lives* (New Haven & London: Yale University Press, 2003).

the biographies of Idina Sackville and Margaret Forster's edited *Diary of an Ordinary Woman* have used similar approaches.<sup>294</sup> Carolyn Steedman uses her memories to depict her and her mother's childhoods to locate their places in history while in another study looks at the use of historical literature to connect personal dramas with the political debates of the period.<sup>295</sup> It is within this feminist scholarship of family law this thesis is located.

## Primary Resources

Included in the primary resources are the original Victorian studies such as the prescriptive works of Mrs Sarah Ellis, Caroline Norton and Frances Cobbe Power.<sup>296</sup> Records of Parliamentary Debates and Royal Commission Reports prove invaluable to locating the political perspectives and the debates around legal reforms. Studies from the inter-war period include the original works of Bertrand Russell, Mrs C., Gasquoine Hardy, Erna Reiss, Marjorie Spring Davies, Vera Britten, Winifred Holtby and Eleanor Rathbone offer a range of perspectives on the social and legal changes of the inter-war period.<sup>297</sup> In addition, legal cases and legal commentaries uncover the shifting perspectives of the law. The case studies materials are from original testamentary evidence through letters and a dormant book that will give a unique and invaluable window to women's (and men's) histories during the inter-war period. The case studies are from private and up to now unseen letters in the Trevelyan family papers held in Special Collections at the Robinson Library at Newcastle-upon-Tyne University. The letters deal with the experiences of Kitty Trevelyan and Johann (Geo) Gottfried Götsch. Kitty Trevelyan's published account of her experiences adds to the resources. The private letters of Anott Robinson form the second case study. While a small number of the original materials from this collection have been previously used as a background in a thesis,<sup>298</sup> in this thesis the focus of study was

---

<sup>294</sup>Forster, M., *Diary of an Ordinary Woman* (London: Vintage, 2004), Osbourne, F., *The Bolter* (London: Virago, 2009).

<sup>295</sup>Steedman, C., *Landscape For A Good Woman* (London: Virago, 1986); Steedman, C., *Dust* (Manchester: Manchester University Press, 2001) at Chapter 5.

<sup>296</sup>Ellis, Mrs S., *The Wives of England; The Mothers of England* (1843).

<sup>297</sup>Rathbone, E., *The Disinherited Family* (Bristol: Falling Wall Press Ltd, 1986 First Published in 1924); Reiss, E., (Barrister) *Rights and Duties of Englishwomen A Study in Law and Public Opinion*, (Manchester, Sheratt & Hughes, 1934).

<sup>298</sup>Reid, N., PhD Thesis *The origins and development of the Independent Labour Party in Manchester and Salford 1880-1914* University of Hull 1981.

completely different, used a greater amount of the original materials and concentrated on the personal experiences rather than the political experiences of the parties involved. Both families have given permission to use the materials. Alongside this, the thesis draws on secondary evidence.

## Secondary Resources

The employment of secondary documentary evidence is valuable and supportive of the primary resources. As John Tosh argues, ‘Few other sources convey so well the public face of political discourse.’<sup>299</sup> Autobiographies and biographies works give a valuable background to the lives of individuals. Here the work of Miss Jane Gray Perkins on Caroline Norton is particularly useful. The author drew on private letters and discussions with Caroline’s granddaughter to gain her knowledge. Novels offer valuable insights to the social context and issues of contention during specific periods.<sup>300</sup> For example, women authors such as Jane Austen and George Elliot provide a picture of the social context and gender inequalities of the late eighteenth and nineteenth centuries. During the economic depression of the nineteen twenties and thirties, George Orwell’s novel *The Road to Wigan Pier* gave a clear picture of the slum conditions of the unemployed and working classes. Through their novels, Virginia Woolf and Vera Britten wove their literature from their own experiences, and the class and gender differences. As Danaya Wright argues, engaging with novels as secondary evidence adds to the bigger picture<sup>301</sup> or at least literature used in this context adds to the chronological narrative. The works of such authors will be drawn on to add depth to the context of the relevant periods. Indeed this links with the growth in scholarship of the law and literature, an area outside the remit of this thesis. However, literature used in this context provides a chronological narrative<sup>302</sup> and a window to society that literature has influenced and shaped. As Maria Aristodemou,

---

<sup>299</sup>Tosh, J., op. cit p63.

<sup>300</sup>The explosion of a writing culture amongst early 19<sup>th</sup> century women included popular novelists such as Jane Austen, the Bronte sisters and George Eliot used the medium of fiction to question marriage, class, economic existence and the changing role of women. Gilbert, S. M., & Gubar., S., *The Madwoman in the Attic* (New Haven & London: Yale Nota Bene Yale University Press, 2000).

<sup>301</sup>Wright, D., op.cit.p219.

<sup>302</sup>Dolin, K., ‘The woman question in Victorian England’ *A Critical Introduction to Law and Literature* (Cambridge: Cambridge University Press, 2007).

contends 'literature offers one way of reopening the world's complexity and thus unsettles both law and life.'<sup>303</sup>

The inter-war period has fascinated me since I was a teenager in the nineteen sixties. My parents were born in 1910 and 1911, and I was brought up with their recollections of their early lives, their struggles and the class and gender inequalities. My collection of original photographs allows me a glimpse of their childhood and their attempts in the inter-war period to become part of the 'new age'. Reading Vera Britten's *Testimony of Youth* deepened my interest in a period of contradictions, social and legal injustices, and gender and class differences. The awareness of gender and indeed class injustices has therefore been part of my life, instigated my interest in the issues of the contradictions of gender politics that are acutely visible in separating families, and contested parenting.

## Summary

This chapter has described the contemporary debates around the issues of parenting post-separation. It has located the concerns within the changing structure of the family and the broader socio-legal debates around the family and drawn parenting, law and gender as the primary themes that will thread through the thesis. The chosen methodology has been considered and the thesis located within academic discussions. The study aspires to contribute to the modern day debates around the increasing numbers of contested cases in residency and contact law through gender politics and the historical context of the nineteen twenties and thirties. This period represents a watershed in the introduction of formal gender legal equality that included the passage of the *Guardianship of Infants Act 1925*. The concept of the welfare of the child was paramount in child custody law and now in residency and contact law is the deciding factor in judicial decisions of contested cases regarding equality to parenting in the legal regulation of the care of the child post-separation. Furthermore, the thesis aspires to add to socio-legal knowledge of the realities for separating parents at that period. Uncovering this history seeks to offer an opportunity to contribute to understanding of the gender issues within this contentious area of family law that

---

<sup>303</sup> Aristodemou, M., *Law and Literature Journeys from her to eternity* (Oxford: Oxford University Press, 2000) pp10 & 25.

would appear despite legal reforms remain unabated. As such, there is a need to have a critical awareness of the complex narratives that have informed the historical changes in the development of child custody laws. Chapter 2 now considers in more detail the historical development of the laws that emerged to regulate the family and the post-separated family from the early nineteenth century up until the end of the First World War and set the framework for the ensuing chapters.

## Chapter 2

### The Historical Roots and Development of Infant Custody Law

In English law, practices quickly become rigid-as the twig is bent so the tree doth grow.<sup>1</sup>

#### Introduction

Susan Boyd argues that the contemporary debates and gender arguments around fathers' rights would seem to suggest that fathers never held any rights to their children following separation.<sup>2</sup> However, as the historical analysis will show, in English common law, fathers have always had legal rights to their legitimate children that reflected the hierarchal position of fathers and husbands during marriage and following legal separation or divorce.<sup>3</sup> Indeed up until the early nineteenth century, fathers had absolute rights of custody of their children; mothers have never held that same legal right.<sup>4</sup> The struggle for legal rights to custody of their children has been the struggle for married and separated mothers.<sup>5</sup>

However, from the nineteenth century, there was a gradual shift from the absolute authority of paternal rights to custody of their children post-separation to maternal presumption linked with the emergence of the welfare of the child. This trend was particularly dominant during the mid-twentieth century and reflected ideas of a 'clean break' in divorce. However, the premise that the law has been biased towards mothers regarding the care of children post-separation rests on the assumptions of the dichotomy of the public and private spheres and the division of labour.

---

<sup>1</sup>Horstman, A., *Victorian Divorce* (London: Croom Helm, 1985) p3.

<sup>2</sup>Boyd, S., *Child Custody, Law and Women's Work* (Ontario: Oxford University press, 2003) pxi.

<sup>3</sup>In the case of *R v De Manneville* [1804] 5 East 221 Lord Ellenborough stated 'the law is clear that the custody of a child, of whatever age, belongs to the father [and ] the father's rights extend to the hour of a child's birth.'

<sup>4</sup>Boyd, S.B. *Child Custody, Law, and Women's Work* (Ontario: Oxford University Press, 2003) pp2 & 20.

<sup>5</sup>In contrast, unmarried mothers have always had custody of their children.

As argued above in the contemporary era, the gendered roles of parents have become blurred. Shifting dynamics in the family linked with mothers' increased involvement in the workforce and changing perceptions of childhood have reframed the role of fathers around the care of the child. This correlates with broader policy changes and state regulation that have politicalised the public and private spheres to maintain stability of the family, wider social cohesion and economic growth. Family law reinforces this policy advocating shared parenting post-separation. Therefore, there has been a swing full circle and a half-turn round again from absolute paternal authority to maternal presumption to shared parenting.<sup>6</sup> Yet the swings in infant and child custody law are not clear-cut. Other complex changes have had an impact that includes the shifting narratives of and towards parenting and increasing state regulation of the family. This chapter sets out to chart the historical shifts that the law has captured and reinforced in changes to the laws regulating the care of children post-separation. The aim is to provide a background to the complex dynamics that underpin the contemporary debates in residency and contact law, gender politics and parenting and have their roots in history.

This chapter is set out in three sections. The first section sets the historical backdrop to the thesis. There is an inextricable link between the laws of marriage, divorce and the legal regulation of the care of children post-separation and this first part will explore the origin of the laws and the foundations of women's legal inequality as a wife, mother and within the family. As indicated in Chapter 1 the methodology is historical and engages with the analysis of documentary evidence. Therefore, through an examination of case law and judicial narratives, it will then explore the debates and controversial campaigns around the introduction of the *Custody of Infants Act 1839*, the first Act towards formal legal equality for women. The second section will consider the slow progress of change towards women's legal equality in the laws of marriage, divorce and infant and child custody from the *Custody of Infants Act 1839* to the *Summary Jurisdiction (Married Women) Act 1895*. It will consider the political and social backdrop to the legal reforms that include feminist initiatives through their writings to illustrate the injustices in women's lives and in campaigns for women's legal equality. An examination of case studies will show that despite a shift away

---

<sup>6</sup>Boyd, op.cit. p2.



from absolute paternal authority, equality for mothers came with restrictions and indeed reinforced maternal inequality.<sup>7</sup> By the late nineteenth century, changes to the system widened access to legal separation. The final part of this section will explore the impact and the increasing need to address the women's inequalities in this area of the law. The First World War was a catalyst of change across a wide range of political, legal, social class and gender distinctions. This final section considers the social and economic context and the challenges for men and women in which to place the legal reforms towards gender equality that followed the war. The concluding part draws together the primary themes emerging from this chapter to provide a framework for the subsequent chapters.

## SECTION 1

### **The Origins and Development of Marriage, Divorce and Infant Custody Laws: From Antiquity to the Custody of Infants Act 1839**

#### Marriage

Historically marriage brought legal status, obligations and rights between husbands and wives, sanctioned sexual relationships and legitimacy to any children born to the couple. As Sir William Blackstone stated 'the establishment of marriage in all civilised states is based upon this natural obligation of the father to provide for his children.'<sup>8</sup> Yet the origins of marriage appear vague. Traces of evidence from early Teutonic<sup>9</sup> times and Hindu law books suggest there was a form of 'marriage by capture.' If the woman consented, the marriage was valid. Alternatively 'sale marriage' involved the sale of the *mund*, the protector-ship over the woman that gave her a position of honour as consort to her husband and made certain by her solemn contract.<sup>10</sup> Ancient Greek literature provides another picture of marriage in history.

---

<sup>7</sup>Wright, Danaya, C., 'The Crisis Of Child Custody: A History Of The Birth Of Family Law In England' 2002 *Columbia Journal of Gender and Law* 11 p175 ; Boyd, S., op.cit. p23.

<sup>8</sup>Blackstone, Sir W., *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765).

<sup>9</sup>Primitive Germanic race that can be traced to the Iron Age.

<sup>10</sup>(According to Liebermann's translation): 'If a man forcibly abducts a maiden let him pay 50 shillings to him to whom she belongs and then buy the consent of him to whom she belongs.' There is no talk of giving her back, but a *bot* must be paid and the *mund* must be purchased as discussed in

For upper class Athenian women, marriage was ‘a matter of paternal wishes and economic considerations’ and the role of wives were simply as reproducers of legitimate heirs and custodians of the home.<sup>11</sup> Thus, from the earliest records of marriage it would appear that there was a pervasive preconception of women as inferior to men, in need of protection and defined by her gender in a functionalist role.<sup>12</sup>

Yet early Anglo-Saxon records reveal a different approach. Far from being subservient, married women had independent status. There appear to be no ideas of gendered roles or indeed women’s social position as inferior. Women contributed to production as much as men did. There was no assumption that women’s roles solely linked with the care of children. Indeed, there were clear economic values given towards child bearing and bringing up children, and settlements made on separation and widowhood.<sup>13</sup> However, feudalism transformed the position of women considerably locating men in hierarchical positions and women, as mothers of legitimate heirs and in need of protection or ‘*coverture*’.<sup>14</sup>

Historically marriage was a simple procedure. There was no need for witnesses. Provided both parties agreed and exchanged a verbal promise, the marriage was valid. Yet there was a distinction between the promises. *Sponsalia per verba de praesenti* (a promise in the present tense) to be husband and wife stood as a valid and indissoluble marriage from the time of the promise. The promise in the future tense, *sponsalia per*

---

Pollock, Sir, F., & Maitland, F.W., 2nd Ed. *The History of English Law* (Cambridge: Cambridge University Press, 1968) pp364-5 at fn 5 AEthelb. 82 .

<sup>11</sup>Demosthenes’ report of the lawsuit *Against Naera* Demosthenes’, *Private Orations*, III, at 122 cf. Ehrenberg *Society and Civilization* at 26 for confirmation that this was a prevalent attitude discussed in Okin Moller, S., *Women in Western Political Thought* (Princeton New Jersey & Oxford: Princeton University Press, 1979) pp20 & 35.

<sup>12</sup>Okin Moller, S., *ibid* pp4-10.

<sup>13</sup>In Anglo-Saxon times recorded from the reign of Aethelbert AD 570-616, the legal structure was based on kinship and family groups. Women were necessary to the family unit not only for procreation but valued in their contribution to the economic production. The laws set out specific economic values in childbearing and upbringing, settlements after separation and widowhood. Women had independent status. Stenton, D. M., *The English Woman in History* (London: Allen & Unwin, 1957) at Chapter 1 and discussed in Atkins, S., & Hoggett, B., *Women and the Law* (Oxford: Basil Blackwell Ltd., 1984) at 9-10; Perkin, J., *Women and Marriage in Nineteenth Century England*, (Chicago: Lyceum Books Inc., 1989) p1.

<sup>14</sup>Feudalism was based on hierarchical land owning and fidelity founded on military services, thus there was a fragmentation of the family as an economic unit. Men’s power emerged from their land owning and women’s role simply as reproducers of legitimate heirs. During this period, legal writers Gratian (1139-42) and Bracton (1300) noted that generally women’s position in society was inferior. As discussed in Atkins, S., & Hoggett, B., *ibid*, p10.

*verba de futuro* did not constitute a marriage as such although it prohibited marriage with anyone else. If after the promise, sexual intercourse took place, the marriage became valid and indissoluble.<sup>15</sup> Amongst the aristocracy, marriage was almost certainly an arranged contract linked with increasing property and wealth.<sup>16</sup> For the poor and middle classes, a hotchpotch of local community practices and customs endorsed informal marriages. Handfasting<sup>17</sup> and broomstick<sup>18</sup> ceremonies were widespread.<sup>19</sup> Thus, marriage was a private contract between a man and a woman with virtually no link with the law or the church.<sup>20</sup>

However, by the Middle Ages, consent between the parties and physical consummation, formed the requisites of what would emerge from the Christian Church as a valid marriage.<sup>21</sup> The Church gradually asserted its jurisdiction over the laws of marriage through the regulation of the ‘prohibited decrees’ of marriage, the publication of church bans and the need for marriage to be solemnised in church and attended by a priest.<sup>22</sup> The separation of canon and common law reinforced the

---

<sup>15</sup>The canon doctrine on marriage the physical union and the promise to live as husband and wife was developed by Gratian (359-383); In the 12<sup>th</sup> century Peter Lombard and Alexander III distinguished these two forms of declarations the present and future tenses as discussed in T. Poynter, 2nd Ed., *A Concise View of the Doctrine and Practice of the Ecclesiastical Courts* (by Thomas Poynter, 1824) at 14 discussed in Pollock, F., & Maitland, F.W., op.cit. pp370-1; Lasch, C., ‘The Suppression of Clandestine Marriage In England: The Marriage Act Of 1753’ (1974) Vol. 26 *Salmagundi* 91, fn 2; Parker, S., *Informal Marriage, Cohabitation and the Law 1750-1989* (Basingstoke: Macmillan, 1990) at 12; Cretney, S., *Family Law in the Twentieth Century: A History* (Oxford: Oxford University Press, 2003) at 4 and fn. 9; Diduck, A., & Kaganas, F., 2nd. Ed. *Family Law, Gender and the State* (Oxford: Hart Publishing, 2006) p59.

<sup>16</sup>Outhwaite, R.B. *Clandestine Marriage in England 1500-1850* (London: The Hambleton Press, 1995) pp21-3.

<sup>17</sup>Handfasting was simply pledging the hand, literally taking hands and simply making a declaration to take each other as husband and wife in front of witnesses. This form of marriage was suppose to last one year and a day, either party had the right to end it after that time Fielding, W.J., *Strange Customs of Courtship and Marriage* (London: Souvenir Press, 1961) at 290 in Parker, ibid, 13 at 17-18.

<sup>18</sup>The process as described to Gwenith Gwyn by a 73 year old woman in the 1920s as ‘A birch besom was placed a slant in the open doorway of a house, with the head of the besom on the doorstone, and the top of the handle on the doorpost. Then the young man jumped over it first into the house, and afterwards the young woman in the same way. The act of jumping was not recognised as a marriage if either of the two touched the besom when jumping or, by accident, removed it from its place. It was necessary to jump in the presence of witnesses too.’ Gwyn, G., *Folklore* 1928 in Parker, ibid, at 18.

<sup>19</sup>Stone, L., *Uncertain Unions* (Oxford: Oxford University press, 1992) at 11.

<sup>20</sup>Diduck, A., & Kaganas, F., op.cit. p58.

<sup>21</sup>Pollock, F., & Maitland, F.W., op.cit. pp364-5.

<sup>22</sup>The Lateran council in 1215 extended this when Pope Innocent III called for the adoption of the publishing of banns of marriage across western Christendom. A constitution published at Lambeth by Archbishop Hubert Walter. Pollock, F., & Maitland, F.W. op.cit. p371.

Church's jurisdiction through the link with Rome<sup>23</sup> and Roman Catholic canonists progressively incorporated the Christian theory of unity into marriage.<sup>24</sup> The impact of which had far-reaching effects on the laws of marriage in England.

Ecclesiastical law embraced the concept of unity. References in Bracton's commentaries during the thirteenth century<sup>25</sup>; Sir Edward Coke in the seventeenth century and Sir William Blackstone in the eighteenth century clearly demonstrated the strength of this position. As Blackstone stated 'By marriage, the husband and wife are one person in law that is, the very legal existence of the woman is suspended during marriage.' He added, 'In the eyes of the law a husband and wife are one, and that one is the husband.'<sup>26</sup> As such, husbands had the legal right to all their wife's property and possessions. Thus, the ecclesiastical laws of marriage adopted and reinforced the ancient ideas of protection and ownership and the formal authority of husbands over their wives.

Nevertheless, there were challenges to the canon laws. During the reign of Henry VIII, Parliament passed a law<sup>27</sup> that stated a promise of marriage should not be a barrier to a later marriage, unless followed by sexual intercourse. The Act intended to overcome the uncertainty of the status of marriage and the uncertainties of 'lawful heirs' in the doctrine of promises. However, Edward VI repealed this section of the Act. Thus, despite a brief period in the seventeenth century when magistrates sanctioned and recorded civil marriages,<sup>28</sup> promises to marry or 'precontracts' continued as valid marriages.<sup>29</sup> Therefore, as Quaife argues by the mid-eighteenth century, a valid marriage was difficult to identify. He suggests this was the

---

<sup>23</sup>To settle the debts to Rome William the Conqueror separated canon and common law giving the church in Rome stronger jurisdiction as discussed in Pollock & Maitland, *ibid* 13 at 364-5; Parker, *ibid*, 13 at 12.

<sup>24</sup>That on marriage a man and a woman became one flesh Genesis Chapter 2, v. 24.

<sup>25</sup>Bracton (1300) noted that generally women's position was inferior to men as discussed in Atkins, S., & Hoggett, B., *op.cit* p10.

<sup>26</sup>Blackstone, W., *Commentaries on the Laws of England*, 4 Vols. (Oxford: Clarendon Press, 1765-1769) at Vol. 1, Chap. II, 430 as discussed in Shanley, Lyndon, M., *Feminism, Marriage and the Law in Victorian England* (Princeton, New Jersey: Princeton University Press, 1989) p8.

<sup>27</sup>32 Henry VIII, c. 38.

<sup>28</sup>*The Marriage Act 1653*, this ended following the Restoration. Hill, B., *Women, Work and Sexual Politics in Eighteenth Century England* (London: UCL Press Ltd., 1994) p203.

<sup>29</sup>2 & 3 Edward VI c. 23 in Jeaffreson, Cordy John *Brides and Bridals* (London, 1872) 1, 126, 114 & 124 as discussed in Lasch, C., *op.cit.* p94, fn 10.

consequences of ‘three overlapping, occasionally hostile but generally exclusive jurisdictions-the Church, the State and customs enforced by the local community.’<sup>30</sup>

By 1740, the majority of marriages in London were ‘Fleet’ marriages performed by disreputable clergy on parole from the nearby Fleet prison.<sup>31</sup> Instigated by the increasing numbers of ‘Fleet’ marriages there were demands to regulate marriage. For example, the landed gentry were concerned that such marriages provided opportunities for bigamy and exploitation, the loss of control of their wealth and property.<sup>32</sup> The English Puritans, the new classes of merchants and tradesmen, with their background of thrift and hard work ethics, were scandalised at the laissez-faire attitudes of the aristocracy towards marriage. They sought to defend the sanctity of marriage.<sup>33</sup> The judiciary also expressed their anxieties. Fraudulent records of Fleet marriages were difficult to prove. Therefore, there were legal consequences as in bigamous cases, claims of a widow’s dower, the legitimacy of children and transference of property.<sup>34</sup> Indeed, clandestine marriages became the subject of authors and playwrights and a source of amusement for the public.<sup>35</sup>

In 1753 the Lord Chancellor, Lord Hardwicke<sup>36</sup> introduced the Marriage Bill in an attempt to restructure and simplify marriage. Support from the House of Lords was

---

<sup>30</sup>Quaife G.R., *Wanton Wives and Wayward Wenches: Peasants and Illicit Sex in early Seventeenth Century* (London: Croom Helm, 1979) at 194 as discussed in Parker, S., *ibid*, p15.

<sup>31</sup>The clergy were ‘a band of profligate miscreants, the refuse of the clergy [and] performed the ceremony of marriage without licence or question, in cellars, garrets, or alehouses, to the scandal of religion, and the disgrace of that order which they professed.’ Smollett, *The History of England* (London, 1830) p100 as discussed in Lasch, *ibid*, 13 at 95; Parker, S., *op.cit.* pp37-8; Cretney, S., *op.cit.* p 5; Outhwaite, R.B., *op.cit.* p35; Payne, J., *From Fleet Street to Gretna Green: The Reform of “Clandestine Marriage” under Lord Chancellor Harwicke’s Marriage Act of 1753, A Paper submitted at the Southwestern Social Science Association Conference, Dallas, Texas, March 24 1995.*

Stone, L. *The Family, Sex and Marriage in England 1500-1800* (London: Penguin Books, 1977) at 32.

<sup>32</sup>Parker, S., *op.cit.* p36.

<sup>33</sup>As against the apparent glittering social circle of the aristocracy, parties, gambling, theatre, and extra marital affairs as discussed in Lasch, *ibid*, 29 at 95; Parker, *ibid*, 13 at 38; Amanada Foreman gives a clear description of the laissez-faire attitude and life style in Foreman, A., *Georgiana Duchess of Devonshire* (London: HarperCollins Publishers, 1999).

<sup>34</sup>*Cochrane v Campbell, Paton’s Cases 1*, p.519 and *Wilson & Shaw’s Case III*, at 135n discussed in Parker, S., *op.cit.* p37; Hill, B., *op.cit.* p203.

<sup>35</sup>C.S. Trevelyan suggested that ‘sham marriage’ was included in the storylines of 50% of the novels at this time and the plot in plays. Trevelyan, G.O. *The Early History of Charles James Fox* (London, 1881); David Garrick *The Clandestine Marriage* 1766; Daniel Defoe *Conjugal Lewdness* 1727 and Oliver Goldsmith’s *The Vicar of Wakefield* as discussed in Lasch, C., *op.cit.* p13 at fn 16, 17, 18 & 19; Parker, S., *op.cit.* p35.

<sup>36</sup>Philip Yoke a barrister entered Parliament in 1719. He became solicitor-general in 1720 and lord chief justice of the King’s Bench in 1733. As Lord Hardwicke he was appointed Lord Chancellor in 1737.

evident. In his opening speech, the Attorney General Sir Dudley Ryder asked, ‘How often have we known of the heir of a good family seduced, and engaged in a clandestine marriage, perhaps with a common strumpet? How often have we known a rich heiress carried off by a man of low birth, or perhaps by an infamous sharper?’<sup>37</sup> Yet there were dissenters. One of the principal opponents, Henry Fox the Secretary at War undoubtedly drew on his own experiences. He secretly married Lady Caroline Lennox the daughter of the Duke and Duchess of Richmond after the duke refused to consent to the marriage. Other leading opponents included Charles Townshend and Robert Nugent. Both made the argument that the Bill would deny liberty and freedom of individual choice and the reforms were part of wider scheme to control the lower classes and reinforce the power of the aristocracy.<sup>38</sup> There would appear to be an element of truth in this allegation. Lord Hardwicke, had little sympathy for the lower classes and treated them with contempt.<sup>39</sup> Yet as Stephen Parker suggests, Lord Hardwicke was merely representative of a ‘new breed of ruler’ intent on exercising greater control over the poor and lower classes.<sup>40</sup> There was indeed a general move towards laws to control vagrancy and idleness and the establishment of workhouses and hospitals.<sup>41</sup> In the mid-seventeenth century, records showed an increase of thieves, the poor and beggars and a general revulsion of any charitable or public support towards them. As one pamphleteer stated, ‘The general rule of all England is to whip and punish the wandering beggars [and] to provide houses and convenient places to set the poore to work’<sup>42</sup>

---

<sup>37</sup>Parker, S., op.cit. p41; O’Donovan, K., *Sexual Divisions in Law* (London: Weindenfiel & Nicholson, 1995) p45 also discussed in Diduck, A., & Kaganas, F., op.cit. p60.

<sup>38</sup>Lasch, C., op.cit. p102; Parker, S., ‘The Marriage Act: 1753: ‘A Case Study in Family Law-Making’ Vol. 1 *International Journal of Law & the Family* 1987 p147; Payne, J.M., op.cit. p29.

<sup>39</sup>It was well documented that Lord Hardwick’s intensely disliked the poor and lower classes rebels and dissenters. This is evident in the death sentences he ordered on the Jacobite peers after the Battle of Culloden a comparable punishment to the Duke of Cumberland’s ‘butchery’ on the battlefield. As discussed in Parker *ibid*, 13 at 39 & <http://www.oxforddnb.com/articles>. Yet as E.P.Thompson argued, the ordinary person hated and despised the law. ‘The British people were noted throughout Europe for their turbulence and the people of London astonished foreign visitors by their lack of deference.’ Thompson, E.P. *The Making of the English Working Class* (First published by Victor Gollancz 1963 this edition London: Penguin Group, 1991) p66.

<sup>40</sup>Parker, S., op.cit. p39.

<sup>41</sup>Lasch, C., op.cit. p104.

<sup>42</sup>A pamphleteer in 1646, *Stanley’s Remedy, or the Way to reform Wandering Beggars, Thieves, Highway Robbers, and Pick-pockets*, 1646 (Thomason Tracts, E. 317 (6) p4 as discussed in Tawney, R.H., *Religion and the Rise of Capitalism* Holland Memorial Lectures 1922 First Ed. March 1926 (Harmondsworth: Penguin Books, 1964) pp261-2.

Nevertheless, the Marriage Bill gained Royal Assent and gave the established Church of England a ‘virtual monopoly’ of marriage. The Act enforced the triple calling of banns in church, the need for witnesses and the ceremony solemnised in the same church. Only members of the Royal Family, Quakers and Jews were exempt.<sup>43</sup> However, social historians have suggested that informal marriages continued particularly amongst close communities and the working classes.<sup>44</sup> Alongside this, the Marriage Act did not extend to Scottish law and gave opportunity for determined couples to elope across the border to marry. For example, pressurised by her parents to marry a more suitable partner, Elizabeth Surtees eloped to Scotland to marry John Scott, later Lord Eldon.<sup>45</sup> Furthermore, the Act did not stop commoners marrying aristocracy. Charles Townshend included. In the year after the Act, he married a wealthy dowager, the Countess of Dalkeith.<sup>46</sup> Consequently, as a measure of control, Lord Hardwicke’s marriage Act did not entirely succeed.

Nonetheless, at the end of the eighteenth century following the French Revolution, some factions of society began to challenge the institution of marriage and the laws. Although they came from diverse standpoints, they shared ideas against marriage and its links with religion. The political theorist William Godwin and poet Percy Bysshe Shelley argued that religion’s emphasis on monogamy and sexual relationships only be within marriage were unnatural. They believed free love was essential to the happiness of the individual.<sup>47</sup>

There were other arguments against marriage. For example, Robert Owen<sup>48</sup> confronted long established views of society in education, trade unions and, through

---

<sup>43</sup>Cretney, S., op.cit. p6 and fn 17.

<sup>44</sup>Discussed in Stone, L., op.cit p31; Tilly, L.A., & Scott, J.W. *Women, Work and the Family* (New York: Holt, Rhenhart & Winston, 1978) p97; Parker, S., op.cit, p63.

<sup>45</sup>Lord Eldon called to the Bar in 1776, had an illustrious career and was a major figure in political and legal circles. He was solicitor-general in 1788 and attorney-general in 1793. Resigning from the Commons, he became Baron Eldon of Eldon Co. Durham in 1792. He held the post of Lord Chancellor in 1801. <http://www.oxforddnb.com/view>

<sup>46</sup>Mahon, Lord, *The History of England 1713-1780* (London, 1858) at 27 discussed in Parker, S., op.cit. p147.

<sup>47</sup>Perkin, J., op.cit. p207.

<sup>48</sup>Robert Owen was born in Wales 1771. He began his working life as a draper’s shop assistant and used his knowledge of fabrics and textile to gain a post as a manager of a Manchester Mill. After his marriage to Caroline Dale, daughter of a prominent banker and industrialist, Owen managed his father-in-law’s cotton mills in New Lanark. Owen a committed businessman, was also a social reformer, improving conditions for his workers and establishing a pioneering educational system in New Lanark. Other Owenite communities emerged and one group formed the Co-operative Movement. New Lanark

the influence of the Scottish feminist Frances Wright,<sup>49</sup> marriage. Owen declared that marriage was ‘a Satanic device of the Priesthood to place and keep mankind within their slavish superstitions, and to render them subservient to all their purposes.’ He argued a marriage ceremony should be simple without any religious emphasis and in addition argued for a cheaper method of divorce.<sup>50</sup> Yet Owen was formally married and his wife, Caroline Dale was from a deeply religious Christian family.<sup>51</sup> Anna Wheeler and William Thompson also raised arguments against marriage.<sup>52</sup> In their study *An Appeal of One Half of the Human Race, Women against the pretensions of the other half, Men* they stated that marriage subordinated wives. They believed gender equality was only achievable through a co-operative social group in which marriage had no place.<sup>53</sup> Therefore, amongst the arguments against the broader ideas and ecclesiastical control of marriage some debates were beginning to emerge on the injustices of the laws of marriage for wives.

Nonetheless, the strongest calls to change the laws of marriage came from Non-conformists and Roman Catholic Churches with their demands for the right to marry in their own churches. Yet together the arguments for changes to the marriage laws and challenges to marriage as an institution failed. Indeed, reforms to the introduction of the Marriage Act 1823 controlled the laws of marriage even further. Yet shifts in the broader context of the social economic context had a significant effect on the regulation of marriage and indeed the family.

---

Conservation Trust, *The Story of Robert Owen* (Lanark: New Lanark Conservation Trust, date not given).

<sup>49</sup>Frances Wright was the daughter of Scottish wealthy linen manufacturer and political radical James Wright. He was an associate of Adam Smith and had connections with French republicans. When he and his wife died and left three young children. Her maternal aunt brought her up in England but Fanny later returned to Scotland. Fanny advocated that married women should have the right to their own property, more opportunities to education, easier divorce and the same sexual freedom as men. She immigrated to America in 1818 and campaigned for the rights of freedom for slaves.

[http://en.wikipedia.org/wiki/Frances\\_Wright](http://en.wikipedia.org/wiki/Frances_Wright) and discussed in Perkin, *ibid*, 45 at 208.

<sup>50</sup>*Lectures on the Marriages of the Priesthood of the Old Immoral World* delivered in 1835 and published in 1838 as discussed in Perkin, J., *op.cit.* p208.

<sup>51</sup>New Lanark Conservation Trust, *op.cit.* p5.

<sup>52</sup>Anna Doyle Wheeler from Tipperary Ireland she married when she was 15 but later separated from her husband. She earned a living translating the works of French philosophers into English and was an associate of Robert Owen, Jeremy Bentham and Frances Wright and William Thompson. Doyle Wheeler was a strong advocate for political rights and women’s equality to education. William Thompson was an Irish politician and philosopher. Together with Anna Wheeler, they formed a strong critique against the subordinate status of women at that time.

<sup>53</sup>Wheeler, A., & Thompson, W., *An Appeal of One Half of the Human Race, Women against the pretensions of the other half, Men* 1st Ed 1825 (New York: Burt Franklin, 1970) as discussed in Perkin, J., *op.cit.* p209.



As indicated above, Lord Harwicke's Act meant little, especially to the working classes and the practice of informal marriages continued. Alongside this, there was a growing disillusionment with religion and the repressive attitude of the Anglican Church. The emergence of the Industrial Revolution had a deep impact across the social, economic and political context. Sprawling urbanisation raised fears for the ruling classes of increasing immorality amongst the poor and working classes. There was a general emergence towards state control and central administration. This included tighter control of the regulation of marriage and the family. The Marriage Bill set out a new structure for the regulation of marriage and ran alongside the Births, Deaths and Marriage Registration Bill. As Lord Russell, the Home Secretary stated, 'the regulation of Dissenters' marriages should be preceded by a Bill of registration [and] important for the security of property—important to ascertain the state and condition of individuals under various circumstances—important to enable the Government to acquire a general knowledge of the state of the population of the country.'<sup>54</sup>

The inter-linking of the Bills was political as well as administrative purposes. The State's interest lay in two parts of the marriage ceremony, the public declarations of the intention to marry and the registering of the marriage following the ceremony.<sup>55</sup> The Boards of Guardians of the Poor Laws were already responsible for the registering of bans and marriages outside the Anglican Church and therefore there was a system in place.<sup>56</sup> The Marriage Bill adopted this structure and ideology. Thus, as Stephen Parker suggests there was a 'logical if unholy, trinity'<sup>57</sup> of the Poor Law Amendment Act, the Births, Deaths Registration Act and the Marriage Act. *The Marriage Act 1836*<sup>58</sup> ended the Church's monopoly over marriage and introduced civil ceremonies in deference to Non-conformists demands.<sup>59</sup> This gave legal status

---

<sup>54</sup>Cobbett, William *Parliamentary History*, vol. xiv, col.368 discussed in Parker, *ibid*, 13 at 58; Cretney, S., *op.cit.* p9 fn 34, Lord John Russell's speech, H L Deb 12 February 1836, c 368.

<sup>55</sup>Stephen Parker suggests that informal or free unions increased after 1750 particularly amongst the working classes, between 15% and one third of marriages between 1753 and 1836 were informal and thus illegal. Newman, A., 'An Evaluation of Bastardy Recording in an East Kent Parish' in Laslett, P., Ed. *Bastardy and its Comparative History* (London: Edward Arnold, 1980) at 151; Stone, O., *Family Law* (London: Macmillan, 1977) p31 as discussed in Parker, S., *op.cit.* pp 62-3.

<sup>56</sup>Indeed the fact that non-conformist marriages had to register with the Guardians of the Poor Laws was a subject of contention within the non-conformist churches. Cretney, S., *op.cit.* pp14-5.

<sup>57</sup>Parker, S., *op.cit.* p55.

<sup>58</sup>6 & 7 Gulielmi Cap.LXXXV.

to marriages conducted by Non-conformist clergy and Roman Catholic priests in their own place of worship provided a Registrar was present. The Act formally introduced the publishing of bans to discourage clandestine marriages. As Stephen Cretney suggests, the Act emerged from ‘a very clear analysis of the respective interests of the Church and State in marriage.’<sup>60</sup> Together the Acts provided the infrastructure for the state to examine closely the status of who married but also a system of control of marriage effectually monitoring the family.<sup>61</sup> The 1836 Act remains the basis for the laws of marriage in contemporary times.

Therefore, by the eighteen thirties, marriage generally had moved away from a private contract to come under the control and regulation of the state. Yet the historical legal authority of the husband had not diminished, indeed the dominant narratives of domesticity and division of the separate spheres in the nineteenth century reinforced patriarchal authority. A husband had absolute legal authority over his wife, her personal possessions and property. He had the right to her body; to have sexual intercourse with her regardless of her consent; the right to use her labour and the right to chastise her. Reforms to the marriage laws had not changed the legal position for wives. Indeed, the Anglican Church marriage service called for a wife to promise to ‘obey’ her husband, although the husband had to promise to endow his wife with all his ‘worldly goods.’ Yet this would appear a contradiction in terms. As Victorian feminist Frances Power Cobbe<sup>62</sup> commented while this was true, ‘it is her goods and earnings, present and future, which belong to him from this moment.’<sup>63</sup>

Through the doctrine of unity, and *coverture*, the idea of the protection of a woman in marriage a husband and wife became one, and by law the husband. Wives had no legal autonomy. Indeed, marriage obscured the legal subjection of women within family relationships.<sup>64</sup> Thus, through an agenda of the law the state regulated a

---

<sup>59</sup>The demands of the non-conformists were not fully addressed until The Marriage Act 1898. Cretney, S., op.cit. p3.

<sup>60</sup>Cretney, S., ibid, p 9.

<sup>61</sup>Cretney, S., op.cit. p3.

<sup>62</sup>Victorian feminist writer and anti-vivisection campaigner.

<sup>63</sup>Power, Cobbe, F., ‘Criminals, Idiots, Women, and Minors’ *Fraser’s Magazine* February 1862 reprinted in Hamilton, S., Ed. *Criminals, Idiots, Women, and Minors* (Essex: Broadview Press, 1996) p109.

<sup>64</sup>Smart C., *The Ties That Bind* (London: Routledge & Kegan Paul plc, 1984) p xi. The Law Reform (Married Women and Tortfeasors) Act 1935 claimed to remove the idea of the idea of unity on

particular form of family. However, this is not to deny that this was the practice in every marriage or indeed that informal marriage did not continue, particularly for the poor and lower classes. Nevertheless, it is idiosyncratic that in an era where marriage and the narratives of domesticity were powerful, legal reforms set out to make divorce more accessible.<sup>65</sup> The following part now turns to consider the background to the reforms to the laws of divorce in the nineteenth century.

## Divorce

There is no long history of the laws of divorce. According to Pollock and Maitland, Teutonic laws allowed the dissolution of marriage by mutual agreement provided both parties were heathen.<sup>66</sup> Although it has been argued that in Anglo-Saxon times, legal separation existed and women had the right to divorce.<sup>67</sup> However, in the shift to feudal society and the influence of ecclesiastical law wives lost their equality of rights under the doctrine of unity and *coverture*. While the Church made marriage simple, divorce and separation were difficult; marriage was indissoluble other than by death of one of the parties. Nevertheless, a decree of nullity, *a vinculo matrimonii*<sup>68</sup> could dissolve a marriage and allow parties to remarry. An application for a judicial separation *a mensa et thoro* through the ecclesiastical courts allowed the parties to legally separate but neither could remarry.<sup>69</sup>

Under the doctrine of unity, only husbands had legal rights and could file for divorce and this involved lengthy court proceedings. This involved a successful action of trespass in the common law courts, ‘criminal conversation’<sup>70</sup> against the wife’s alleged seducer or lover was necessary before proceeding to the Ecclesiastical Courts

---

marriage. However in reality the practice remained. It was not until the *Domicile and Matrimonial Proceedings Act 1973* that a married woman’s residence should not automatically be the same as her husband. For Income Tax purposes ‘unity’ remained an issue until the Finance Act 1988, s.32. The case of *Midland Bank Trust Co Ltd. v Green* (1980) Ch 496, 622 signalled the death knell of the doctrine of unity, as discussed in Cretney, S., op.cit. p113.

<sup>65</sup>Cretney, S., ibid, p3.

<sup>66</sup>Pollock, Sir F., & Maitland F. W., p393.

<sup>67</sup>Atkins, S., & Hoggett, B., op.cit. pp9-10; Perkin, J., op.cit.1.

<sup>68</sup>Pollock, Sir F., & Maitland, F.W., op.cit. p393.

<sup>69</sup>Pollock, Sir F., & Maitland, F.W. ibid, p 394;Johnson, E.L., 2nd. Ed., *Family Law* (London: Sweet & Maxwell, 1965) p2.

<sup>70</sup>Criminal conversation-where a husband accused another man of adultery with his wife, if found guilty the husband was able to claim ‘damages’. Discussed in Shanley, Lyndon, M., *Feminism, Marriage, and the Law in Victorian England* (Princeton, New Jersey: Princeton University Press, 1989) p24.

for an application for a decree of divorce *a mensa et thoro* a judicial separation. Only if successful on those two procedures could a husband by a private Act of Parliament obtain a divorce.<sup>71</sup> Wives had no legal rights.

According, to Graveson, during the two centuries prior to the *Matrimonial Causes Act 1857* there were approximately 250 divorce cases.<sup>72</sup> Nevertheless, as history has shown aristocracy and royalty, as Henry VIII demonstrated, were not averse to employing dubious methods to obtain a divorce to ensure continuation of their lineage and titles.<sup>73</sup> Indeed, in the early nineteenth century, George IV took extraordinary steps to divorce his wife. Parliament introduced a Bill of Pains and Penalties to stop Caroline becoming queen. Charged with adultery, Caroline faced trial before the House of Lords. As a Bill and not a divorce case, there was no need to bring evidence of the King's long renowned atrocious behaviour towards Caroline.<sup>74</sup> The Bill failed, they remained married but Caroline was not crowned queen.

The ecclesiastical courts however, were not an option for the poorer classes. As Laurence Stone points out, divorce and remarriage were 'possible by law for the very rich and by folk custom for the very poor, but impossible for the great majority in the middle who could not afford the cost of one or the social stigma and remote risks of prosecution of the other.'<sup>75</sup> Thus, desertion and bigamy were common. A 'wife-sale' by public auctions was one practice of ending a marriage and indeed regarded as legitimate.<sup>76</sup> Indeed, Thomas Hardy uses the apparently common practice of a 'wife-sale' in his novel *The Mayor of Casterbridge*. Therefore, by the eighteen thirties, divorce was difficult for the majority of husbands and not an option for wives. In the few numbers of divorces, the only parties involved were the husband and wife any children of the marriage were not a consideration. The father's legal right to custody

---

<sup>71</sup>Odgers, Blake, W., 'Changes in the Common Law And In The Law Of Persons, In The Legal Profession, And In Legal Education' in *A Century of Law Reform* (London: Macmillan & Co. Ltd., 1902) p14.

<sup>72</sup>Graveson, R., 'The Background of the Century' Graveson, R.H., & Crane, F.R., Eds. *A Century of Family Law 1857-1957* (London: Sweet & Maxwell Ltd, 1957) p5.

<sup>73</sup>Horstman, A., op.cit. p11.

<sup>74</sup>False accusations and disreputable witnesses beset the trial. The Government failed to reach a majority vote and the Bill was withdrawn on the Third Reading. Despite her protests during the coronation Caroline was never crowned queen. She lost public support and died the following year. Hastings, Sir Patrick *Famous and Infamous Cases* (London: W. Heinemann, 1950) pp176-91.

<sup>75</sup>Stone, L., op.cit. p35.

<sup>76</sup>Thomas Rowlands painting 'Selling a Wife' dated 1812-14 depicts the practice.

and guardianship was absolute. However, challenges to paternal authority were emerging that would ultimately bring children to the centre of divorce laws and this next part tracks the origins and progress of infant custody laws.

### Infant Custody

As noted above, historically, marriage gave legitimacy to any children born to the couple. Indeed, as Sir William Blackstone stated ‘the establishment of marriage in all civilised states is base upon this natural obligation of the father to provide for his children.’<sup>77</sup> He declared,

The duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation [and] laid on them not only by nature herself, but by their own proper act, in bringing them into the world<sup>78</sup>

As indicated above, fathers have always had legal custody of their legitimate children during marriage and after legal separation or divorce. Yet ‘custody’ is an ambiguous term. In its primary sense, it means the right to physical care and control; it is the correlative of the duty to protect. However, the term also signifies ‘the whole bundle of rights and powers vested in a parent or guardian.’<sup>79</sup>

Yet as Susan Crean argues, custody ‘involves much more than a day-care contract. It carries with it all sorts of political and social baggage relating to male-female identity and to the division of labour between the sexes, as well as cultural attitudes to childcare and motherhood itself.’<sup>80</sup>

Women have probably always fulfilled the nurturing role (Mead 1949) and have always been subordinate to men in this role) since

---

<sup>77</sup>Blackstone, Sir W., op.cit. p6.

<sup>78</sup>Sir William Blackstone and cited in Hogget, B. *Parents and Children* (London: Sweet & Maxwell, 1993) p6.

<sup>79</sup> Bevan, H.K. *The Law Relating to Children* (London: Butterworths, 1973) p256

<sup>80</sup>Crean, S., *In The Name of the Fathers* (Toronto: Amanita Enterprises, 1988) pp18-19.

they were the child carers in practice (Anderson 1971) [and] This would probably have always been true at any time in history, since the law was concerned with the legal authority of the head of the household, rules of inheritance and kinship, not with the actual day to day care of the child, unless that day to day care was in dispute.<sup>81</sup>

The origins of infant custody laws, like marriage, have their roots in antiquity. Literature illustrates that Ancient Greek society considered children like women as chattels and possessions of the father.<sup>82</sup> In Roman law, fathers had absolute authority over his legitimate children, *paterfamilias*, a legacy that remained in English common law.<sup>83</sup> Nevertheless, as indicated above, Anglo-Saxon times were more egalitarian, women had independence and status and on separation, the mother received a larger settlement if the children remained in her care than if the children stayed with the father. It was, as discussed above, feudalism that removed any legal rights of women<sup>84</sup> and, along with Ecclesiastical law and the doctrine of unity the shift towards *coverture* and the protection of women and children. As Brenda Hoggett argues, the development of infant and child custody law emerged from the need to establish a legitimate heir, the transmission and preservation of property rights and served the needs of the propertied classes.<sup>85</sup> A father's power of authority could indeed continue after his death if he had designated a testamentary guardian that need not be the mother.<sup>86</sup> The Court of Chancery's jurisdiction over wardship, *Parens Patriae* could legally challenge the supreme power of the father and the duty of care come under legal guardians appointed by the Lord Chancellor.<sup>87</sup> The father however could seek a writ of *habeas corpus* from the Court of the King's Bench to reclaim custody

---

<sup>81</sup>Maidment, S. *Child Custody and Divorce* (Basingstoke,: Croom Helm, 1984) p116.

<sup>82</sup>Okin Moller, S., op.cit.p31.

<sup>83</sup>Petit, P.H. 'Parental Control and Guardianship' in Graveson, R.H. & Crane, F.R. Eds. *A Century of Family Law 1857-1957* (London: Sweet & Maxwell, 1957) p56.

<sup>84</sup>Atkins, S., & Hoggett, B., op.cit p10; Perkin, J., op.cit. p1

<sup>85</sup> Hoggett, B., op.cit. p6; Boyd, S., op.cit. p 21.

<sup>86</sup>Maidment, S., op.cit. p111.

<sup>87</sup>Petit, P.H., op.cit. p56.

of his child.<sup>88</sup> Any other children in the family their 'welfare' was associated with nurture and a parental duty of care.<sup>89</sup>

During the reign of Philip and Mary, the law did allow the mother the right of custody of her children following the death of her husband but only female children.<sup>90</sup> The *Tenures Abolition Act 1660* effectively repealed this Act and denied the mother any legal rights to custody of any of her children. Therefore, across history, fathers during marriage and following legal separation or divorce had absolute legal authority and custody of their children; the daily care of children has generally been the primary responsibility of mothers even after separation, although this has not been entirely straightforward. Therefore, historically, class and gender distinctions informed infant custody laws following the break-up of a marriage and legal separation or divorce. Mothers, married, separated or divorced had no such formal legal rights. Through an analysis of case studies, the next part of this section illustrates the extent of paternal authority and the power of the courts.

### **Case Studies-A Need for Legal Reform**

During the late eighteenth century, the courts began to apply discretion to the decisions of child custody and challenge the absolute authority of the father in some cases of dispute. An early example is the case of *R v Deleval*.<sup>91</sup> Judicial discretion and a writ of *habeas corpus* gave Lord Chief Justice Mansfield the power to challenge the absolute rights of the father, on the grounds of his coercing his child into prostitution and legal custody of the child given to an appropriate party.<sup>92</sup> He

---

<sup>88</sup> Maidment, S., op.cit. p93.

<sup>89</sup> O'Halloran, K., *The Welfare of the Child The Principles and the Law* (Aldershot: Ashgate Arena, 1999) p11.

<sup>90</sup> Ph & M. c 8s.14 and in discussions with the late Professor William Elliot.

<sup>91</sup> 3 Burr 1434, 97 Eng. Rep 899 [K.B. 1763].

<sup>92</sup> Fathers could regain custody of their child through an application of a writ of *habeas corpus* from the King's Bench. There would be a call to deliver the child to the courts and the decision made whether the child was under 'improper restraint.' There was a simple test. 'Proper and free' custody of the child was when the child was with the father, a child living away from the father was considered improperly restrained. Bowerman, E., *The Law of Child Protection 1-7* (1933); Hurd, R., *A Treatise On The Right Of Personal Liberty And On The Writ Of Habeas Corpus And The practices Connected With It* 465 (1858) as discussed in Zainaldin, J.S. 'The Emergence of a Modern American Family Law: Child Custody, Adoption and the Courts, 1796-1851' in 1979 *Northwestern University Law Review*, 73 p1054n. 48 in discussed in Shanley Lyndon, M., op.cit. p133.

followed the same reasoning in the *Blisset* case.<sup>93</sup> Lord Mansfield declared ‘The natural right is with the father; but if the father is a bankrupt, if he contributed nothing for the child or family, and if he be improper, for such conduct as was suggested at the Judge’s chambers, the court will not think it right that the child should be with him.’ Consequently, Mansfield was able to use the discretion of the court to challenge the father’s authority to right of custody of his child.

Yet the use of discretion in these cases related to the rights of the father against the state or third parties but not the mother.<sup>94</sup> However, Jamil Zainaldin argues, ‘The threshold of permissible parental conduct was raised to a higher level, with the father’s rights theoretically capable of forfeiture to the mother.’<sup>95</sup> However, the use of discretion in such decisions was short-lived. English political and legal thought went through a powerful conformist reaction following the French Revolution. As discussed above, new ideas emerged challenging the establishment, religion, marriage and divorce.<sup>96</sup> Certainly, the decisions made by Lord Ellenborough<sup>97</sup> in child custody disputes demonstrated the commitment to a rigid common law philosophy. As such, this strengthened the absolute authority of the father and buttressed to an unparalleled level a patriarchal concept of familial relationships. Any discretion employed by the courts to deny a father’s right to custody on the grounds of his behaviour moved out of the scope of the courts of the common law.<sup>98</sup>

A number of subsequent cases illustrate this shift. For example, in the case of *R v De Manneville, De Manneville v De Manneville*<sup>99</sup> the mother left her husband taking their child. The father followed and seized the child ‘then at the breast and carried it away almost naked.’<sup>100</sup> Although the mother applied for a writ of *habeas corpus*, Lord Ellenborough issued a restraining order that the child should remain within the Court’s jurisdiction. He declared ‘the law is clear that the custody of a child, of

---

<sup>93</sup>Lofft 749, Eng. Rep. 899 [K.B. 1774].

<sup>94</sup>Shanley Lyndon, M., op.cit. p133.

<sup>95</sup>Zainaldin, J.S., op.cit. p1054 n 48.

<sup>96</sup>As discussed above in the arguments of William Godwin, Percy Bysshe Shelley, Robert Owen, Anna Wheeler and William Thompson.

<sup>97</sup>Chief justice of the King’s Bench.

<sup>98</sup>Discussed in Zainaldin, J.S., op.cit. p1060 fn 77 & 1063 fn 97; Shanley Lyndon, M., op.cit. pp133-4.

<sup>99</sup>[1804] 5 East 221.

<sup>100</sup>Norton, C. ‘The Separation of Mother and Child By The Law of ‘Custody of Infants’ Considered, in Roberts, Dr. M.M., Mizuta, Professor, T. Eds. *The Mothers Controversies of Motherhood* (London: Routledge/Thoemmes Press, 1994) p27.



whatever age, belongs to the father [and] the father's rights extend to the hour of a child's birth.'<sup>101</sup> Since the father had not injured the child by denial of nurture (he handed the child to a nurse), the judge stated the father had not abused his 'right'. The courts had no power to consider any other decision, and custody of the child given to the father.<sup>102</sup> The case of *Skinner v Skinner*<sup>103</sup>, was complex. Despite a separation order that permitted the child to live with the mother, the father applied for a writ of *habeas corpus* to reclaim custody of the child. However, the court denied the father custody and a third party held legal custody of the child. The father removed the child, however, imprisoned for debt, he was unable to care for the child and his mistress dealt with the child's day-to-day care. The courts dismissed the mother's further claims to return the child to the mother on the grounds the court had 'no power to interfere.'<sup>104</sup> Yet generally, the courts considered contact between the child and the father's mistress as morally wrong.<sup>105</sup> Thus, the outcome, particularly in this case, illustrated the strength of the authority of the father, the power of the courts and the injustices to separated mothers.

Some judges did have sympathy for mothers. In the case of *Ball v Ball*<sup>106</sup> the mother gained a legal separation through the Ecclesiastical Courts and through the Court of Chancery petitioned to have custody and access to her daughter. The courts denied her claim. Yet, Vice Chancellor Hart stated:

This court has nothing to do with the fact of the father's adultery unless the father brings the child into contact with the woman.' Yet he added, 'I do not know of any case similar to this, which would authorize any making the order sought, in *either* alternative. *If any could be found, I would almost gladly adopt it; for in a moral point of view I know of no act more harsh and cruel, than depriving a mother of proper intercourse with her child.*<sup>107</sup>

---

<sup>101</sup>Norton, C.N. op.cit. pp26-9.

<sup>102</sup>Norton, *ibid*, p29.

<sup>103</sup>[1824] 9 Moore.

<sup>104</sup> Norton, C., op.cit. p41.

<sup>105</sup> *Ball v Ball* [1827] 2 Sim.35.

<sup>106</sup>[1827] 2 Sim. 35.

<sup>107</sup> Author's italics. Norton, C., op. cit. p41.

In the case of *Ex parte McClelland*,<sup>108</sup> the courts acknowledged the mother's role but denied the mother's claim to custody. As Mr Justice Patterson commented, 'It might be better, as the child is in a delicate state of health, that it should be with the mother, but we cannot make any order on that point.' The rights of the father to custody of his child remained absolute. Yet the Chancery Court did hold the power to intervene through the action of wardship. The Court was more reasonable than the common law courts in their approach to decisions in child custody disputes. However, the Chancery Court could only intervene if property was concerned. This meant only the wealthier classes were able to challenge a father's absolute rights. The extent of intervention was also limited. Before exercising their discretion to deny a father's rights to custody, the court needed to establish that the conduct of the father would be liable to disrupt the education, corrupt or harm the children.<sup>109</sup>

Several cases illustrate this practice. In *Lyons v Blenkins*<sup>110</sup> the courts refused to grant the father custody of his daughters, aged 19, 14 and 12, on the grounds that he had permitted them, on the death of their mother to reside with their aunt for the majority of their childhood. The case of *Shelley v Westbrook*<sup>111</sup> involved the poet Percy Bysshe Shelley. Shelley deserted his wife and child. Pregnant with their second child his wife returned to her father's home where he and their mother cared for the children. The mother died in 1821 and Shelley sought to 'get possession of their persons and educate them as he thought proper.'<sup>112</sup> However, Shelley was an avowed atheist. As a student, he had published *The Necessity of Atheism*. In court, Lord Eldon stated there was nothing in the evidence to suggest that Shelley had changed his opinions and his principles could not be misunderstood or ignored. His conduct was considered 'immoral and vicious' and the welfare of the children at risk.<sup>113</sup> In his judgment Lord Eldon opined, 'I cannot, therefore, think that I should be justified in delivering over these children for their education exclusively, to what is called the care to which Mr. S. wishes to be entrusted.'<sup>114</sup> The court refused Shelley paternal authority and appointed a third party the children's guardian.

---

<sup>108</sup>[1827] 1Dowl. P.C.

<sup>109</sup>Wroath, J., *Until They Are Seven* (Winchester: Waterside Press, 1998) p15.

<sup>110</sup>[1821] Jac 245.

<sup>111</sup>[1821] Jac 266.

<sup>112</sup>[1821] Jac 266.

<sup>113</sup>Op. cit. at 266.

<sup>114</sup>[1821] Jac 267.

The case of *Wellesley v Duke of Beaufort*<sup>115</sup> provides another example of the court overruling the authority of the father. In this case the court denied the father custody of the children on the grounds of his ‘profligate and immoral conduct.’ In addition, it was reported that ‘not only was he in the habit of swearing and of using obscene language in the presence of his own children, but he encouraged them in such immorality, and caused even the girl to learn to repeat indecent words, and the most vulgar oaths.’<sup>116</sup> Thus, in both cases, the courts applied discretion to deny the fathers custody of the children on the principle of the moral welfare of the children.

In contrast, in a study of the Westmeath’s turbulent marriage, if a husband was in agreement a couple, legal advisers could draw ‘a prospective deed’ a separation bond (a settlement arrangement) on the grounds of the possibility of the marriage breaking-up and negotiate terms of settlement for the mother and children. This marriage was interspersed with marital arguments, his adulterous affairs, and violence to Emily. She however, was no weak and mild Victorian wife and described as stubborn and vindictive.<sup>117</sup> In exchange for dropping threats to sue George for legal separation on the grounds of cruelty in the ecclesiastical courts, Emily obtained written indentures that secured a financial allowance for her, settlements on and full custody of their children. The case demonstrates that there was the opportunity to challenge the absolute authority of the father but only if the father was a party to the legal arrangements.

The case of *R v Greenhill*<sup>118</sup>, gained even more sympathy with important effects on the laws regarding infant custody. Henrietta Greenhill left her adulterous husband taking their three infant daughters and through her uncle petitioned for a divorce *a mensa et thoro*. After her refusal to withdraw from the proceedings, Benjamin Greenhill demanded the return of his jewels, a carriage and the children. Again, and by her uncle, Henrietta applied to the court of Chancery to make the children wards of court

---

<sup>115</sup>[1827] 2 Russ. Rep. 1.

<sup>116</sup>[1827] 2 Russ. Rep. 1 p239.

<sup>117</sup>Stone, L., ‘Westmeath v Westmeath’ in *Broken Lives* (Oxford: Oxford University Press, 1993) pp284-97.

<sup>118</sup>[1836] 4 A & E (OS) 624.

and an order ‘as to who was the fit and proper person to have the infant children.’<sup>119</sup> In reply, Benjamin Greenhill applied for a writ of *habeas corpus* for the children’s return.

There followed a number of counter arguments from both parties. An affidavit stated that Mrs Greenhill had been a dutiful wife and a caring mother. There were no grounds, counsel argued, for denying her of the children. Yet the court had no power to intervene and as such upheld the authority of the father to custody of his children. Counsel stated ‘The question raised by these proceedings is, not whether the father’s rights over his children be paramount, but whether the rights of the mother are to be wholly disregarded, so that she may not claim access even to infants within the age of nurture.’<sup>120</sup>

There was a great deal of public interest and sympathy for Henrietta Greenhill and this included both counsels. Serjeants Wilde and Talfourd expressed their discomfort at dealing with the case. Indeed, during the debates around the Custody of Infants Bill 1838, Lord Chief Justice Denman commented, ‘I believe that there was not one judge who had not felt ashamed of the state of the law and that it was such as to render it odious in the eyes of the country.’<sup>121</sup> Unquestionably, the case raised concern in the legal profession towards the inequalities of the law towards mothers regarding the legal rights to their children post-separation, and Serjeant Talfourd one of the strongest supporters. However, he was not alone. The name of the Hon. Mrs Caroline Norton is synonymous with the campaigns to amend the laws of infant custody. The next section explores her background and experiences in more detail to better understand her situation and the impetus behind her campaigns and joining forces with Serjeant Talfourd to change this area of the law.

---

<sup>119</sup>Wroath, J., op.cit. p41.

<sup>120</sup>*K v Greenhill* [1836] 4 A & E (OS) 924.

<sup>121</sup>As discussed in Wroath, J., op.cit. p50.

## The Case of the Hon. Caroline Norton

Caroline Norton was the third child, and middle daughter of Henrietta and Tom Sheridan<sup>122</sup> and a granddaughter of the playwright Richard Brinsley Sheridan. Biographers recount Caroline as a distinctive child with a rebellious streak indeed she was the only daughter in the family sent away to school. While there, Caroline visited Womersley Park the home of Lord Grantley. It was here she attracted the attention of his brother George Norton. Caroline's mother turned down George's first proposal of marriage to Caroline on the grounds of her youth. However, during the nineteenth century, the pressure to marry was intense, particularly if like the Sheridan daughters there was little in the way of a dowry.<sup>123</sup> Alongside this, social protocol demanded that each sister married in turn. Since Caroline's elder sister, was already married and her younger sister wished to marry there was some obligation on Caroline to accept George's second proposal and they married in 1827.

It was an ill-matched relationship. Authors have described Caroline as an impetuous young woman and a witty socialite. She was a Whig with strong political interests. George was the opposite. He was a Tory Member of Parliament and portrayed as dull, obstinate, suspicious and slow-witted. Despite an outward appearance of kindness, he also had 'a capacity for cruelty and brutality and slow revenge, when once convinced he had been aggrieved.'<sup>124</sup> Shortly after their marriage, Caroline experienced George's brutality in a violent physical attack, the first of many throughout their marriage. As a married woman, legally tied to an abusive husband Caroline had no legal means to escape the situation. On marriage, a wife promised to obey, serve and honour her husband. If her husband ill-treated, neglected her or committed adultery she remained tied to him by her marriage vows.

George and Caroline's relationship fluctuated between open affection for each other and hostility. Financial hardship added to this unhappy relationship. Caroline's small

---

<sup>122</sup>Miss Jane Gray Perkins suggests that Thomas Sheridan and Miss Henrietta Callender of Craigforth met in Edinburgh. Alice Acland added that the couple eloped probably because the bride's parents disapproved of the Sheridan family theatrical background and connections with the Regent and Devonshire House set. Miss Jane Gray Perkins, *The Life of Mrs Norton* (London: John Murray Albemarle Street, 1909) p1; Acland, A., *Caroline Norton* (London: Constable & Company Ltd., 1948) p18.

<sup>123</sup>Wroath, J., op.cit.p64.

<sup>124</sup>Perkins, Miss J. G.J., op.cit p14.

dowry and success as an author augmented the family income. In fact, her earnings and her husband's legal right to them, her possessions and trust monies became the source of much bitter acrimony between the couple. George's claim of family income was far from the truth and although a barrister at law, he never practised. When he lost his seat in the House of Commons in 1830, George encouraged Caroline to use her contacts to find him another post. Through Lord Melbourne, a friend of her grandfather, George gained the position as Recorder at Guildford Magistrates' Court. Lord Melbourne became a frequent visitor to Storey's Gate and developed a close relationship with Caroline with the full knowledge of her husband.<sup>125</sup> Ultimately, the friendship between Caroline and Lord Melbourne became the focus of speculation, the subject of media debate, and instigator of legal reform.

Caroline and George had three children, Fletcher, Thomas Brinsley and William. Evidence from two of her biographies indicates she clearly had a loving relationship with her children<sup>126</sup> yet they were to become pawns in the volatile relationship between their parents. On one occasion, George refused to allow Caroline to take the children to her brother's home. The next morning Caroline left early to call on her sister for advice. Her own words describe the event: 'the man-servant (from Storey's Gate) came to me and said that something was going wrong at home-that the children, with their things, had been put in a hackney-coach and taken away, he did not know where.'<sup>127</sup> In fact, George had sent his children to his cousin Miss Vaughan. George refused to allow Caroline into their home and denied her access to the children. Caroline did not return to her husband.<sup>128</sup> George lost no time in making it public that Caroline had left him and he was no longer responsible for her or her debts.<sup>129</sup> According to Miss Jane Gray Perkins *The Age and the Satirist*, 'two of the most scurrilous newspapers of the day, were soon busy with the vilest kind of slander and innuendo' not only against Caroline, but her whole family.<sup>130</sup>

---

<sup>125</sup>Perkins, Miss, J.G., op. cit. p 34.

<sup>126</sup>In 1840 Caroline Norton published '*The Mother's Heart*' a poem describing the deep love she felt for her sons.

<sup>127</sup>Perkins, Miss J.G., op.cit pp80-2.

<sup>128</sup>Perkins, Miss J.G. ibid, pp80-1; Ackland, A., op. cit. p80; also discussed in Wroath, J., op.cit. p82.

<sup>129</sup>By law, husbands were legally responsible for a wife's debts before and after marriage.

<sup>130</sup>Pekins, Miss J.G., op.cit. p82.

In May 1836, George brought a case of ‘crim con,’ a civil suit for adultery against Lord Melbourne (then Prime Minister) as first steps to divorce Caroline. It was as Alice Ackland stated ‘the sensation of the season, and not only in England but in all the courts of the Europe.’<sup>131</sup> The consequences had deep political implications.<sup>132</sup> In a letter from Lord Melbourne to Caroline, he expressed his concern with the situation and the effects on his health, but added, ‘The real and principal object of my anxiety and solicitude is you, and the situation in which you have been so unjustly placed.’<sup>133</sup> The case came to court on June 22<sup>nd</sup> with Sir John Campbell, Attorney General for the defence, Sir Frederick Thesiger and Thomas Noon Talfourd as junior counsel. There was a great deal of public and media interest in the trial. However, the witnesses were primarily servants and comprehensively overpowered by the defence. After a lengthy summing up, the jury dismissed the case against Lord Melbourne. His political future was safe. Of course Caroline never appeared in court. Married women had no legal autonomy. In a letter to Mrs Shelley addressed from Hampton Court on 25<sup>th</sup> June, Caroline wrote, ‘a woman is made a helpless wretch by these laws of men, or she would be allowed a defence, a counsel, in such an hour.’<sup>134</sup> Yet despite proven innocent, the case destroyed Caroline’s reputation.

With no case of proven adultery, there could be no divorce for Caroline and George. Contact with the children was difficult. Arrangements for access were dependent on George’s terms and changing temperament. In the subsequent four years, Caroline saw her children once. George had sent the children to Scotland and thus out of the English jurisdiction.<sup>135</sup> It was the hopelessness of the situation drove her to campaign, for changes to the laws of child custody through her writing skills. Soon after the trial, Caroline privately published *Observations on the Natural Claim of a Mother to the Custody of Her Children as affected by the Common Law Right of the Father*. This was her first step in campaigning for legal reforms to the child custody laws.

---

<sup>131</sup> Ackland, A., op.cit. p85.

<sup>132</sup> Ackland, A., ibid, pp84-92; Wroath, J., op.cit. pp84-5.

<sup>133</sup> Letter from South Street dated 23 April (1836) from Lord Melbourne to Hon. Mrs Caroline Norton reprinted in Perkins, Miss J. G., op.cit p93.

<sup>134</sup> Perkins, Miss J.G. op.cit. pp94-5.

<sup>135</sup> Perkins, Miss J. G., op.cit. pp96-103.

As a woman, Caroline had no political voice consequently, through her friend Abraham Hayward, Caroline met Serjeant-at-law-Talfourd<sup>136</sup> a barrister of law, judge of the Court of Common Pleas and elected Member of Parliament for Reading.<sup>137</sup> Although Talfourd had won Benjamin Greenhill's case in his battle for custody of his children, as indicated above, he was aware of the injustices towards mothers in child custody law. In him, Caroline had found a Member of Parliament to introduce changes to the law. Talfourd presented the Infant Custody Bill to Parliament for its First Reading. However, reunited with her sons, Caroline informed Talfourd she was no longer interested and the Bill went no further.<sup>138</sup> Yet when George again denied Caroline access to the children, she rekindled her campaign Serjeant Talfourd re-introduced the Infant Custody Bill. It is therefore understandable that feminist campaigners for legal change such as Harriet Martineau, gave Caroline little support, they regarded her interest as personal rather than the wider interest the injustices to mothers.

However, Caroline published political pamphlets advocating for change: *The Separation of Mother And Child By The Law Of 'Custody Of Infants' Considered* 1838 and under the pseudonym of Pearce Stevenson, *A Plain Letter To The Lord Chancellor On The Infant Custody Bill* in 1839. The first pamphlet demonstrated that Caroline clearly understood the law and had a good knowledge of the reported cases of child custody dispute. For example, she quoted and discussed the *De Manneville*, *Skinner*, *McLelland*, and *Greenhill* cases in detail. Caroline based her arguments on differences between the authority of the father and the natural love of the mother. She stated,

The Father's right is absolute and paramount, and can be no more affected by the mother's claim, than if she had no existence. The result of this tacit admission by law of an individual right so

---

<sup>136</sup>Thomas Noon Talfourd born in Reading in 1795 was as a young man an enthusiastic poet, writer and public speaker. He was called to the bar in 1821, and became a serjeant and leader of his circuit. Yet despite his career in law, he never gave up writing. He contributed to the publication of Greek and Roman history but his most notable works were on his biography of Chales Lamb. He was elected to Parliament in 1834. *He died suddenly while delivering a speech to the grand jury at Stafford in 1854.*

<sup>137</sup> Wroath, J., op.cit p171.



entirely despotic, (the assertion of which *can* only be called for in seasons of family disunion and bitterness of feeling), is exactly what might have been expected. Instances have arisen from time to time in which the power has been grossly and savagely abused. It has been made the means of persecution and the instrument of vengeance [and] in short, there is scarcely any degree of cruelty which has not been practised under colour of its protection.<sup>139</sup>

Yet Caroline did not seek to undermine a father's legal authority. She clearly stated that, 'It is a case of simple protection of the liberty and rights of the subject, and not of any encroachment on the authority of a father as the master of the house and the head of his family.'<sup>140</sup> There was, she argued no new ideas in her campaign to intervene with the common law rights of the father. Caroline declared there ought to be a new law, 'that whereas hitherto the Courts have refused to consider the suffering and wrong done on very many instances to the mother, [and] some recognition and acknowledgment may now be made of the mother's separate existence, and right to protection.'

In her second approach, Caroline based her arguments on the 'principle of *natural* justice' and the natural love of the mother. She asked what *natural* justice in the law had on separation, given a father absolute power to restrict a mother from access to her children.<sup>141</sup> To the husband, she pointed out, 'the law awards that which can rarely be entrusted to any human being, even in the calmest hours of life, namely, *despotic power!*'<sup>142</sup> She continued,

Doubtless the claim of a father is sacred and indisputable, but when the mother's claim clashes with it, surely *something* should be accorded to her. There are other laws beside those *made by men-what says the holier law, the law of nature?*<sup>143</sup>

---

<sup>139</sup>Norton, C., op.cit. p3.

<sup>140</sup>Norton, C., op.cit. p6.

<sup>141</sup>Norton, C., op.cit. pp6-7.

<sup>142</sup>Norton, C., op.cit. p7.

<sup>143</sup>Author's italics. Norton, C., ibid p7.

Caroline argued that the love of the mother '*is believed to be the strongest tie of nature, and her care to be essential to the well-being of her infant children.*' The unnatural separation of a mother from her children she regarded would have devastating effects on a mother. Caroline declared,

how maddening those bursts of intense longing to be with her children-to know how they are treated-to guard, to guide-to be in short what a mother's love is, an *Inferior Providence* over these helpless creatures! And this is a grief which does not wear out, or go by, like other sorrows-it is the torture of a lifetime; Why should any man have power because he is offended, to inflict the torture of a lifetime? <sup>144</sup>

Caroline categorically dismissed the argument that the rights of the father were the right of nature and above the law. She argued,

*There is no reason [then] why a man living under the law should be independent of it in one single and isolated instance';* She continued, 'Either the right admitted, is *natural* or *artificial*; if *artificial*, the law has the same power to adjudge the custody of infants, that it would have in case of any other artificial right; if *natural*, the law has no power to order children from their mother, since by nature the rights of both parents are co-equal. <sup>145</sup>

Caroline further suggested 'it *may* perhaps occur to the lawgivers of a free country, that it would be more for the peace of society, and the credit of humanity, conditionally to admit the *mother's natural claim.*'<sup>146</sup> It is evident that Caroline based her campaigns on her own bitter experiences and her literary skills the only means open to her as a woman to raise the inequalities and injustices of the laws regarding the area of children post-separation. Indeed, following the rejection of the Bill by the House of Lords in 1838, and under the pseudonym Pearce Stevenson, Caroline

---

<sup>144</sup>Norton, C., op.cit. pp13-4.

<sup>145</sup>Norton, C., op.cit. p22.

<sup>146</sup>Norton, C., op.cit. p25.

published *A Plain Letter to the Lord Chancellor on the Infant Custody Bill*. It was opined as ‘one of the most remarkable things from the pen of a woman.’ A visiting American jurist commented that ‘The world here does not suspect her, but supposes that the tract is the production of some grave barrister. It is one of the best discussions on a legislative matter I have ever read.’<sup>147</sup> A satirical letter, it in fact criticised Caroline. To quote,

The House has to consider, and not the paltry and ridiculous doubt whether Mrs Norton used her woman’s tears, and her woman’s arguments, to increase Serjeant Talfourd’s acquired impression, that there ought to be vested in the courts a peculiar power of protection to meet certain cases, which power at present does not exist.<sup>148</sup>

Nevertheless, ‘Pearce Stevenson’ argued for the importance of the role of mothers.

She is under God responsible for the souls and bodies of the new generation confided to her care; and the woman who is mother to the children of a profligate and tyrannical husband is bound by her duty, even if she were not moved by the strong instinct of her own heart, to struggle against the seizure of her infants. [and] To refuse the protection which would enable a blameless wife to continue her care of infants in such a case, merely on the plea that the law will not interfere with the husband, what is it but to deny the position of the woman as a rational and accountable creature?<sup>149</sup>

‘Pearce Stevenson’ pleaded with the Lords to reconsider the Bill. ‘He’ hoped the Chancellor would support the Bill and ‘the law may be brought to do justice to those,

---

<sup>147</sup>In a letter in Pierce’s *Life of the American jurist, Sumner* dated February 16. The American jurist had been in London in 1839. Mrs Norton had been present at a small dinner party Sumner had attended during his visit. As discussed in Perkins, Miss J. G., *op.cit.* pp154-5.

<sup>148</sup>Stevenson, Pearce *A Plain Letter To The Lord Chancellor On The Infant Custody Bill Dated 15 December 1838* (London: Ridgway, 1839) p90.

<sup>149</sup>Stevenson, P., *op.cit.* p108.

whose sufferings are not the less intense, because they are borne in helplessness, and comparative obscurity.’<sup>150</sup>

The unseen sufferers were the subject of Serjeant Talfourd’s arguments for changes to the laws in the House of Common. He stated, ‘It is instances in which the sufferer endures unseen, that it is chiefly felt.’ Yet, like Caroline, Talfourd did not seek to change the law regarding the father’s right to custody. He stated clearly that ‘he sought not to disturb the common-law right of the father to custody of his children; he sought merely to allow a remedy in certain cases of grievous wrong by giving to judges a discretionary power, which they had themselves asked for, to permit a wife to see her children.’<sup>151</sup>

Indeed, he stated that he felt ashamed of the slight changes that he presented in the Bill. He did however ask that, ‘some mitigation of the mother’s lot [and for] some slight control over the operation of that tyranny which one sex has exerted over the helplessness of the other.’<sup>152</sup>

There was support for the Bill. Mr Leader commented ‘No man who has given this subject the smallest consideration can deny that the law requires some alteration.’ He continued

As it stands at present, the law is entirely in favour of the husband and oppressive to the wife. A man may be drunken, immoral vicious, and utterly brutalized, may place his wife, who seeks to live separately from him, in this cruel dilemma-[and] You shall either continue to live with me, or you shall be deprived of your children.<sup>153</sup>

The law he declared ‘sternly refuses to listen to the pleadings of natural sympathies and affections, gives to the husband the charge and possession of the children, and denies even the sight of them to the beloved and loving mother.’ He added, ‘there are

---

<sup>150</sup>Stevenson, P., *ibid*, p124.

<sup>151</sup>Mr Serjeant Talfourd, H C Deb 9<sup>th</sup> May 1838 c 1054.

<sup>152</sup>Mr Serjeant Talfourd, H C Deb 23<sup>rd</sup> December 1837 c 1089-90.

<sup>153</sup>Mr *Leader* H C Deb-23<sup>rd</sup> December 1837 c. 1090.

hundreds of women now suffering in silence, pining for the children whom a stern law has torn from them.’<sup>154</sup>

Yet there was powerful opposition to the Bill. The pamphlet, *A Brief Exposure of the Most Immoral and Dangerous Tendency of a Bill Affecting the Rights of Parents now under Consideration of Parliament, or, Summary of Reasons Why this Bill, entitled “Custody of Infants Bill”, should not be allowed to become the Law of the Land* was published. The authors, Richard and John E. Taylor set out specific reasons why the Bill should not become law.<sup>155</sup> The Bill they argued was immoral, antichristian, unconstitutional, and unjust to individuals, impractical, inconsistent and absurd.<sup>156</sup> Other strong opponents included Lord Brougham and Lord Wynford, George Norton’s uncle.<sup>157</sup> However, personal feelings rather than opposition to reform may have influenced their opposition. Both men had a link with Caroline. Lord Brougham had been a friend however, this ended with his belief that she had been involved with the exclusion from the Melbourne Government.<sup>158</sup> The troubled relationship between Caroline and George would undoubtedly have some influence on Lord Wynford’s attitude. Sir Edward Sugden was another outspoken opponent. He argued that the passage of the Bill would encourage increased numbers of separations between husbands and wives. In a later debate, he warned, (Parliament) ‘to beware how by altering the law they relaxed and weakened that bond by which domestic morality was cherished and preserved.’ In fact, Sugden suggested that ‘The existing law was by no means so cruel as was represented.’<sup>159</sup> He argued where parties separated the mother was generally given reasonable access, unless her behaviour justified the father refusing.<sup>160</sup>

Nonetheless, despite the arguments for and the counter arguments against change, the Custody of Infants Act received Royal Assent in 1839. The Act gave separated and divorced women the right to apply to the Court of Chancery for custody and access to their children but only up until they were seven. However, this was only a

---

<sup>154</sup>Mr *Leader*, *ibid*, c 1090-1.

<sup>155</sup>Wroath, J., *op.cit.* p101.

<sup>156</sup>Wroath, J., *bid*, p103.

<sup>157</sup> Wroath, J., *bid*, p101.

<sup>158</sup>Perkins, Miss J. G., pp146-7; Wroath, J., *ibid*, p108.

<sup>159</sup>Sir Edward Sugden H C Deb 9<sup>th</sup> May 1838 c 144.

<sup>160</sup>Sir Edward Sugden H C Deb 9<sup>th</sup> May 1838 c. 144-5.

consideration if the parties had separated and the mother was not guilty of adultery. Therefore, the reforms were limited and dependent on the moral behaviour of the mother.

For Caroline the Act did not bring success. She discovered her children had been living in Scotland and regarded as residents therefore, they were outside the jurisdiction of English law. It was another two years before she gained access to see her children. Even then, they were difficult times with George changing arrangements for Caroline to meet the children. The boys were now over seven years old, consequently Caroline could only have access and not custody. Adding to her distress her youngest son William fell in a riding accident, although his injury was slight, he contracted blood poisoning and died before his mother could reach him.<sup>161</sup> The relationship between Caroline and George continued to be acrimonious particularly over financial matters. Indeed, these bitter battles later instigated Caroline Norton's campaign for reforms to the divorce laws. Yet, in the reforms to infant custody law, Caroline Norton undoubtedly was a driving force despite opposition, criticisms and her changing opinions. With Serjeant Talfourd, Caroline's campaign to change the law and address the injustices and legal inequalities for separated mothers was a remarkable achievement. Indeed the Act formed the origins of women's legal equality with men. Yet the laws of infant custody stood in the eighteen thirties were, for mothers, restrictive and riddled with double standards. Thus far, the first section of this chapter has provided a broad sweep of the origins and historical evolution of the laws of marriage, divorce and infant custody up until 1839. It has offered an insight into the ways shifting dominant narratives the Church and the state have gradually regulated the laws of marriage to sanction sexual relationships, contain wealth and preserving a patriarchal family structure and defined through class and gender distinctions. Historically, in marriage through the doctrine of unity and the idea of *coverture*, wives and mothers were legally non-existent; they had no formal legal rights. Fathers had absolute authority to their wife's possessions, property, and their legitimate children during marriage and after legal separation or

---

<sup>161</sup>Caroline eventually had access to her sons often for six months of the year. Her son Brinsley kept poor health and a semi-invalid. He lived in Capri with his wife who spent most of her time caring for him. Caroline devoted her time to raising their children. After George Norton and his brother Lord Grantley died, Brinsley inherited his title. Caroline married her friend William Stirling-Maxwell in 1874 but died a few months later. Wroath, J., op.cit. p137.

divorce. The analysis of reported cases illustrated the extent of legal injustice towards wives and mothers. However, the first challenges to the father's absolute authority were in infant custody law. Section 1 explored in detail the background to the legal reforms and in particular to Caroline Norton, a key campaigner for legal change in this area of the law reform. Her experiences demonstrated the restrictions of the marriage laws, lack of straightforward divorce laws and the profound inequalities of infant custody laws. Caroline Norton's campaigns and the reforms to infant custody law represented the origins of the struggle for women's legal equality. Yet despite the challenges to the legal authority of fathers, the laws of marriage, divorce and infant custody laws were limited for wives and mothers and continued to be biased towards husbands and fathers. The second section of this chapter turns to explore the slow progress of legal change and through an analysis of judicial commentaries that reinforced the persistence of legal inequalities for mothers.

## **Section 2**

### **Measured Reforms: the Laws of Marriage, Divorce, Infant and Child Custody Laws from the Mid-Nineteenth Century to the Early Twentieth Century**

#### **The Narratives of Domesticity and the Public and Private Spheres**

In the nineteenth century, marriage was important for women. Indeed, for upper and middle class women it was fundamental, and an expected progression. There was no other life open to them. Generally, girls had little formal education and entry to universities and the professions not a consideration. For working class women, marriage may have brought some improvement to their lives but more likely, it was a transfer from one form of labour to another.<sup>162</sup> Yet, as discussed above, on marriage women became legally non-existent. Church wedding ceremonies called for a woman to promise to obey and serve her husband. Thus, the law and the church sent out messages that the role of wives should be subservient and inferior to their husbands.

---

<sup>162</sup>Wroath, J., op.cit. p9.

For women, marriage reinforced the dichotomy of the public and private spheres and distinct gendered roles. Strict moral standards and social values underpinned ideals of Victorian society and dominated social, political and legal narratives with distinct gendered roles for men and women. Mothers were responsible for upholding moral values and raising their children as loyal citizens.<sup>163</sup> The private sphere of the home symbolised a refuge from the public sphere of politics, business, and promiscuity. Narratives of domesticity, the home and the family were powerful and vital images, reflecting status and social meanings. Indeed, amongst many of the images portrayed of the new Queen Victoria was the idea of her as a middle-class bourgeois wife. Of course, she was not Victoria was the monarch. Yet even here, there were contradictory undertones. In her role as queen, she served the nation.<sup>164</sup> Nevertheless, the idea and indeed imagery of Victoria as the submissive wife to her husband Albert surrounded by the family perpetuated the notion of a desired patriarchal family structure.

Yet women claimed and reinforced the ideas of domesticity. There were numerous domestic manuals published giving advice on the daily practicalities of women's role in the home, for example the works of Isabella and Samuel Beeton.<sup>165</sup> Other writers took a different stance. Mrs Sarah Stickney Ellis aimed to make domesticity a lived experience. As Leonora Davidoff and Catherine Hall argue, her books assumed that domesticity was a private sphere 'with men as the absent presence' to give orders but to be physically elsewhere.<sup>166</sup> Mrs Ellis was described by *The Metropolitan* as 'not a stern moralist who frightens with her severity, but a winning instructress to whom it is sweet to listen; and though the work before us is one of teaching, it will be read with pleasure recommended by its taste, its sentiment, and its refinement.'<sup>167</sup>

Ellis promoted the idea that women's primary role in life was to be a good wife and mother and typified by titles such as *The Mothers of England; The Women of*

---

<sup>163</sup>Shanley Lyndon, M., *Feminsim, Marriage and The Law in Victorian England* (Princeton, New Jersey: Princeton University Press, 1989) pp5-6.

<sup>164</sup>Homans, M., *Royal Representations Queen Victoria and British Culture 1837-1876* (London: The University of Chicago Press, 1998) p2.

<sup>165</sup>Mrs Beeton's *Book of Household Management* (London: S.O.Beeton 1861).

<sup>166</sup>Davidoff, L., & Hall, C., Revised 3<sup>rd</sup> Ed. *Family Fortunes* (London: Routledge, 2002) pp180-1.

<sup>167</sup>Comments by *The Metropolitan* on the publication of Mrs Ellis book *Hints to Make the Home Happy*, (London The Caxton Press, no year) in Ellis, Mrs., S., *The Mothers of England, Their Influence and Responsibility* (London: Fisher, Son & Co., 1843) p303.



*England; The Daughters of England and the Wives of England.* In *The Mothers of England*<sup>168</sup> Ellis argued that the responsibilities and influence of a mother were important. On education she commented, ‘that while young women and unmarried, may with propriety cultivate her mind and improve her character to almost any extent; but that as a wife she has no need to advance any further, and as a mother she will do well if she can superintend the dressing and undressing of a baby!’<sup>169</sup> It was, she argued, a mother’s responsibility to instil high moral standards and obedience in the younger generation. ‘There is in reality scarcely anything which ought to stand in the way of a mother’s constant and strict attention to the training of her children; because she is in reality the person whose influence over them is the most powerful.’<sup>170</sup> In *Women of England*, she argued women were the moral protectors of the nation. Ellis declared: ‘women have ‘deep responsibilities, you have urgent claims, a nations moral wealth is in your keeping.’<sup>171</sup> Therefore, the ideas of domesticity and the importance of the wife and mother not only concerned the private sphere of the home and family it was much wider. The good wife and mother represented the moral standing of society and indeed the English nation. This was certainly an attitude mirrored in politics. As Lord Shaftesbury stated, ‘the strength of the people rests upon the purity and firmness of the domestic system [and] the man is trained to be a good citizen [and the wife and mother] complementary pillars of both domestic and civil society.’<sup>172</sup>

However, the concept of domesticity did not only reflect ideas of women’s role in the private sphere. As John Tosh argues, it was also important to uphold men’s position in the public sphere alongside their role as ‘dutiful husbands and attentive fathers’ devotees of hearth and family.’<sup>173</sup> Men needed their wives in the private sphere to support them to give credibility to their position in the public sphere. Thus, domesticity as an overarching concept had a profound and real impact on the imagery of the separate spheres; marriage as an institution reinforced this state through the

---

<sup>168</sup>The inscription in this book reads, ‘Maria Stephens From Your Affectionate Mother Penelope Ann Edwards Sept. 1865’ perhaps a gift from a mother to her daughter on her marriage.

<sup>169</sup>Ellis Mrs. S., *ibid*, p23.

<sup>170</sup>Ellis, Mrs. S., *ibid*, p67.

<sup>171</sup>Ellis, Mrs. S., 2<sup>nd</sup> Ed. *The Women in England Their Social Duties and Domestic Habits* (London: Fisher, Son & Co., no date) p13.

<sup>172</sup>As quoted in Wohl, A., Ed. *Victorian Family* (New York: St Martins, 1987) p9-10.

<sup>173</sup>Tosh, J., *A Man’s Place* (New Haven: Yale University Press, 1999) p1.

legal and political subjection of wives and mothers.<sup>174</sup> Coventry Patmore's *'The Angel in the House'* captures the ideal of marriage and domesticity in the Victorian era. He described the bourgeois wife as 'a devoted and submissive wife, passive and powerless, meek and self-sacrificing.'<sup>175</sup>

Nevertheless, the idea of 'the angel in the house' may not have been truly indicative of the reality of some marriages. While domesticity generally defined the role of married women and mothers in the nineteenth century there is evidence that not all women's experiences were the same. Indeed, the issue of class defined the public role wives could take. Caroline Norton is a clear example. Her published writings and novels supplemented or indeed was the primary source of family income.

Evangelicalism and philanthropy allowed wives and mothers the opportunity to step out of the private sphere of the home. In their study of the role of Scottish women in the Victorian era, Eleanor Gordon and Gwyneth Nair argue upholding moral standards gave women a sense of power, pride and status in the public sphere.<sup>176</sup>

They also found evidence that some married women were very much involved in the public sphere of business. Wives, they pointed out played a supportive role to their husbands in businesses such as shopkeepers' wives, and supportive in professions of teaching, academia, medicine and the ministry.<sup>177</sup> Leonora Davidoff and Catherine Hall found similar proof in England. For example, Elizabeth Cadbury worked in the family drapery business beside her husband Richard and Ann Conder was not only an author but also supported her husband, Josiah in his ministry. Married women also had their own trades as milliners and dressmakers. Yet, as Davidoff and Hall revealed differences in pay existed, in Witham National School in 1840, masters earned £55 per annum while schoolmistresses earned £35 per annum.<sup>178</sup> Nevertheless, the

---

<sup>174</sup>Perkins, J., op.cit. p20; Dolin, K., *A Critical Introduction to Law and Literature* (Cambridge University Press, 2007) p121.

<sup>175</sup>*The Angel in the House* first appeared in 1854 part of four sections composed over a number of years in honour of his first wife Emily.

<sup>176</sup>Gordon, E., & Nair, G., *Public Lives Women, Family and Society in Victorian Britain* (New Haven; Yale University Press, 2003) p265.

<sup>177</sup>Barbara Leigh Smith Bodichon pointed out that a Saxon custom continued in the City of London that allowed a married woman to trade by her own name, *femme sole* trader provided her husband gave his agreement. Smith, Bodichon, B.L. *A Brief Summary, in Plain Language of The Most Important Laws of England Concerning Women together with a Few Observations Thereon*. Reprinted in Roberts, Mulvey., Dr. M. & Mitzuta, Professor, T., Eds. *The Disempowered Women and the Law* (London: Routledge/Thoemines Press, 1992) p30. Gordon & Nair, *ibid*, pp4 & 156-9.

<sup>178</sup>Davidoff, L., & Hall, C., op.cit. pp52, 62 & 291-9.

narratives of separate spheres and domesticity were powerful.<sup>179</sup> However, considering the apparent critical role wives and mothers apparently held in the family and the importance of their role in the wider society, they had no legal rights. As such, the law sent out a clear message of women's inferior legal position under the doctrine of unity and *coverture*. Yet questions on gender difference, women's legal inequality were emerging. This next part turns to examine the route towards women's legal equality.

### **The 'Woman Question': the Struggle for Women's Legal Equality**

Questions on gender difference, women's legal rights and inferior position in society, and the 'woman question' were slowly developing. To trace the history of women and feminist thought is a vast area of study and outside the remit of this thesis. Therefore, this part of the chapter will offer a broad sweep of the different ways men and women raised the 'woman question' as a subject of into public and legal discourses. Specifically, it will consider women's use of literature to reflect the inequalities in their lives within the family and the wider social context. Alongside this, other women engaged in political writing through pamphlets and articles to emphasise the injustices towards women. Through this medium, the aim is to locate the social and political backdrop of the growing demands for legal equality for women. As John Stuart Mill stated in the mid-nineteenth century,

Ever since there have been women able to make their sentiments known by their writings (the only mode of publicity society permits them), an increasing number of them have recorded protests against their present social condition.<sup>180</sup>

In the late eighteenth century, Mary Wollstencraft and Hannah More were two of the earliest women writers on the 'woman question'. Both were schoolteachers and advocated for better education for girls.<sup>181</sup> However, More joined an evangelical

---

<sup>179</sup>Okin Moller, S., op.cit. p21.

<sup>180</sup>Mill, John Stuart *The Subjection of Women* First published in 1869 (This Edition Ware, Hertfordshire: Wordsworth Editions Limited, 1996) p129.

<sup>181</sup>Mary Wollstencraft wrote *Thoughts on the Education of Daughters* 1786 and Hannah More's work *Strictures on the Modern System of Female Education with a View to the Principles and Conduct of*

religious group and turned her energies towards encouraging women to follow traditional ideas of charity, humility and piety.<sup>182</sup> Wollstencraft took a different track. Influenced by the French Revolution and radical political thought, Wollstencraft published *A Vindication of the Rights of Woman*, a history of women's injustices in comparison to men and a demand for the rights of women. Her work is considered the genesis of feminism and the women's movement.<sup>183</sup>

Yet there were others raising the 'woman question'. In the eighteenth century, women's inequality with men emerged as an area of intellectual debate. As noted above, Robert Owen, Frances Wright, Anna Wheeler and William Thompson were all involved in discussions of the subjective position of women. By the early nineteenth century, the 'question' was emerging from different perspectives. As illustrated above, in the field of law, barristers and judges were beginning to voice concerns of the legal injustices against wives and mothers in cases of child custody dispute. For example, Vice-Chancellor Hart in the case of *Ball v Ball*, Mr Justice Patterson in *Ex parte McClelland*, Serjeants Talfourd and Wilde, and Lord Justice Denham in *R v Greenhill* all demonstrate this approach. The 'woman question' also emerged through literature, poetry, political pamphlets and journals. Indeed, literature can provide following generations with an insight to the wider social and political background as well as personal historical experiences. This applies to Victorian writings. One of the earliest to raise the 'woman question' was Alfred Lord Tennyson. Yet, to quote one brief section of his poem the 'Princess',

Man for the sword and for the needle she:

Man with the head and woman with the heart:

Man to command and women to obey;

All else confusion.<sup>184</sup>

---

*Women of Rank and Fortune* 1799 as discussed in Anderson, B.S. & Zinsser, J.P., *A History of Thier Own* (London: Penguin Group, 1990) pp122-3.

<sup>182</sup>Anderson, & Zinsser, op.cit. pp126-7.

<sup>183</sup>Wollstonecraft, M., *A Vindication of the Rights of Women* (London: J.M.Dent, 1995, The text is edited from the 2<sup>nd</sup> revised edition published in London: Joseph Johnson, 1792, This edition first published in Everyman in 1929). The influence of the French Revolution prompted Wollstencraft to write a *Vindication of the Rights of Man* in the previous year to her book on the rights of women.

<sup>184</sup>Alfred Lord Tennyson's poem *The Princess* published in 1847.

It would appear to reinforce the subordinate position of women, yet Tennyson regarded the education of the poor classes and women as two of the great social debates of the time. He was one of a growing number of male voices that emphasised the need to bring the ‘woman question’ into public debate. Other men such as the radical writer and political reformer Samuel Smiles also brought the ‘woman question’ into political debate.<sup>185</sup> According to Alex Tyrell, Smiles early works focused on resolving his beliefs that the ‘natural destiny’ of the majority of women should be in the private sphere of the home and his support of women’s legal status.<sup>186</sup> In 1838, Smiles published *Physical Education* an innovative study aimed at the middle classes advocating new ways of parenting in an attempt to avoid early child mortality. However, the second edition,<sup>187</sup> took a different approach campaigning for education and equal citizenship for women. Smiles arguments emerged alongside other activists from religious factions who through the growth of scientific interest challenged orthodox religion and established political and social doctrines. Indeed, the Unitarians became a leading faction in campaigning for women’s legal rights. Smiles used his position as editor of the *Leeds Times*, to promote his Unitarian philosophies advocating political equality for women.<sup>188</sup> However, as Tyrell argues, Smiles never moved away from the idea of the ‘angel in the house,’ albeit an educated wife and mother.

The injustices and non-legal status provoked a number of women in the late eighteenth and nineteenth centuries, to use their writing to emphasise the inequalities of their gender. Since women had no political voice, it was the only way open to them, although, as Caroline Norton (Pearce Stevenson) and Mary Ann Evans (George Eliot) used male pseudonyms. Some women used literature to express their opinions. Jane Austen’s eighteenth century novels are particularly significant. Informed by the experiences of women’s lives in the late eighteenth century her novels provide a picture of the restricted lives of middle class women and the legal inequalities for

---

<sup>185</sup>Smiles trained as a doctor and lived in Haddington and Edinburgh. At that time, there was a strong intellectual climate amongst Edinburgh and the Lothian societies debating political and social concerns of the period. Smiles was part of this group.

<sup>186</sup>Tyrell, A., ‘Samuel Smiles and the Woman Question in Early Victorian Britain’ 2000 *The Journal of British Studies* 39 2 p187.

<sup>187</sup>Influenced by the work of George Combe, an Edinburgh phrenologist (would be science of mental abilities identified by feeling the head).

<sup>188</sup>Smiles, S., ‘Why Are Not Women Enfranchised?’ *Leeds Times* 9/5/1840 as discussed in Tyrell, A., op.cit., p194.

women. *Sense and Sensibility*, *Emma*, *Pride and Prejudice* and *Northanger Abbey* illustrate the constraints and competitive market of marriage, and the pressures on young women and their families to find eligible (and wealthy) men to marry. Anne Brontë's novel, the *Tenant of Wildfell Hall*, published in 1840 but set in the eighteenth century is a novel with a modern resonance. It is a story of Helen Huntingdon, escaping from her abusive and drunkard husband to set up an independent life for herself and her son. Of course, this was against social convention and the law and Helen Huntingdon soon found herself the victim of gossip and slander. It is a story of the ways the law discriminated against wives,<sup>189</sup> however, it is a story recounted by a man.<sup>190</sup> Yet, as Anne Brontë stated in the Preface to the Second Edition that the aim of her writing was to tell the truth, 'for truth always conveys its own moral to those who are able to receive it.' She further added 'Let it not be imagined, however, that I consider myself competent to reform the errors and abuses of society, but only that I would fain contribute my humble quota towards so good an aim.'<sup>191</sup>

Elizabeth Gaskell in her stories of *Cranford* gave a glimpse of a different view of the lives of women generally hidden beneath an imagery of women in the private sphere of the home. Gaskell's stories describe very capable women speaking out against the establishment and authority. Yet her stories also include descriptions of a gentle and sensitive men side of men such as Mr Holbrook towards Miss Matty.<sup>192</sup> Later other women novelists such as Mary Ann Evans writing under the pseudonym of George Eliot based her novels on the wider context of the social and political life of the nineteenth century. This however is not to deny that male authors did not use novels to achieve similar effects. For example, Charles Dickens and Wilkie Collins used the medium of literature to attack an indifferent society to the status of the poor, powerless and vulnerable. Therefore, from literature and particularly women's narrative the subtexts of the dramas of life in the eighteenth and nineteenth centuries presented a picture of the wider social, legal and political context of the times.

---

<sup>189</sup>Ward, I., *The Case of Helen Huntingdon* plenary lecture at the Conference on Equity in Law and Literature at the University of Verona May 2007 and published in Project Muse 2007 *Criticism* 49 2 pp151-182.

<sup>190</sup>Flint, K., 'Women writers, women's issues' in Glen, H., *The Cambridge Companion to the Brontës* (Cambridge, Cambridge University Press, 2002) p180.

<sup>191</sup>Brontë, A., Preface to the Second Edition *The Tenant of Wildfell Hall* First published 1848 (London: Penguin Group, 1994) p13.

<sup>192</sup>Uglow, J., Introduction Elizabeth Gaskell *Cranford* First published in Charles Dickens magazine *Household Words* in 1853 (London: Bloomsbury Publishing Plc., 2007).

However, other women writing on the ‘woman question’ took a different style. In contrast to women writers using novels to express their inner feelings of injustice, others used their experiences to write political pamphlets and articles to promote women’s formal legal inequalities. For example, Harriet Martineau born into a Unitarian family had a similar education to her brothers. Yet unlike the brothers, she and her sisters were unable to enter university. Consequently, she drew on her childhood experiences and focused on the rights of women to education. Profoundly deaf she was unable to teach and relied on her writing to provide an income and promote her feminist campaigns for women’s legal rights and a regular contributor to the *Westminster Review*.<sup>193</sup> Barbara Leigh Smith Bodichon concentrated her literary campaign on achieving women’s legal rights. In 1855, she published *A Brief Summary, in Plain Language of The Most Important Laws of England Concerning Women together with a Few Observations Thereon*<sup>194</sup> and her contribution instrumental in the debates to the divorce and married women’s property laws. Indeed, both Bodichon and Martineau were active members of the ‘Ladies of Langham Place’ one of the first organised feminist groups.

As discussed above, Caroline Norton’s literary talents are a clear example of the ways women used their writing skills. Her literature reflected her bitter experiences of her marriage.<sup>195</sup> For example, in *Stuart of Dunleath*, one character Sir Stephen she portrayed as violent causing injuries to his wife Eleanor and as discussed above George was physically abusive to Caroline and on one occasion caused her to miscarry. *Lost and Saved*, illustrated the story of Beatrice, described as a ‘dark beauty [and] passionate, impulsive and vulnerable’ a picture of Caroline herself and her lonely life amidst a pitiless high society.<sup>196</sup> In her political writings, Caroline forcefully campaigned for legal reforms to the laws of marriage, divorce and infant

---

<sup>193</sup><http://en.wikipedia.org/wiki>.

<sup>194</sup>Bodichon, B.L.S., *A Brief Summary in Plain Language of The Most Important Laws of England Concerning Women, together with a Few Observation Thereon* printed in full in Mulvey Roberts, & Mizuta, op.cit. p30.

<sup>195</sup> Publications included: *The Dandies Rout* 1825; *The Sorrows of Rosalie* 1829 (Poetry), *The Undying One* 1830 (Poetry); *Voice from the Factories* 1839 (Labour reform poem); Her novels *The Wife and Women’s Reward*, 1835; *Stuart of Dunleath*, 1851; *Lost and Saved*, 1863; *Old Sir Douglas*, 1868 *The Rose of Jericho*, 1870.

<sup>196</sup>Acland, A., op.cit. pp141-7.

custody.<sup>197</sup> Yet, Caroline was no campaigner for women's legal equality with men, she sought to remove the injustices of the laws for wives and mothers. While other women campaigners such as Harriet Martineau, aimed for (all) women's legal rights; they argued Caroline's struggles focused on her personal aims. Indeed, there would appear to be little communication between Martineau and Norton. Although the two had probably met, according to Alice Acland, there were clear indications in Martineau's autobiography that the two did not agree on their approaches for legal equality.<sup>198</sup> Yet both contributed much to the 'woman question'.

A new generation of women writers followed and employed their literary skills to campaign for legal rights. Yet their campaigns struggled to gain access to the multitude of reviews, journals or newspapers available at that time. However, feminists retaliated and established their own journals and periodicals. This included such journals as, *English Woman's Journal* 1858, followed by *Englishwoman's Review* 1865, *Woman's Gazette* 1875, *Woman and Work* 1874 and the *Shield* 1870. Thus, they provided opportunities and a platform to engage in political debate on the sexual difference however, in an index of more than eleven thousand writers only thirteen per cent were women.<sup>199</sup> Frances Power Cobbe was a prominent feminist writer and published a number of critical essays on women's inequality and injustices to women indeed she was one of the first women to tackle the issue of wife beating. However, she also raised the 'woman question'. She asked why 'Englishwomen of full age' should not have legal majority or indeed considered as an exception, and included alongside criminals, idiots and minors. This she argued was the true point of the 'woman question'. Her primary argument was the injustices in the regulation of married women's property. She argued,

---

<sup>197</sup>Caroline Norton was a friend of Emily Westmeath and cited the Westmeath case in Her Open Letter to The Queen on the laws of divorce. Drawing on her experiences Emily also published a pamphlet supporting reforms to the divorce laws. George published his own pamphlet in reply.

<sup>198</sup>Acland, A., op.cit. p41.

<sup>199</sup>Christ, Carol, T., " 'The Hero as Man of Letter': Masculinity and Victorian Non-fiction Prose in Morgan, Thais, *Victorian Sages and Cultural Discourse* (no date found) pp19-31 as discussed in Hamilton S., Ed. *Criminals, Idiots, Women & Minors* (Ontario, Canada: Broadview Press Ltd., 1996) p11. This included of course Harriet Martineau, Josephine Butler, Frances Power Cobbe, Helen Taylor, Millicent Garrett Fawcett, Mona Caird, Barbara Leigh Smith Bodichon, Eliza Lynn Linton and Margaret Oliphant.



The existing Common Law is not *Just*, because it neither can secure nor actually even attempts to secure for the woman the equivalent support for whose sake she is forced to relinquish her property. It is not *Expedient*, because while in a happy marriage it is superfluous and useless, in unhappy ones it becomes highly injurious.<sup>200</sup>

Later in the nineteenth century, Mona Caird engaged on a discussion of the inequalities for women within marriage. She argued ‘Marriage becomes what Milton calls ‘a drooping and disconsolate household captivity.’ Caird stated ‘Modern “Respectability,” draws its life-blood from the degradation of womanhood in marriage and prostitution.’ To remedy the situation Caird suggested that marriage should be free and there was no need for bonds to tie two people together as long as there was trust, love and friendship. She argued for the economic independence of women as a primary requirement of ‘free marriage’.

Under improved economical conditions the difficult problem of securing the real independence of women, thence of the readjustment of their position in relation to men and to society would find easy solution.<sup>201</sup>

Yet other women writers, such as Margaret Oliphant whose arguments run parallel to those of Eliza Lynn Linton took anti-feminist perspectives. Margaret Oliphant spoke out against divorce. ‘Divorce’ she argued, ‘must remain the dreadful alternative of an evil which such monstrous and unnatural aggravations as to be beyond all limits of possible endurance.’<sup>202</sup> She did not support ideas of women’s legal rights rather she argued of distinct differences that emphasised women’s specific role. Not all women agreed with equality of legal rights for women:

---

<sup>200</sup> Author’s italics Cobbe, F., op.cit., p123.

<sup>201</sup> Caird, M., Marriage Reprinted from *Westminster Review August 1888* in Hamilton, S., op.cit. pp273 & 282-3.

<sup>202</sup> Oliphant, M., ‘The Condition of Women’ *Blackwood’s Edinburgh Magazine* February 1858 reprinted in Hamilton, S., ibid, p228.

Let us not be misunderstood: we are not endeavouring to establish the “equality” of the two. Equality is the mightiest of humbugs- there is no such thing in existence; and the idea of opening the professions and occupations and governments of men to women, seems to us the vainest as well as the vulgarest of chimeras.<sup>203</sup>

This part of Section 2 has considered the use of women’s writings in the struggle for their legal equality. Prompted by radical political thought in the late eighteenth century and non-conformist religious groups these early women writers used their experiences and literary skills to raise the ‘woman question’, the injustices and inequality for women. It was from this diverse background that by the mid-nineteenth century, feminism and an organised feminist movement emerged with the aim to achieve equality of women’s legal rights to education, entry to the professions, equality in marriage, divorce and child custody and the right to vote.

Yet there were critics. For example, Heber Hart argued that the attitudes of women and legal equality would destroy the family and the home. He declared, the law regarded women incapable of voting and their rightful place was ‘the maker of the home and the preserver of the Race.’<sup>204</sup> However, as in the earlier part of the nineteenth century a number of men supported the demands for women’s legal rights. Indeed, as with Serjeant Talfourd and the campaigns of Caroline Norton, to achieve any measure of legal reform a male voice in Parliament was essential. One of the strongest campaigners in the later part of the nineteenth century was John Stuart Mill, a social reformer and political philosopher. His name is synonymous with the struggle for women’s enfranchisement and equality of legal rights.<sup>205</sup> The publication of his work *The Subjection of Women* in 1869 was an inspired controversial argument

---

<sup>203</sup>Oliphant, M., op.cit., p217.

<sup>204</sup>Hart, H., *Woman Suffrage; a national danger* (London: Murby, 1909) pp69 & 82.

<sup>205</sup>John Stuart Mill was born in 1806. His father James Mill had been a Scottish country shoemaker. Sent by benefactors to Edinburgh University he moved south and into journalism. He was a friend of Jeremy Bentham. James Mill educated his son at home teaching him Greek, Latin, history, arithmetic, ethics and metaphysics. John worked with his father and began writing producing articles and reviews for journals. In 1830, JSM met Mrs Harriet Taylor. Although their close friendship shocked society Harriet assured her husband, John Taylor, her friendship with JSM was purely platonic and shared academic interest. After the death of her husband, JSM and HT married. Harriet strongly influenced JSM’s philosophy on women’s rights. After her death, JSM’s writing included pamphlets on parliamentary reform and women’s legal rights. O’Grady, J., ‘Introduction’ to Mill, J., Stuart, *On Liberty and The Subjection of Women*, Published in 1869 (This edition published Ware, Hertfordshire: Wordsworth Edition, 1996) ppviii-xiii.

in support of feminism. His protests against the institution of marriage are renowned. He argued, ‘the wife is the actual-bond servant of her husband [and] She vows a lifelong obedience to him at the altar, and is held to it all through her life by law.’<sup>206</sup> Indeed, before his marriage to Harriet Taylor he made a formal declaration against the existing law of marriage.<sup>207</sup> He stated,

The whole character of the marriage relation as constituted by law [and] it confers upon one of the parties to the contract, legal power & control over the person, property, freedom of action of the other party, independent of her own wishes and will.<sup>208</sup>

The laws of child custody did not escape from Stuart Mill’s critical commentaries either. He pointed out that, while the wife has no legal rights their children are his children by law. ‘Not one act can she do towards or in relation to them, except by delegation from him.’<sup>209</sup> Opponents ridiculed Stuart Mill for his beliefs. However, his arguments and support for women’s legal rights undoubtedly instigated debates for legal reforms.<sup>210</sup> The next part of this section explores the reforms introduced from the mid-nineteenth century up to the end of the century.

### **Legal Reforms and Case Studies: 1857-1895.**

In the backdrop to reforms to the laws of marriage and divorce in the mid-nineteenth century, Caroline Norton and her political writings reappeared, the outcome of a turbulent court case and bitter public confrontations between George and Caroline. The case evolved around Caroline’s unpaid bills for which George by law was liable, an invalid deed of separation between the couple, an unpaid settlement, and legacies to Caroline.<sup>211</sup> Although there were flaws in George’s arguments, the decision went in

---

<sup>206</sup>Mill Stuart, J., *ibid*, p145.

<sup>207</sup>Shanley Lyndon, M., *op.cit* p3.

<sup>208</sup>Hayek, F.A., *John Stuart Mill and Harriet Taylor: Their Friendship and Subsequent Marriage* (London: Routledge & Kegan Paul, 1951) p168 as discussed in Shanley Lyndon, M., *op cit* p3.

<sup>209</sup>Mill Stuart, J., *op.cit.* p146.

<sup>210</sup>Cretney, S., *op.cit.* p96.

<sup>211</sup>In 1848, George approached his wife to raise money on a trust property settled on her and their children. In return, Caroline asked for a deed of separation, settlement of an income of £500 per annum and his promise not to interfere with her financial affairs again. Caroline signed the document yet it was invalid since Caroline was still George’s wife and therefore could not make a contract with

his favour on a technicality. The case became a media sensation, raising again the scandal of the earlier case against Lord Melbourne but also the subsequent reactions and stream of attacks and counter attacks between Caroline and George through open letters to the Times newspaper.<sup>212</sup> Caroline's anger and frustration at the laws of marriage and divorce and with no legal rights to address her situation drove her to campaign for changes to the divorce laws.

In May 1854, Caroline published her pamphlet, *English Laws for Women in the Nineteenth Century*. She stated from the beginning that she had not drawn from her own experiences but merely reflected her desire to change the law. However, the tone of her writing and the length of the pamphlet would indicate otherwise. She asked,

is there any reason why attention should not be called to the defective state of the Laws for Women in England, as attention has been called to other subjects:-Is there any reason why (attention being so called to the subject) Women alone, of the more helpless classes,--the classes set apart as not having free control of their own destinies,--should be denied the protection which in other cases supplies and balances such absences of free control? Are we to believe that the gentlemen of Great Britain are so jealous of their privilege of irresponsible power in this one respect, that they would rather know redress **impossible** [and] a married woman is, by the code of England **non-existent** in law.<sup>213</sup>

---

him. The same year Lord Melbourne died and left a legacy to Caroline of which George had no knowledge. Two years later Caroline's mother died and left her a lifetime income of £480 per year. When George heard of her mother's legacy, he informed Caroline he could no longer pay her the annual sum agreed to. Caroline could not hold George to the deed of separation. In 1853, a carriage firm sued George for her unpaid repair bills since by law he was liable for her debts. He retaliated by subpoenaing anyone connected to Caroline, her bankers, publishers, servants and Caroline. In court, the question arose of the validity of the earlier 'legal' contract. George stated that he had made the agreement under the guarantee that Caroline had received no monies from Lord Melbourne. The evidence on her bank statements proved otherwise and therefore George had no legal obligation to meet his commitment. Perkins, Miss J. G., op.cit. pp208-9; Acland, A., op.cit. pp184-5 & 195-7; Shanley Lyndon, M., op.cit. p25-6.

<sup>212</sup>Acland, A., op.cit. pp197-200.

<sup>213</sup><http://www.indiana.edu/letrs/vwwwp/norton/englaw.html>. Author's emphasis and spelling. Norton, C., *English Laws for Women in the Nineteenth Century* (London: Printed for Private Circulation, 1854) pp15 & 20.

She declared her plea for reform was ‘a complaint of the exercise of irresponsible power, to the source of power:--an appeal from **THE LAW**, as it stands, to the legislature which frames and alters laws.’<sup>214</sup> Yet alongside Caroline Norton’s bitter and angry campaigns, demands for reforms were emerging from other perspectives. The Law Lords became increasingly frustrated at costly and lengthy procedures to divorce initiated the setting up of the Royal Commission on Divorce in 1850. Alongside this, Lord Brougham formed the Law Amendment Society to bring legal equality to women.<sup>215</sup> The Women’s Committee, supported by Brougham, and included feminist campaigners such as Barbara Leigh Smith Bodichon and Harriet Martineau added to the demands to change the laws of divorce and legal equality for women.

Furthermore, there was a need to address the differences between the laws of divorce in England and Scotland. Since the laws of Scotland allowed equality to divorce, the issue became complex if a couple married in England then divorced in Scotland. In 1854, the Matrimonial Causes Bill was brought before Parliament and raised fears amongst the ruling classes of the breakdown of the sanctuary of marriage and indeed the family. However, proposals to limit a wife’s grounds for divorce and Lord Cranworth’s comments that it would seem unkind if a wife could petition for divorce if he had been only a ‘little bit profligate’ brought an outburst of rebukes particularly from Caroline Norton.<sup>216</sup> She published another pamphlet *The ‘Non-Existence’ of Women A Letter to the Queen on Lord Chancellors Cranworth’s Marriage and Divorce Bill*. In this, Caroline raised the question of the differences between Scottish and English law on divorce and pointed that despite the differences Victoria was queen of both countries. However, Caroline’s letter attacked the lack of debate and vehemently criticised the Lord Chancellor and his opinions. She stated,

when profligacy, personal violence, insult and oppression, fill up the measure of that wrong which pardon cannot reach-why is there to be no rescue for the women? Why is such a man to be sheltered

---

<sup>214</sup>Author’s emphasis. Norton, C., *The ‘Non-Existence’ of Women English Laws for Women in the Nineteenth Century* (London: Printed for Private Circulation, 1854) p23

<http://www.indiana.edu/letrs/vwwp/norton/englaw.html>.

<sup>215</sup>Maidenment, S., op.cit. p117.

<sup>216</sup>Wroath, J., op.cit. pp130-1.

under the Lord Chancellor's term of 'only a little profligate,' and 'condonation' suppose to be the only proper notice of his conduct?

217

In 1856, Lord Cranworth's Bill came forward again and strongly supported by Lord Lyndhurst an old friend of Caroline Norton. Indeed, Lord Lyndhurst raised many of Caroline's arguments to bring a number of amendments to the Bill.<sup>218</sup> Miss Jane Gray Perkins found a letter of Lord Brougham's on the subject of Caroline's letter to the Queen he wrote:

December 1855

It is as clever a thing as ever was written, and it has produced great good. I feel certain that the Law that the Law of Divorce will be much amended, and she has greatly contributed to it.<sup>219</sup>

The Bill became law on 1<sup>st</sup> January 1858 and in doing so the *Matrimonial Causes Act 1857*<sup>220</sup> abolished the need for an Act of Parliament to grant a divorce, abolished the action of 'criminal conversation' and removed the jurisdiction of marriage and divorce from the Ecclesiastical Courts. Thus, after centuries the church lost its power on the laws of marriage.<sup>221</sup> Yet the laws of marriage remained; a wife lost her legal status on marriage, however, after a legal separation, Sections 25 and 26 allowed a separated wife legal rights to her property obtained after separation. Adultery was the only ground for divorce. Yet by the Act only husbands could petition on the sole ground, wives had to prove their husband's adultery and additional misconduct that included bigamy, desertion for at least two years, rape, or cruelty. The Act also allowed the courts to make an order 'as it may deem just with respect to the custody of children.'<sup>222</sup> The Woman's Committee failed in their aims of legal equality for

---

<sup>217</sup> Norton C., Letter to the Queen on Lord Chancellor Cranworth's Marriage and Divorce Bill By the Hon. Mrs Norton, London 1855, Norton, C. *Letter to the Queen 1855* The 'Non-Existence' of Women Art VIII reprinted in full in Roberts, Dr. M. Mulvey & Professor Mitzuta, T., Eds., *The Wives: The Rights of Married Women* (London: Routledge/Thoemmes Press, 1994) p544.

<sup>218</sup> Norton, C., *A Review of the Divorce Bill of 1856, with propositions for an amendment of the laws affecting married persons* (1857) <http://digital.library.upenn.edu/women/norton/nc-biography.html>. Perkins, Miss J. G., op.cit. p249; Acland, A., op.cit. p206.

<sup>219</sup> Perkins, Miss J. G., *ibid* p248.

<sup>220</sup> 20 & 21 Vict. C. 85.

<sup>221</sup> The introduction of the *Matrimonial Causes Act 1860* established the unlikely trio of the Courts of the Admiralty, Divorce and Probate to deal with divorce petitions.

<sup>222</sup> sec. 35.

women. Thus, despite major changes gender differences continued. Consequently, the judiciary had the ability to deny custody orders of children to the adulterous party in a divorce case reinforcing the concepts of ‘innocent and guilty.’ Nevertheless, its passage was a triumph for Caroline Norton and she succeeded in her aim for the protection of property of a separated wife. Undoubtedly, her campaign towards legal reform to the laws of marriage and divorce contributed greatly to bringing wives another step towards legal equality with their husbands.<sup>223</sup> The following section turns to consider the reforms to child custody laws as part of that move towards gender legal equality from the mid-nineteenth century until the *Infant Custody Act 1891*.

#### Infant and Child Custody Laws.

*The Infant Custody Act 1839* was remarkable considering the long history of the absolute authority of the father. Yet, as argued above the reforms were limited and fathers still had absolute rights of custody to their children during marriage and post-separation as a number of recorded cases illustrated. For example in the case of *Re Fynn*<sup>224</sup>, the father retained custody of his sons, despite the court’s comments that he was an unsuitable parent. However, by his consent and on the grounds of his behaviour, the father relinquished custody rights of his young daughter who remained in the custody of the maternal grandmother. Thus, a father could, by his choice forfeit the right to custody.

There was a different attitude taken by the courts in the case of *Warde vWarde*<sup>225</sup>. While denying the father his rights to custody of his children, the Lord Chancellor, Lord Cotterham was reluctant to make a custody order that would favour one parent over the other. He stated ‘the children should be brought up, if possible, with respect for both parents’.<sup>226</sup> However, the courts, in the best interests of the children, gave

---

<sup>223</sup>This was the last time Caroline Norton actively engaged with political campaigns. Her son Fletcher died in 1859 and caused Caroline grief and anguish. Her other son Brinsley was a semi-invalid and his wife dedicated her time to look after him at their home in Capri. Their children moved to England and Caroline brought them up. George Norton died in 1875. Caroline eventually married her friend William Stirling Maxwell in 1877, Caroline died a few months later.

<sup>224</sup>[1848] 2 De G. & Sm. 457 at 205.

<sup>225</sup>[1849] 2 Phillip’s Chancery Reports 291.

<sup>226</sup>[1849] 2 Phillip’s Chancery Reports 291 and discussed in Wroath, J., op.cit. pp114-5.

the mother custody on the grounds of the father's adultery and reckless behaviour. This was a significant decision and an early example where the interests of the child superseded the rights of the father. However, in contrast the rights of the father remained in the case *re Halliday's Estate, ex parte Woodward*<sup>227</sup> In this case, the father removed the child from the custody of the mother and gave custody of the child to a third party. In settling the dispute, the courts considered both parents financial situations and decided there was little difference financially to benefit the child yet paternal rights to custody of the child were held.

Nevertheless, reforms to child custody laws were emerging and from a diversity of perspectives. For example, the *Matrimonial Causes Act 1857* allowed the courts to make an order 'as it may deem just with respect to the custody of children.'<sup>228</sup> Nevertheless, as Stephen Cretney points out 'the existence of this power did not give rise to much discussion.'<sup>229</sup> There are a number of points to consider on this statement. Despite the Act divorce remained outside the financial scope of the majority of men and women, particularly wives who were generally financially dependent on their husbands.<sup>230</sup> Therefore, there were few divorce cases. However, more significantly, the only parties involved in divorce were the husband and wife; children and their welfare were not a concern. Indeed, it was inconceivable that a father's sole absolute legal rights to his children would even be under consideration. Thus, the probability of losing her children was a further limitation on mothers applying for custody.<sup>231</sup> The *Judicature Act 1873*<sup>232</sup> brought the common and equity laws together, the latter overruling the former where there was dispute, allowing a flexible approach in custody decisions.<sup>233</sup> However, the *Custody of Infants Act 1873*<sup>234</sup> introduced some changes that shifted the emphasis from absolute paternal authority.

---

<sup>227</sup>[1852 ] 17 Jur 56 1 WR 59 21 LTOS 17.

<sup>228</sup>sec. 35.

<sup>229</sup>Cretney, S., op.cit. p576.

<sup>230</sup><sup>230</sup>Between 1876-1880 there was an average annual number of 277 using the legislation. As discussed in Graveson, R.H. 'The Background of the Century' in Graveson, R.H. & Crane, F.R. A. *Century of Family Law* (London: Sweet & Maxwell Ltd, 1957) p12.

<sup>231</sup>Graveson, R. H., op.cit. p17.

<sup>232</sup>36 & 37 Vict. C.66.

<sup>233</sup>Holmes, A., Sumner "Fallen Mothers' Maternal Adultery and Child Custody in England 1886-1925" in *Maternal Instincts Visions of Motherhood & Sexuality in Britain 1875-1925* (New York: St Martins 1997) pp41-2.

<sup>234</sup>36 Vict. C.12.



The Act removed the statutory bar to any adulterous mothers to petition for custody of their children. The Act further empowered courts to grant mothers custody of their children up until the age of 16 through a petition to the Court of Chancery.<sup>235</sup> In addition, the Act stated that where parents separated, the mother only had custody of her children if the courts were of the opinion that the decision was for the benefit of the child.<sup>236</sup> Nevertheless, as Mary Lyndon Shanley pointed out, a decade after the 1873 Act, legal commentators observed that in exercising their discretion judges continued to deny mothers custody of her children unless ‘grave misconduct’ that would affect the child, could be made against the father.<sup>237</sup> Therefore, the shift away from a father’s absolute authority of custody of his child was limited and a resolution only for mothers who had the financial means to proceed with the petition and set against entrenched paternal rights and the concept of the morally ‘good mother’.

#### The Case of Annie Besant

Frank Besant an Anglican vicar married Annie Wood in 1867. Marital differences and Frank’s increasing violent behaviour towards Annie, gradually affected her mental health. A chance attendance to a theistic meeting changed the direction of her life.<sup>238</sup> Annie began to publish critical theological articles that clearly displeased her husband. He presented her with an ultimatum, to either conform to the doctrine of the Church of England or leave the family home. Annie chose to leave home. To avoid public scandal they separated by private deed, a long established practice in the Ecclesiastical courts.<sup>239</sup> The couple agreed on arrangements for their children, Annie had custody of their daughter and Frank custody of their son.<sup>240</sup>

---

<sup>235</sup>S.1.

<sup>236</sup>S.2.

<sup>237</sup>Irish Law Times and Solicitors’ Journal 18 (12 July 1884) at 356 and discussed in Shanley Lyndon, M., Lyndon op.cit. p141.

<sup>238</sup>Nethercot, A.H., *The First Five Lives of Annie Besant* (Chicago: The University of Chicago Press, 1960) pp39-47.

<sup>239</sup>As discussed in Section 1 of this chapter. The legal separation orders drawn between Emily and George Westmeath and Caroline and George Norton are examples in this study. Since the arrangements were in private there are no figures recorded, it was only in 1893 that statistics of matrimonial proceedings became available. McGregor, O.R., Blom-Cooper, L., & Gibson, C., *Separated Spouses* (London: Gerald Duckworth & Co. Ltd, 1970) pp11 & 32.

<sup>240</sup>Nethercot, A. H., op.cit. p54.

Annie met Charles Bradlaugh, a Freethought speaker and outspoken advocate for the injustices to ordinary working class people. He was president of the London Secular Society and editor of the *National Reformer*, an atheistic and radical journal. Annie contributed reviews and articles to the *National Reformer* and made her name as a radical writer and lecturer.<sup>241</sup> In 1876, Bradlaugh and Annie Besant republished *The Fruits of Philosophy*.<sup>242</sup> This led to their arrest under the *Obscene Publications Act*. The trial drew a great deal of media and public attention. While the jury were unanimous in their opinion that the book was corruptive, the courts acquitted them on a technical point.<sup>243</sup> Following the trial, Frank Besant began legal action against his wife for custody of their daughter claiming Annie's behaviour made her an unsuitable mother. Counsel for Frank Besant argued that 'the future of this child will be prejudiced by her being brought up in association with persons who hold the opinions which her mother professes and advocates-opinions which are looked upon by most people as wrong, and by her own sex as perfectly shocking.'<sup>244</sup> Yet Lord Jessell acknowledged that Annie Besant had taken great care of and loved her daughter. Nevertheless, under the 1873 Act s. 2, Lord Jessell had the power to invalidate the private agreement between the mother and father and enforce the father's rights for the benefit of the child.<sup>245</sup> He argued, 'she has taken upon herself not merely to ignore religion, not merely to believe in religion, but to publish and avow that unbelief, and to become the publisher of pamphlets written by her, and to deliver lectures composed by herself, stating her disbelief in religion altogether.' He added 'I must take that into consideration in determining what effect it would have upon the child if brought up by a woman of such reputation.'<sup>246</sup> Similar to Percy Bysshe Shelley, Annie Besant's outspokenness of atheism became a point of question. The

---

<sup>241</sup>Nethercot, A. H., *ibid*, pp63-9.

<sup>242</sup>*The Fruits of Philosophy, The Private Companion of Young Married People* an anonymous study published in 1832 by Doctor Charles Knowlton, a birth control manual. Although seemingly popular in Victorian England, the book was banned for publication under the *Obscene Publications Act 1857*. A republication in 1876 resulted in the publisher Henry Cook imprisoned for two years. After heated debates within the N.S.S. and according to Nethercot, Annie persuaded Bradlaugh to publish the book. Nethercot, A. H., *ibid* pp107-112. Annie Besant later went on to publish her own version *The Law of Population: Its Consequences and Its Bearing upon Human Conduct and Morals*. The booklet became a success.

<sup>243</sup>Returning to court and after much debate the Lord Chief Justice Cockburn and Justice Mellor freed the couple on a fine of £100 each. Nethercot, A. H., *ibid*, pp125-7.

<sup>244</sup>*In re Besant* [Court of Appeal] [1878] [1879] 11 Ch D 517.

<sup>245</sup>Access to her children was granted but this proved too painful for mother and daughter. Annie was confident that when they were old enough the children would make their own decisions they would return to her, which they did. As discussed in Nethercot, A. H., *op.cit.* p144.

<sup>246</sup>*In re Besant* [Court of Appeal] 11 Ch D 513.

courts' judged her as 'not a fit and proper person to have custody of her child, not because of her mothering, but because of her opinions.'<sup>247</sup> Thus, the courts continued to determine the welfare of the child through the threat of immoral influences more than the loss of the mother's care.<sup>248</sup>

The same principal was employed in *Re Agar-Ellis* and *,Agar-Ellis (No 2)*.<sup>249</sup> In this case, the couple were from different religious backgrounds and prior to their marriage, agreed that any children would follow the mother's Roman Catholic faith. This practice continued after the couple legally separated. The father objected to the children following the mother's faith and removed the children from her custody. The older daughter asked to spend time with her mother but her father refused. The mother appealed to have the father's rights discharged since their daughter was over the age of sixteen. Nonetheless, the Court of Appeal dismissed the application on the grounds the father's rights continued until the age of 21. 'The father knows far better as a rule what is good for his children, than a court of justice.'<sup>250</sup> The case again illustrates the importance of the role of religion and particularly the significance of the *Established* church in relation to decisions of the welfare of the child in custody decisions. The publicity and absurdity of the Agar-Ellis case, considering the 'child's' age, highlighted the need for further legal reforms to the laws of child custody.

Other legislative reforms had an impact on changes to child custody laws. The *Matrimonial Causes Act 1878*<sup>251</sup> gave magistrates' courts the power to grant a judicial separation on the grounds of cruelty, enforce a maintenance order and grant a mother legal custody of any children under the age of ten. The *Married Woman's Property Act 1870*<sup>252</sup> allowed women rights to their own earnings; the *Married*

---

<sup>247</sup> Anderson Fix, N. 'Not a Fit or Proper Person' Annie Besant's Struggle for Child Custody, 1878-9' in Nelson, C., & Sumner Holmes, A., Eds. *Maternal Instincts Visions of Motherhood & Sexuality in Britain 1875-1925* (Hampshire: Macmillan Press Ltd., 1997) p13.

<sup>248</sup> Anderson Fix, N., *ibid* p22.

<sup>249</sup> [1878] 10 Ch D 49 (CA); (No. 2) (1883) 24 Ch D 317.

<sup>250</sup> As discussed in Maidment, S., *op.cit.* p126.

Cretney, S., *op.cit.* pp525-6.

<sup>251</sup> 41 Vict. C.19.

<sup>252</sup> Feminist supporters that included John Stuart Mill, had originally put forward a Bill to separate the property of a husband and wife, however, as the Bill progressed the focus shifted to the protection of women's earnings particularly working class married women's earnings and inherit money up £200. 33 & 34 Vict. C.93, s.7.

*Woman's Property Act 1882*<sup>253</sup> extended this provision. The Act allowed married women the right to hold all the property she had before marriage and after as her separate property although not to make contracts but only to the extent of her own property. The two Acts effectively removed the concept of *coverture*.<sup>254</sup> The *Married Women's (Maintenance in Case of Desertion) Act 1886*<sup>255</sup> granted deserted mothers maintenance in their own right and for their children. Thus, the Acts gave mothers the potential to afford divorce, custody of their children, although in reality, women were unlikely to earn sufficient income, and also provided a threshold to advance further gender legal equality<sup>256</sup>.

Alongside this, during the late nineteenth century there had been growing concern amongst, social reformers, philanthropists and politicians of children as property, parental cruelty and neglect, and the wider physical and sexual exploitation of children. Consequently, a number of Acts introduced reflected the legal protection, welfare and education of children. The *Education Act 1870*, the *Criminal Law Amendment Act 1885* and the *Better Prevention of Cruelty to Children Act 1889* demonstrated this shift, as did the *Guardianship of Infants Act 1886*.

Feminist campaigners supported the approach towards the protection of the child but also demanded for equality of mothers' rights to custody within marriage. A strong feminist campaigner, Mrs Wolstenholm Elmy argued for the need of the child to have both parents and of the 'irreparable calamity to the child' on the loss of a parent.<sup>257</sup> As she pointed out, in child custody dispute cases, the law could exclude one parent or subordinate the other, this she declared involved 'a fraud upon or denial of the most just and natural claims of the child.' She continued,

To degrade and enslave the mother is to fly in the face of the plainest teachings of nature herself-of justice and of humanity; to ignore the father is to miss, for both parents and children, the

---

<sup>253</sup>45 & 46 Vict. C.75.

<sup>254</sup>The idea of protection of the wife as discussed earlier in the chapter.

<sup>255</sup>49 & 50 Vict. C.52.

<sup>256</sup>Cretney, S., op.cit. p98.

<sup>257</sup>In a Paper presented to the Annual Congress of the Social Science Association, at Birmingham in 1884. The Paper cites Mrs Wolstenholm Elmy as the author, however it is noted on the front page that Mr Elmy read it to the Congress no reason was given for this.

highest possibilities of human happiness, and the finest and noblest of educating influences.<sup>258</sup>

This formed the centre of the feminists' argument. The Bill not surprisingly faced tactical delays. The primary reason lay in the withdrawal of Clause 2 to allow the joint guardianship of children by both parents. As Mrs Wolstenholm Elmy pointed out, 'As usual, our "practical" politicians found it easier to suggest palliatives for some cruel consequences of a legal justice, than to sweep away the injustices itself.'<sup>259</sup> Pleading for its re-instatement, she declared,

Nothing short of the recognition by law of the co-equal rights and claims of both parents can ever satisfy mothers of this nation, or do justice to children. Nor can any remedial measure stopping short of this point be either just or effective. For what is the ever-recurring difficulty of the Courts in dealing with questions between parents as to their children? Simply that one of the parties has no true legal status whatever. The English Courts, at any rate, have partially adopted the just principle that the interests of the children should be the guiding consideration; but they are confronted by the fact that even these interests have to be subordinated to the paramount, exclusive and supreme legal rights of the father.<sup>260</sup>

Mrs Wolstenholm Elmy further called Parliament to reinstate Clause 2 and 'see the deepest reproach of our domestic life swept away, and another great step taken towards the establishment of the family on the basis of justice, equality and mutual duty and love.'<sup>261</sup> Despite the appeals and general support, the Act did not include the feminists' demand for legal equality of parents to guardianship. Nonetheless, the *Guardianship and Custody of Infants 1886*<sup>262</sup> granted equated adultery as grounds for divorce and introduced the principle of the welfare of the child to the statute books.

---

<sup>258</sup>Elmy Wolstenholme op.cit. p3. (Both quotes at 3)

<sup>259</sup>Elmy, Mrs Wolstenholm The Infants Bill, *A Paper Read by Mr. Elmy at the Annual Congress of the Social Science Association, Held at Birmingham, 1884, and Published By Permission of the Council.* Manchester: A. Ireland and Co., Printers, 1884) p5.

<sup>260</sup>Elmy Wolstenholme, Mrs., *ibid*, p10.

<sup>261</sup>Elmy Wolstenholme, Mrs., *ibid*, p12.

<sup>262</sup>1886] Ch. 27, 49 & 50 Vict.

The Act required the courts to ‘have regard’ to the welfare of the child up until the age of 21.<sup>263</sup> The Act stated,

where a judicial separation, or a decree either nisi or absolute for divorce, shall be pronounced, the Court pronouncing such a decree may thereby declare the parent by reason of whose misconduct such a decree may thereby declare the parent by reason of whose misconduct such a decree is made to be a person unfit to have custody of the children(if any) of the marriage;<sup>264</sup>

Therefore, a father’s adultery was no longer dismissed in custody decisions by the courts and adultery could prevent either parent having custody of their children; however, the use of the word ‘may’ in the Act allowed the courts the power to use discretion in contested cases.<sup>265</sup> The Act allowed the courts, on the application of the mother, to make a decision on custody and access in relation to the welfare of the child the conduct and wishes of the parents.<sup>266</sup> Furthermore, the Act could grant a mother the legal right to be guardian of her children after her husband’s death if he had not appointed a guardian. If the husband, or the courts, had appointed a guardian, the mother could act jointly with them. *The Custody of Infants 1891*<sup>267</sup> extended the courts’ discretion to deny parental rights if the child had been abandoned or deserted. Therefore, reforms to child custody laws were not only about the rights of mothers and fathers, but of state protection and intervention in relation to the welfare of the child.<sup>268</sup>

Following the 1886 Act there were few reported cases of child custody disputes the presumption would be that the spouse, who had petitioned for divorce on the grounds of the adultery would have custody of the children. However, a number of cases illustrate the use of the courts’ discretion in determining the welfare of the child. In

---

<sup>263</sup>S. 9.

<sup>264</sup>[1886] Ch. 27, s.7 49 & 50 Vict.

<sup>265</sup>Sumner Holmes, A. ‘Fallen Mothers’ Maternal Adultery and Child Custody in England, 1886-1925’ in Nelson, C., & Sumner Holmes, A., *Maternal Instincts: Visions of Motherhood & Sexuality in Britain 1875-1925* (New York: St Martins, 1997) p42. *The Custody of Infants Act 1891* 54 Vict. C.3 extended this discretion to deny parental rights if the parent had abandoned or deserted the child.

<sup>266</sup>S. 5.

<sup>267</sup>54 Vict. C.3.

<sup>268</sup>Shanley Lyndon, M., op.cit. pp151-53.

the case of *re A and B (Infants)*<sup>269</sup> both parents had committed adultery and the judge awarded the parents joint custody of the children. The father appealed but lost on the grounds of equality of offences demonstrating the court's power to use discretion in a case of child custody dispute. As Lord Justice Rigby stated, 'The Act is intended to interfere, and interfere to a very great extent, with the rights of the father.' He continued, 'Practically establishing equality in this case between the husband and wife, was the wisest and best thing, and clearly for the benefit of the infants.'<sup>270</sup>

The decision *In re McGrath (Infants)*<sup>271</sup> was more complex and revolved around the different faiths of the parents and the link with the welfare of the child. After the death of the father, the mother appointed another woman, a member of the Church of England, to be guardian of her children. Although brought up into the Roman Catholic faith the children did not follow that faith. On his deathbed, the father returned to his Catholic faith. Prior to her death, the mother had become a member of the Protestant church. The youngest child lived with an uncle and the other children sent to industrial schools. An aunt of the father took out a summons to remove the guardian and appoint a Roman Catholic woman appointed as guardian. The court decided, had the application been made immediately after the father's death, the children would have been directed by the court to be brought up in the father's faith. However, in the interests of the welfare of the children, the courts dismissed the appeal. In the early twentieth century, the case of *Mozley Stark v Mozley Stark and Hitchins*<sup>272</sup> again demonstrates the use of the courts' discretion in determining the welfare and the needs of the child in disputed cases. Here, the courts granted the husband a divorce decree on the grounds of the wife's adultery, and awarded him custody of the child. However, the daughter went to live with her mother. The father appealed and the daughter returned to him. On a counter appeal and petition for custody from the mother, the judges overturned the lower court's decision. 'Adultery by the wife which justifies a divorce ought not to be regarded for all time [and] to disentitle her to access to, or even custody of, her daughter.'<sup>273</sup>

---

<sup>269</sup>[1897] 795-6 C.A.

<sup>270</sup>[1897] 795-6 C.A.

<sup>271</sup>[1892] 2 Ch 496.

<sup>272</sup>[1909] P 190 C A.

<sup>273</sup>[1909] P 190 C A at 194.

While the cases demonstrate the courts' use of discretion in determining the welfare and needs of the child, and intervene in disputed cases decisions they also signify that religion and moral standards continued to have a role in that decision. Nevertheless, in *Re A and B* and *Mosley Stark v Mozley Stark and Hitchins*, the rulings demonstrated a shift towards the courts recognition of the mother/child bond and that a mothers' sexual behaviour did not necessarily eliminate her ability to care for her children. Therefore, there was by the early twentieth century, the needs and welfare of the child challenged the historical absolute authority of the father to custody of his children and a gradual shift towards maternal presumption. Yet there is another argument. The trend towards maternal presumption emerged parallel to the introduction of maintenance raising the question of a link between them. The connection strengthened arguments of a growing bias towards mothers and legal commentaries to declare they were 'the darling of the law.'<sup>274</sup> Indeed debates were growing of the 'revolutionary reforms' for wives and bias towards mothers in contested custody cases. However, as Danaya Wright argues, far from empowering mothers this in fact generally had the opposite effect. Employment would undoubtedly be limited and poorly paid thus disempowering separated and divorced mothers further financially and socially and maintaining the separated spheres of the public and private divide and women's inferiority.<sup>275</sup>

At the end of the century, the *Summary Jurisdiction (Married Women) Act 1895*<sup>276</sup> significantly created a two-tier system dealing with matrimonial disputes. Consequently, there was a higher court for the wealthy and the magistrates' courts dealt with cases from the poor and working classes.<sup>277</sup> The magistrates' police courts played a distinctive role in the lives of the poor and working classes. George Behlmer suggests the magistrates courts emerged from the 'extension of summary jurisdiction' between the seventeenth and nineteenth centuries. The courts had a special

---

<sup>274</sup>Lush, M., 'Changes In The Laws Affecting The Rights, Status, And Liabilities Of Married Women' in Odgers, Blake, W., *A Century of Family Law on the Changes in the Law of England During the Nineteenth Century* (London: Macmillan & Co., Ltd, 1902) p344.

<sup>275</sup>Wright, Danaya, C., 'The Crisis Of Child Custody: A History Of The Birth Of Family Law In England' 2002 Vol.11 *Columbia Journal of Gender and Law*, p175.

<sup>276</sup>58 & 59 Vict. C. 39.

<sup>277</sup>The Act granted deserted wives or wives who had suffered persistent cruelty or wilful neglect, the right to apply to the court of summary jurisdiction, the magistrates' courts, for a maintenance order. If successful, the wife would no longer be bound to live with her husband and granted custody of any children under the age of sixteen.s.4.



significance to the lower classes and became the ‘great clearing house of crime’ from petty offences of begging, vagrancy to drunkenness, juvenile crime to marriage, maintenance and custody orders. However, they also provided a shelter or resting place for the poor as well as a source of media frenzy if even a slight scandalous case came before the magistrates. Indeed, Victorian and Edwardian historians described the courts as ‘picturesque’ or ‘degrading’ elements of the judicial theatre.<sup>278</sup> By the end of the nineteenth century, the poor and working classes had become used to looking to the magistrates’ courts for support. The magistrates and court officers took a paternalistic responsibility and a reconciliatory role towards couples with marital problems<sup>279</sup> to the extent where the magistrates were overwhelmed with pleas for support, petitions for legal separation and maintenance orders. This represents a pioneering move towards the courts’ dealing with divorce cases. Yet the Act opened up a route for working class women to seek legal separation and they did in increasing numbers. Figures showed that in 1895 there were 1,035 orders made, following the Act the numbers rose to 5,399 and at the turn of the century an increase to 7,292 applications.<sup>280</sup> The rise in the figures and the pressures on the courts contributed to demands for further reforms of the divorce laws, reinforced the link with child custody laws and addressed the gender inequalities in this area of the law

Thus far, Section 2 has considered the legal reforms to the laws of marriage, divorce and child custody law since the Infant Custody Act 1839. Through an historical analysis of women’s literature and political writings, it has explored the debates around women’s legal inequality, the ‘woman question’ and the emergence of an organised feminist movement. It has considered the legislative changes that granted wives and mothers a measure of legal rights and the gradual link between legal separation, divorce and child custody laws through the welfare of the child and shifting narratives of motherhood in the law. Yet the law’s roots are deep and embedded in society and culture and by the end of the nineteenth century, increasing arguments of injustices to husbands and fathers in this area of the law began to surface. Indeed, the connection between maternal presumption and maintenance

---

<sup>278</sup> Belhmer, G.K ‘Summary Justice and Working-Class Marriage in England 1870-1940’ 1994 *Law and History Review* Fall, 12 2 pp230-4; also in Behlemer, G.K. *Friends of the Family* (Stanford California: Stanford University Press, 1998).

<sup>279</sup> Behlmer, G. K., op.cit, p235; Behlemer, G. K., *Friends of the Family* ibid, p190.

<sup>280</sup> Sir Gorell Barnes in *Dodd v Dodd* [1906] 203.

supported the arguments that women were becoming ‘the darling of the law.’<sup>281</sup> The laws were certainly ‘revolutionary,’ considering that for centuries women were legally ‘non-existent’. Yet the ‘revolutionary’ reforms particularly for separated and divorced mothers were undoubtedly limited, disempowering and continued to reinforce the separate spheres of the public and private divide and gender inequalities. The last section of Chapter 2 will reflect on the debates around the ‘revolutionary’ changes. It will consider influence of the increasing numbers of women campaigners for legal equality and the impact of the dramatic social changes following the First World War.

### **Section 3**

## **Socio-Legal Change and Legal Reforms in the Early Twentieth Century: Routes to Women’s Formal Legal Equality**

### **A Revolution in the Law**

As indicated above, at the end of the nineteenth century, there were growing debates of the ‘revolutionary’ changes to the laws relating to wives and mothers and arguments of a bias towards women. For example, legal academic Edward Jenks<sup>282</sup> argued that over the last century the reforms ‘have been hasty and unsystematic [and] may not be unfairly described, in the language of our ancestors as an “ungodly jumble.” The old system was logical; though to our ideas, unjust. The new system is not only illogical, but, in many ways, still unjust.’<sup>283</sup> Jenks pointed out that were a considerable number of inconsistencies that gave married women privileges within the law. For example, in criminal proceedings, if a wife commits a crime with her husband, she is exempt from punishment; a married woman who helps her husband to escape from justice knowing he has committed an offence is also exempt. In civil liabilities, a married woman is only liable to the extent of her own separate property

---

<sup>281</sup>Lush, M., op.cit. p344.

<sup>282</sup>Edward Jenks first trained as a solicitor. He studied law at King’s College Cambridge and called to the bar. Jenks moved to Australia and became dean of the faculty of law at the University of Melbourne. On his return, he continued his academic career in Manchester, Liverpool and Oxford. He became dean of legal studies to the Law Society and was prominent in establishing the Society of Public Teachers of Law.

<sup>283</sup>Jenks, E., *Husband And Wife In The Law*, (London: J.M. Dent & Co., 1909) pv.

unlike a married man or single woman and a married woman could not be made bankrupt.<sup>284</sup> The courts could grant a wife separation and maintenance orders; under the *Licensing Act 1902*, such orders could be made if either party was a habitual drunkard, however when the husband is the complainant, he would have to pay his wife maintenance.<sup>285</sup> A married woman's 'disabilities' in the law were Jenks argued, were 'difficult to speak of.'<sup>286</sup> The anomalies of the laws regarding husbands and wives were a subject area that Jenks did not abandon easily.

In contrast, others such as W. Blake Odgers and Sir Montague Lush<sup>287</sup> applauded the changes to the legal reforms of the laws between husbands and wives. Blake Odgers declared that 'Next to lunatics, or polite text-book writers always placed married women' yet, he argued in the nineteenth century reforms meant, 'a wife is in a position of almost complete equality with her husband.' This included the removal of injustices of child custody laws towards mothers.<sup>288</sup> Lush declared, 'I do not suppose that there is any branch or department of the law in which the change has been greater or the contrast more violent. It is not that there has been an alteration, but a revolution in the law.' The changes he added, meant married women 'certainly entitled to be called "the favourite of the law".' He argued that 'It is within the last half-century that married women have been emancipated and set free from the restraints imposed upon them by the common law and place in a position which they were long ago entitled to occupy-a position of independence and equality with their husbands.'<sup>289</sup> Yet not everyone agreed, least of all feminists, their supporters and the growing suffragist movement.

#### Feminist Politics and the Women's Movement: A Shift in Direction

For feminists and their supporters the 'revolutionary' reforms of the late nineteenth century had not gone far enough. However, during the late nineteenth and early

---

<sup>284</sup> Jenks, E., *ibid* pp61-4.

<sup>285</sup> Jenks, E., *ibid* p78.

<sup>286</sup> Jenks, E., *ibid* p71.

<sup>287</sup> Sir Charles Montague Lush a barrister at Grays Inn and later judge at the King's Bench. <http://www.oxforddnb.com/articles>.

<sup>288</sup> Odgers, Blake, W. *A Century of Family Law 12 Lectures on the Changes in The Law of England During the Nineteenth Century*, (London: MacMillan & Co. Ltd. 1902) pp20-1.

<sup>289</sup> Lush, E., *op.cit.* pp342-4 & 378. Blackstone also took up the point of women being a favourite of the law. Blackstone, Bk.1, cap, 15, p445.

twentieth centuries, there was a different emphasis from earlier feminist campaigns for reform. There were a number of triggers initiated this shift. The growth in factory manufacturing and increased employment of women in industry raised a number of issues such as women's paid employment and working conditions.<sup>290</sup> It was from here organised women's political groups emerged although some groups surfaced from established societies. For example, the Women's Protective and Provident League established by middle-class women campaigners in 1874 changed the name to the Women's Trade Union League. The Bryant and May 'match girls' strike 1889 provides an example of working class women's trade union activism. The strike, on factory health and safety conditions also exposed the difference in the emphasis in the women's movement. Millicent Garret Fawcett, an early leading campaigner for equality of women's legal rights, was a shareholder in Bryant & May did not support the women, but the company's views in the strike.<sup>291</sup> This is not to argue that middle class feminist campaigners were not aware of the struggles of working class women. As Barbara Caine argues, the early feminists believed that all women would benefit through legal equality.<sup>292</sup>

Alongside this, Guilds and societies, such as the Co-operative Women's Guild,<sup>293</sup> gave women the opportunity to meet. Certainly, under the leadership of Margaret Llewelyn Davies,<sup>294</sup> the Guild actively canvassed for new members and proved to be an influential activist body giving voice to married working-class women's concerns

---

<sup>290</sup>Large numbers of working women joined the trade unions for example the Cotton Workers Union of Lancashire had 96,000 women as against 69,000men. Yet women did not have the same bargaining power as men. Gore-Booth E., *Women Workers and Parliamentary Representation* Textile Tracts No.1 Lancashire Women Textile Workers' Representative Committee No date as discussed in Liddington, J. & Norris, J., *One Hand Tied Behind Us, The Rise of the Women's Suffrage Movement* (London: Virago Press.,1978) pp25-7.

<sup>291</sup>Caine, B., *English Feminism 1780-1980* (Oxford: Oxford University Press, 1997) pp148-9.

<sup>292</sup>Caine, B., op.cit. p148.

<sup>293</sup>The Guild, part of the Co-operative Union, was formed in 1883 by Mrs Alice Acland, wife of an Oxford don. Although established by educated middle class women the majority of members were married women, the wives of skilled male workers. The Guild's manifesto set out to ease the drudgery of working class women through practical support, educational and pro-active meetings. Gaffin, J., and Thoms., D., *Caring & Sharing* (Manchester: Co-operative Union Ltd., 1983) at 1-6; Davies, Margaret Llewelyn, *Maternity Letters from Working Women*, First published 1915 by G. Bell & Sons Ltd., this edition (London: W.W. Norton & Co., 1978)ppvii-viii.

<sup>294</sup>Margaret Llewelyn Davies was General Secretary of the Guild between 1889 and 1921. Her father, the Reverend John Llewelyn Davies was a strong Christian Socialist and influenced Margaret's humanitarianism. Her attitudes were also influenced by her aunt Emily Davies, the founder of Girton College, Cambridge and an uncle, a friend of John Stuart Mill. Gaffin, J., & Thoms, D., *Caring & Sharing* (Manchester: Co-operative Union Ltd., 1983) pp26-7.

of their economic, social welfare and child-care.<sup>295</sup> Indeed, it was argued that the issues of working-class women were linked with the labour movement rather than the principles of the women's movement.<sup>296</sup> From another standpoint, the Women's Fabian Group brought the issues of health and welfare and economic position of working-class wives into the political debate.<sup>297</sup> Therefore, from a range of perspectives, mass numbers of working class women with different experiences joined the ranks of political debate. Feminist groups were no longer exclusive to educated middle-class women. This was a critical shift for the women's movement. These groups provided a public voice for middle and working class women and raised issues relating to women's health, safety at work, housing conditions and childcare. The focus shifted from individual political rights of women to the needs of married women and mothers.<sup>298</sup>

Nevertheless, the struggle for legal rights continued. In 1903, under the leadership of Emmeline Pankhurst and her daughters Christabel and Sylvia, the Women's Social and Political Union (WSPU) emerged. A new chapter surfaced and adopted a militant campaign. However, this shift instigated a split in the women's enfranchisement movement and the emergence of the National Union of Suffrage Societies a non-militant group with different approaches and agendas to the WSPU.<sup>299</sup> The Women's Co-operative Guild belonged to this group. As noted above, under the presidency of Margaret Llewelyn Davies, the Guild became a significant channel for for working class women giving them a voice for legal reform and policy change.<sup>300</sup> As a spectator at one of the Guild's meetings, Virginia Woolf wrote of the determination and resolution of the members. In their passionate speeches, she noted they spoke for reform to the divorce laws, and the minimum wage, children's education and the right to vote. Yet as she pointed out, 'In all that audience, among all those women who worked, who bore children, who scrubbed and cooked and bargained, there was not a single woman with a vote. Let them fire off their rifles if they liked, but they would

---

<sup>295</sup>Gaffin, J., & Thoms, D., *ibid*, pp39 & 44.

<sup>296</sup>Caine, B., *op.cit*. p150.

<sup>297</sup>For example, the Maud Pember Reeves' study *Round About A Pound A Week* of the poor conditions of working class women lives at that time.

<sup>298</sup> Caine, B., *op.cit*. pp138, 312-3.

<sup>299</sup>Pugh, M., *op.cit*. p26.

<sup>300</sup>The Guild's proposed the availability of free legal advice and that women should be in legal administration posts to bring a better understanding to the legal problems for married women. Gaffin, J., & Thoms, D., *op.cit*. p44.

hit no target; there were only blank cartridges inside. The thought was irritating and depressing in the extreme.<sup>301</sup> Nonetheless, the Women's Guild did find their voice supporting a route to reform of the divorce laws and issues of child custody.

### **Route to Reforms of the Divorce Laws**

There were demands for reform to the divorce laws from the legal profession. Sir John Gorell Barnes, a judge and later President of the Probate, Divorce and Admiralty Division<sup>302</sup> was fully aware of the need to reform the divorce laws. He was conscious of the increasing anxiety by magistrates regarding the growing numbers of applications for matrimonial and custody orders.<sup>303</sup> Furthermore, he was concerned with the very real threat of the consequences of easier divorce increasing immorality. Indeed, he argued the increased numbers of applications for separation and maintenance convinced Gorell Barnes that the *Summary Jurisdiction (Married Women) Act 1895* 'has been to cause women in numerous cases to rush off to the Court on slight provocation to endeavour to make a case sufficient to obtain an order.'<sup>304</sup>

Notwithstanding the criticisms of some legal commentators of bias towards wives in divorce cases, Gorell Barnes acknowledged gender inequalities in the divorce laws continued. He pointed out in the case of *Dodd v Dodd* [1906] P.189 the wife was unsuccessful in her petition for divorce, yet in other 'civilized' countries wives had the legal right to divorce on equal grounds to husbands. He argued:

---

<sup>301</sup> Woolf, V., 'Introductory Letter To Margaret Llewelyn Davies' in Davies, Llewely, M., Ed. *Life as We Have Known It* (London: W.W.Norton & Co., 1975 a Reprint of the 1931 ed. Published by L. and V. Woolf (London: Hogarth Press) at xvi-xviii.

<sup>302</sup> Sir John Gorell Barnes, born in 1848 the eldest son of a shipowner he studied at Cambridge and entered the legal profession in a solicitors' office. Called to the bar in 1876 he became a leading commercial lawyer with a substantial Admiralty practice and a Court of Appeal judge. In 1892, he was appointed Judge to the Probate, Divorce and Admiralty Division and President in 1905. As Baron Gorell of Brampton he called for radical changes to the laws of divorce and made chairman of the Royal Commission Marriage and Divorce. <http://www.oxforddnd.com>.

<sup>303</sup> In 1893 there were 3482 recorded applications for Matrimonial Orders in the Courts of Summary Justice. Between 1895 and 1899, the numbers had risen to 7355 and by 1905/9 the figures had increased to 11067 as discussed in *Dodd v Dodd* Probate, Divorce and Admiralty Division [1906] p203.

<sup>304</sup> *Dodd v Dodd* Probate, Divorce and Admiralty Division [1906] 203-4.

the present state of the English law of divorce and separation is not satisfactory can hardly be doubted. The law is full of inconsistencies, anomalies, and inequalities amounting to almost absurdities; Whether any, and , what remedy should be applied raises extremely difficult questions, the importance of which can hardly be over-estimated, for they touch the basis on which society rests [and] it would be most detrimental to the best interests of family life, society, and the State to permit divorces being lightly and easily obtained [and] It is sufficient at present to say that from what I have pointed out, there appears to be good reason for reform.<sup>305</sup>

In this, Gorell Barnes acknowledged the inconsistencies and gender inequalities of the law, yet his comments also revealed growing anxieties of increasing immoral behaviour, the breakdown of family life and the wider society, particularly amongst the poor and working classes. Stedman Jones argued they were ‘generally pictured as coarse, brutish drunken and immoral [and] had become an ominous threat to civilization.’<sup>306</sup> Andrew Mearns declared ‘the poor have been growing poorer, the wretched more miserable, and the immoral more corrupt’<sup>307</sup> squalid living conditions left little room for any moral standards. Mearns describes the conditions,

To get into them you have to penetrate courts reeking with poisonous and malodorous gases arising from the accumulation of sewage and refuse scattered in all directions [and the example of] a mother who turns her children into the street in the early evening because she lets her room for immoral purposes until long after midnight.<sup>308</sup>

---

<sup>305</sup>Sir Gorell Barnes *Dodd v Dodd* Probate, Divorce and Admiralty Division [1906] 207.

<sup>306</sup>Stedman, Jones, G., *Outcast London* (London: Penguin Group. First published in 1971 Oxford: Oxford University Press) p285.

<sup>307</sup>Mearns, A., *The Bitter Cry of Outcast London* The Victorian Library Series (Leicester: Leister University Press 1970) pp56; 58-9 & 61.

<sup>308</sup>Mearns, A., op.cit. pp 58-9 & 61.

Ideas of social control of the family and the breakdown of the family were growing. In an attempt to address the issues a Royal Commission on Divorce and Matrimonial Causes was set up with Sir John Gorell Barnes as the Chairman. The Commission invited the Women's Co-operative Guild and Margaret Llewelyn Davies to give evidence. This was extraordinary considering this was a group of ordinary working class women with no legal right to vote.

#### The Co-operative's Women's Guild- Research and Evidence

The evidence from the Guild represented the views of 27000 members from 1500 of the co-operative societies and was controversial, contradictory and intuitive. They showed 'an overwhelming demand amongst them for the need for drastic changes to the divorce laws. One respondent stated 'No other subject in the life of the Guild has aroused such immediate response, and elicited such strength and earnestness of feeling.'<sup>309</sup> Overall, the findings addressed a wide range of issues that included morality, gender inequality, economics and child custody. The results were certainly positive in supporting changes to make divorce easier and cheaper that would indeed they argued 'raise the standard of morality for both men and women.'<sup>310</sup> However, the Guild suggested that the economic position of married women must change or any legal reforms would be futile.<sup>311</sup> 'Much needs to be done in educating woman to a realisation of her own importance and responsibility, when she may be the companion and not the servant or property of her husband.' Another respondent commented, 'We want to get rid of the idea that a man owns his wife just as he does a piece of furniture.'<sup>312</sup>

The findings also illustrated the public stigma of shame of separation and divorce. 'The disgrace is dreaded' as indeed were the lack of opportunities for employment and financial implications. 'A woman endures everything, even amounting to

---

<sup>309</sup>See above Women's Co-operative Guild 'Working Women and Divorce. An Account of Evidence Given On Behalf Of The Women's Co-operative Guild Before The Royal Commission On Divorce' in Martin, A. *Working Women and Divorce The Married Working Woman* (First Published London: David Nutt 1911, this edition New York: Garland Publishing, Inc., 1980) pp2-4.

<sup>310</sup>Martin, A., op.cit. p7.

<sup>311</sup> A concern later raised by Eleanor Rathborne, see above.

<sup>312</sup>Martin, A., op.cit. pp32 & 33 (in that order).



martyrdom, before saying a word. A mother feels it a duty to suffer and bear unkindness in silence for her children's sake. She will suffer much to prevent the finger of scorn being pointed at her children. [And] Everything is covered up for the sake of the children.'<sup>313</sup> The majority of the findings agreed that the mother should have custody of any children. As one Member commented,

I should like to see every effort made even where the mother is the guilty person, for her to have the children. It is the exception when she is not the most suitable guardian, and the so-called guilt generally is not an argument against suitability. It is very often a thing apart. A man's unfaithfulness is rarely considered a characteristic of paternal responsibility. [and] It does not follow that because a woman had committed adultery, perhaps under provocative circumstances, that she is destitute of the many virtues necessary to make a good mother.'<sup>314</sup>

Nevertheless, there was a certain amount of opposition within the Guild primarily on religious grounds and against the teachings of the Christian Church.<sup>315</sup> Indeed, the Co-operative Union strongly opposed the Guild's findings to the extent they withdrew financial support to the Guild for four years.<sup>316</sup> As one branch secretary argued that the findings in her area concluded,

It was resolved that the time was not ripe to alter the laws on marriage and divorce. Instead of doing away with the workhouse we should want more, for if the poor got divorce easy, and there are four or five children, who will keep the wife and children? As we know, the woman would not be able to support them; then they fall on the State.'<sup>317</sup>

---

<sup>313</sup> Martin, A., *ibid*, p40.

<sup>314</sup> Martin, A., *ibid*, pp26-7.

<sup>315</sup> Martin, A., *ibid*, p30.

<sup>316</sup> Gaffin, J., & Thoms, D., *op.cit.* pp48-9.

<sup>317</sup> Martin, A., *op.cit* p37.

Nevertheless, the results of the survey leave a valuable insight to the attitudes and beliefs of working class married women at that time and illustrate the gathering political strength of married working class women. However great the evidence, global events overtook any further changes towards addressing the anomalies and inequalities of divorce and child custody laws or indeed women's enfranchisement. The outbreak of the First World War swept away nearly all women's political demands. The following section provides an overview of the background of the political scene before and the social changes after the First World War.

### **The First World War and Social Changes**

A series of radical political upheavals swept across Edwardian Britain before the outbreak of the First World War.<sup>318</sup> The Irish struggle for Home Rule remained unresolved. Military action was mounting in Ireland between the Ulster Unionists and nationalists. Trade unions gathered momentum, mass membership and galvanised massive bitter strikes and riots against massive job losses, poor wages and extending working hours. The Labour Party emerged from a confusion of roots in socialism, Marxism, trade unions and intellectuals. As indicated above, the Women's Social and Political Union (WSPU) engaged in increasing militant tactics and mass demonstrations for women's enfranchisement.<sup>319</sup> Amidst this national turmoil, war broke out.

It is not the remit of this thesis to discuss the First World War in any detail. As such, only a brief overview is given. However, this does not dismiss the catastrophic impact of the war or indeed opportunities for some to gain financially from the war. The war was a tragedy. There were around eight million dead and 25 million in associated deaths leaving many men and their families suffering the psychological impact of the battles. Imagery of the period paints a picture of lost lives amid the mud-filled trenches, rat-infested duckboards and the bleak and desolate no-man's land.<sup>320</sup>

---

<sup>318</sup>Hattersley, R., *The Edwardians* (Great Britain: Little, Brown, 2004) p1.

<sup>319</sup>Schama, S., *A History of Britain 3, 1776-2000 The Fate of the Empire* (London: BBC Worldwide Ltd, 2002) pp293-338.

<sup>320</sup>Schama, S., op cit pp 329-33.

It was as S. Gertrude Ford's poem suggests a '*Fight to the Finish.*'

'Fight the year out!' the War-Lords said:  
What said the dying among the dead?  
'To the last man!' cried the profiteers;  
What said the poor in the starveling years?  
'War is good!' yelled the Jingo-kind:  
What said the wounded, the maimed and blind?  
'Fight on!' the Armament-kings besought:  
Nobody asked what the women thought.'  
"On!" echoed Hate where the fiends kept tryst:  
Asked the Church, even, what said Christ?<sup>321</sup>

The outbreak of war halted nearly all of the political agitation.<sup>322</sup> Certainly, suffragists directed their energies to supporting the war. As men went off to war women took up their places in the heavy industries, transport and engineering, banks and civil service and coped with the hostile reactions from the unions. Yet as Ray Strachey argued, the early years of the war were confusing, and women's offers of help rejected. For example, Dr Elsie Inglis offered fully staffed medical units to the War Office. Officials told her 'To go home and keep quiet.'<sup>323</sup> However, the Voluntary Aid Detachments drew in over 18,000 women to help support nursing aid. Certainly, the work of women towards the war effort gained media acclamation and public approval. Yet four years of fighting, massive loss of lives and terrible injuries left a scar on the nation. At the end of the war, the feminist writer Vera Britten wrote that men and women did not cry 'We've won the War!' The massive human losses stunned the nation, they cried, 'The War is over.'<sup>324</sup> The effects of the war changed everything.

---

<sup>321</sup>S. Gertrude Ford a feminist worked for the 'women's cause.' She contributed to a number of journals and edited a collection of verse. 'Fight to the Finish' in Reilly, C., *Scars upon my heart' Women's Poetry & verse of The First World War* (London: Virago Press Ltd., 1981) pp38 and 133.

<sup>322</sup>Trade union activists continued their campaigns see Hutt, A., *The Post-War History of the British Working Class*, (London: Victor Gollancz, 1937).

<sup>323</sup>Strachey, R., op.cit. pp337-54.

<sup>324</sup>Vera Britten discussed in Schama, S., op.cit. p333.

As men returned home, women workers, particularly married women were encouraged to return to their homes. Indeed, the state through the law reinforced this shift. Through the Restoration of *Pre-War Act 1918*,<sup>325</sup> 775,000 women lost their jobs. Media attention swung against women. As Ray Strachey declared, to continue working was a ‘sort of deliberate wickedness.’<sup>326</sup> Therefore, there was a complete turn around for married women. The narratives of domesticity had all but been abolished during the war but afterwards reinstated by law. Nevertheless, the consequences of the First World War had a massive and dramatic impact across society challenging the traditional establishment, gender politics and class distinctions. Indeed, the inter-war period was a significant period in women’s history with the introduction of legal reforms for formal legal equality; women had the right to vote, pension rights and equality in divorce and child custody laws.

Chapter 2 has taken a chronological view that has traced the origins of the laws of marriage, divorce and infant and child custody laws. It has explored the historical agenda of the church and the state through the law that legally maintained patriarchal authority and the subordination of wives and mothers. This reflected the absolute legal authority of husbands and fathers over their wives and custody of their children during marriage and following legal separation and divorce, although, as case studies showed there were exceptions to the rules. This provided the backdrop for the emergence of debates to address the ‘woman question’ and the inequality of women’s’ legal rights in the nineteenth century. The chapter considered the ways women writers employed their skills to campaign for legal reform and tracked the measure of reforms introduced to the laws of marriage, divorce and infant custody. Indeed, legal commentators argued the reforms were revolutionary and biased towards wives and mothers. Yet undoubtedly, the reforms for equality were limited. Despite the discontinuities, class and gender differences continued maintaining women’s subordinate position within the family. Engaging with the historical analysis of formal legal sources and testamentary evidence has the shifting narratives that informed the changes and identified the primary themes of the law, gender and parenting that will thread through the thesis. Chapter 3 will explore these issues

---

<sup>325</sup>9 & 10 Geo. 5 C. 42.

<sup>326</sup>Strachey, R., op.cit. p79.

through the twentieth century and up to the Royal Commission of Marriage and Divorce in 1956.

## CHAPTER 3

### Legal Equality or Bound by the Rules?

Mothers' Maternal Rights to Child Custody 1925- 1958.

'Throughout long centuries they have been told that a woman's first and only duty is domestic. It is not possible in one or two generations to counteract that long tradition.'<sup>1</sup>

#### Introduction

At the beginning of the twentieth century, legal commentators looked back at the changes to the laws regarding wives and mothers in the previous century, as 'revolutionary'. Considering the embedded doctrine of unity and *coverture* of the common law of England in which married women had no legal status, this is understandable. Certainly, the nineteenth century legal reforms, did bring striking changes for married women and mothers. However, the reforms were limited and gender inequalities persisted. Nevertheless, as Danaya Wright argues, the changes provided a step towards more significant reforms regarding women's formal legal equality in the twentieth century.<sup>2</sup> Indeed, the 'real' revolution' was in the nineteen twenties.

As indicated in Chapter 2, the First World War became a catalyst for change and signalled a new Age. Unquestionably, it was poised to be a key period in women's histories indeed a series of significant Acts during this period gave women formal legal equality. This included women's equality to vote, sex disqualification in employment and important legislation in divorce, legal separation and child custody laws.<sup>3</sup> The reforms reflected changing attitudes and political agendas following the

---

<sup>1</sup>Holtby, W., *Women and a Changing Civilisation*, London, (John Lane The Bodley Head Ltd., 1934) p103.

<sup>2</sup>Wright, D., ' "Well-Behaved Women Don't Make History" Rethinking English Family, Law, And History' 2004 *Wisconsin Women's Law Journal* 19 p221.

<sup>3</sup>*Sex Disqualification (Removal) Act 1919; Matrimonial Causes Act 1923; The Guardianship of Infants Act 1925; Summary Jurisdiction (Separation and Maintenance) Act 1925; Widows Pension Act 1925; Representation of the People (Equal Franchise) Act 1928.*

First World War.<sup>4</sup> However, legal reforms alone do not transform the lives of individuals.<sup>5</sup> In reality, the changes for women and men were confusing, contradictory and argued as rooted in blurred gender identities and gender politics.<sup>6</sup> This chapter explores the extent of the contradictions through narratives of domesticity and parenting that infant custody law reproduced and indeed reinforced.<sup>7</sup>

This chapter follows the structure of Chapter 2 and is set out in three sections and relates to the period following the First World War up until the outbreak of the Second World War in 1939. The first section will consider the reforms to the laws of divorce and more significantly child custody laws. It will explore the debates surrounding the *Guardianship of Infants Act 1925* and the contradictory reactions to the reforms. It looks at the demographic statistics in marriage and divorce to provide a broader picture of the trends and class distinctions. The chapter then contextualises the legislative changes within the broader political, social and economic framework. It explores the contradictions in class and gender divisions and employs literature from the nineteen twenties to set the framework in which the case studies are located. The chapter will then examine original documentary evidence from two case studies, Annot and Sam Robinson, Kitty Trevelyan and Johann Georg Götsch. This is at the heart of the thesis. A critical analysis of the documents will reveal insights into the realities and the contradictions of the impact of the social and legal changes for separated mothers and fathers. Whilst this is a snapshot view, it represents an invaluable and exceptional insight of the experiences for two families in that specific point of history and fills a gap in socio-legal history. The final section of the chapter considers the social context and the need to rebuild family life following the Second World War. It examines the increasing rates of divorce figures, and in detail the Report of the Royal Commission of Marriage and Divorce 1956<sup>8</sup> the findings of which were intuitive and far-reaching in the future direction of reforms to the divorce laws and the laws regulating the care of children post-separation.

---

<sup>4</sup>Pugh, M., *Women's Suffrage in Britain 1867-1928* (London: The Chameleon Press, 1980) at 35.

<sup>5</sup>As discussed in Boyd, S. B., *Child Custody, Law, and Women's Work* (Ontario: Oxford University Press, 2003) p19; Wright, D., *op.cit.* p220.

<sup>6</sup>Holtby, W., *op.cit.* p103; Kent, Kinsley, S., *Gender & Power in Britain 1640-1990* (London: Routledge, 1999) p287.

<sup>7</sup>As discussed in Boyd, S.B. *Child Custody, Law and Women's Work* (Ontario: Oxford University Press, 2003) p5.

<sup>8</sup>Cmd. 9678.

## Section 1

### Women's Formal Legal Equality & 'The Domestic Strife Bill'<sup>9</sup>

A series of legislative reforms enacted at the end of the First World War set out to establish gender equality. *The Sex Disqualification (Removal) 1919*<sup>10</sup> proposed to abolish gender discrimination in the workforce and allowed some women to enter the professions such as medicine and law. The long struggle for women's enfranchisement was over and women gained the right to vote. However, only women over the age of thirty had the right to vote. There was also a strange anomaly with this Act. Women under the age of thirty did not have the right to vote yet the Act allowed women to become Members of Parliament from the age of 21. A few women did become MPs, however this was through the inheritance of their husband's Parliamentary seat.<sup>11</sup> It was not until 1929 that women over the age of twenty-one gained equal rights with men to vote. Bertrand Russell argued the reforms were in recognition of women's support during the war.<sup>12</sup> Yet, as Stephen Cretney argues, the political background 1920-24 was unstable with three general elections in a short period. This he suggests influenced the political parties' unwillingness to upset any of the major groups and lose their members' votes.<sup>13</sup> Regardless of the arguments, in

---

<sup>9</sup>Sir Charles Wilson, H C Deb 4<sup>th</sup> April 1924 c 2674.

<sup>10</sup>9 & 10 Geo. C.71. This was included in the new Government's manifesto in a letter of November 1918 a year before the General Election that 'It will be the duty of the new Government to remove all existing inequalities of law between men and women.' Colonel Greig H C Deb 6<sup>th</sup> May 1921 C 1395 & 1400

<sup>11</sup>Horn, P., *Women in the 1920s* (Stroud, Gloucestershire: Alan Sutton Publishing Ltd., 1995) pp21, 135-6.

<sup>12</sup>*Representation of The People Act 1917* Russell, B. Edition 1970 *Marriage and Morals* (New York: Liveright Paperbound, Copyright C R, edition by Horace Liveright Inc Manufactured in the USA., 1919) p81. Arguments suggested that the groundwork for the enfranchisement of women had been set out in 1913. In addition, that there was a need to allow women to vote and compensate for the lack of numbers of men away fighting. While another suggestion argued, the vote was granted as an acknowledgement of the support women and women's groups gave during the war. Ray Strachey writing in 1928 suggested that if all women had gained the right to vote there was a fear of government being taken over by women, whose population figures outnumbered men. Yet women, under thirty, who did miss out on the vote were the ones who had contributed most to the war effort however the women's groups had no choice but to accept the propositions and fight from there. Strachey, *ibid*, 309 pp354-7. Martin Pugh argued that the exclusion of younger women exposed the political intrigues that the vote should only go to women who by their thirties were settled in a more traditional role of wife and mother. Pugh, M., 2<sup>nd</sup> Ed. *Women and The Women's Movement in Britain* (New York: St. Martins Press LLC., 2000) pp35-6 and 41-2.

<sup>13</sup>Cretney, S., *Law, Law Reform and the Family* (Oxford: Clarendon Press, 1998) p165.



1918<sup>14</sup> women gained voting rights. Alongside this, the *Matrimonial Causes Act in 1923*<sup>15</sup> brought equality to the grounds of divorce and the introduction of the *Guardianship of Infants Act 1925*<sup>16</sup> set out to give equality to both parents to apply for custody of their children following separation. With such a series of acts in a short space of time, the revolutionary changes of the nineteenth century faded with the ‘new’ revolution in women’s legal rights in the twentieth century. The next part explores the debates around the *Guardianship of Infants Act 1925*, the principle of which continues to be the deciding factor in cases of dispute in contemporary times.

Following women’s political enfranchisement, women’s groups and societies splintered and reformed.<sup>17</sup> The NUWSS changed its name to the National Union of Societies for Equal Citizenship (NUSEC). In 1919, Eleanor Rathbone became President, with Eva Hubback as Parliamentary Secretary. The group brought the campaigns on equal citizenship and equality for women in employment, divorce, parental rights and guardianship of children to the forefront of the groups’ political agendas.<sup>18</sup> As discussed in Chapter 2 by the beginning of the twentieth century, determining the welfare of the child linked with the emergence of the new ‘psy’ sciences and the mother/child bond and the welfare of the child should be taken into consideration in decisions of child custody. However, separated mothers had no legal rights had no legal rights to custody of their children, it was only at the discretion of the courts through the welfare principle. Married mothers had no legal rights to legal custody of their children it was this line of argument the debates followed.

---

<sup>14</sup>*Representation of The People Act 1917.*

<sup>15</sup>13 & 14 Geo. 5 C.19.

<sup>16</sup>15 & 16 Geo.5 C.45.

<sup>17</sup>Smith, H.L., *British Feminism in the Twentieth Century* (Aldershot, Hants, Edward Elgar Publishing Ltd., 1990) p47.

<sup>18</sup>In *The Claims of Mothers And Children* Margaret Llewelyn Davies wrote of the increase in the numbers of separated couples and ‘the disregard of the marriage tie since the war affecting public opinion. A state of things, in fact, is seen to exist only too frequently in connection with marital relations and motherhood which is intolerable to those sensitive to human suffering, entirely out of keeping with democratic ideals of freedom, justice and equality, and fatal to the well-being of the nation.’ MLD’s claim opened up the debate on eugenics and the state of the British race at that time. She continued: ‘The progress of the race can best be served by raising motherhood to a position of power and equality, so that the rights of parenthood may be shared by both men and women. No date given but this was after the enfranchisement of women and in Mulvey Roberts, M., and Mizuta, T., Eds. *The Mothers: Controversies of Motherhood* (London: Routledge/Thomess Press., 1994) p2-3.

In 1921, a private Members' Bill was introduced to Parliament as 'a phase of the application of the principle of equal citizenship of women before the law.'<sup>19</sup> Colonel Greig stated,

The whole tendency of recent legislation has been to put man and woman, husband and wife, on equal terms as regards their property and all other civil rights, and the claim of now made, and the Bill embodies it, that the wife should be treated on an equal footing with her husband in all cases of the control and up-bringing of the children.<sup>20</sup>

The Bill had wide support from women's groups and political parties. However, there was equally strong opposition. There was an argument that the Bill would discourage marriage particularly among men if they would be unable to bring up their own children. In addition, there were fears that there would be a risk of immorality that would lower the position of women.<sup>21</sup> Regarding equality of parties to the custody of children Major Falle declared,

There is a good old English proverb, which will bear analysis, that if two people ride on a horse, one of them has to sit in front. The point is, which is to sit in front and hold the reins? [An Hon. Member: "Give each a horse!"] That means divorce and we do not want a new Divorce Bill. We are talking of ordinary family life, in which one must be the master. I am quite prepared to say it should be the woman, but I prefer it should be the man. It must be one or the other, it cannot be both, and to say this Bill would make the child in any way happy-why, it simply means that the poor child

---

<sup>19</sup>Summarised in the Second Reading by Colonel Greig; "The whole tendency of recent legislation has been to put man and woman, husband and wife, on equal terms as regards their property and all other civil rights, and the claim of now made, and the Bill embodies it, that the wife should be treated on an equal footing with her husband in all cases of the control and up-bringing of the children." Co. 1394-1395.H C Deb 6<sup>th</sup> May 1921 c 1394-1395.

<sup>20</sup>Greig, *op.cit.* c 1394-5.

<sup>21</sup>Major Sir B. Falle H C Deb 6<sup>th</sup> May 1921 c 1409.

would be the shuttlecock of its father's and mother's idiosyncrasies.<sup>22</sup>

Lieut-Colonel Freemantle argued that there were two campaigns supporting the Bill and there should be no confusion. From one perspective, the Bill emerged from a sentimentalist approach and the welfare of the child. This had full support. Conversely, the other issue was legal equality for women's rights. Freemantle argued, 'of course in theory we all agree with it, [and] How are you going to do it in actual cases? Where does the equal responsibility come in? [and] If it comes to any difference of opinion, each side has an equal vote, but the casting vote is given to the husband.'<sup>23</sup> However, as noted above there were three general elections during this period that aside from opposition delayed the passage of the Guardianship Bill. Nevertheless, Margaret Wintringham re-introduced the Bill in 1924.<sup>24</sup> The debates followed a similar path to the earlier arguments.

The main thrust of the debates lay in Clause 3 that proposed to allow joint guardianship of children. As Mrs Wintringham pointed out some separated and divorce mothers had custody of their children, as did unmarried mothers, married mothers did not. However, the opposition argued on the practicalities of applying Clause 3 with fears this would lead to disputes between husbands and wives on the daily care of their children and the fears of a decrease in the authority of the father in the home. Indeed, disagreeing with the Bill, Sir Charles Wilson suggested it be renamed, 'The Promotion of Domestic Strife Bill.'<sup>25</sup> The Bill became law. However,

---

<sup>22</sup>Falle *ibid*, c. 1407.

<sup>23</sup>Lieut. Colonel Freemantle H C Deb 9<sup>th</sup> May 1921 c 1420.

<sup>24</sup>Margaret Wintringham, a member of the NUWSS, was a magistrate and a member of Grimsby Education Committee. On the death of her husband, she was invited to stand at a by-election as the Liberal candidate for Lough and became the second woman, after Lady Astor, to enter Parliament. She campaigned for women to have the right to vote at the age of twenty-one and introduced the Guardianship of Infants Bill. In her opening debate Mrs Wintringham spoke of the previous attempts to introduce the Bill and the blocks in Report stage to what were seen as 'contentious amendments' as well as the dissolutions of Parliament and general elections that held up further moves on the Bill. , H C Deb 4<sup>th</sup> April 1924, c 2659.

<sup>25</sup> Sir Charles Wilson, H C Deb 4<sup>th</sup> April 1924 c 2674-75. The Bill ran alongside the Summary Jurisdiction (Separation and Maintenance) Act 1925. The arguments and around the provision indeed strengthened this argument. In s 14 of this Act a married woman could apply for a separation and custody order while living with her husband. This issue will be discussed more fully in Chapter 3.

in the final debates, it was disclosed that the previous Government policymakers, Mrs Wintringham and representatives of some of the larger women's organisations had agreed to withdraw any aggressive amendments and settle on a less controversial Bill.<sup>26</sup> Upsetting the establishment was not an easy course or one that even women's groups could overcome. As Ellen Wilkinson argued,

The Bill is part of the constant agitation on the part of women of all shade of political thought to translate into law the equality that has been granted to them in the political field.' She continued, 'What it does is to establish equality where the people in question cannot agree; but where people are living apparently quite happily, whatever goes on behind the lace curtains, the fact still remains that the woman is not regarded as equal.'<sup>27</sup>

It took another forty-eight years for married women to gain equality of custody and guardianship of their children.

#### The Guardianship of Infants Act 1925

The Act gave separated and divorced mothers 'like powers to apply to the courts in respect of any matter affecting the infant as are possessed by the father.'<sup>28</sup> However,, the principle of the welfare of the child was the most significant point of the legislation. The Act stated that the first and paramount consideration of the welfare of the child would be considered over and above the rights of the father or mother.<sup>29</sup> Feminists considered the principle gave the courts the power to retain the absolute rights of the father since the Act did not change the exclusive rights of the father or indeed his power after his death.<sup>30</sup> This is illustrated in the case of *re Thain (An Infant) In re M.M. Thain. Thain v Taylor*.<sup>31</sup> In this case, the father, on the death of his wife, had accepted the offer of his married sister-in-law to raise his baby daughter as

---

H C Deb 4th March 1925 c 549.

<sup>26</sup>Cretney, S., *Law Law Reform and the Family* op.cit p83.

<sup>27</sup>H C Deb 4<sup>th</sup> March 1924 c 540-1.

<sup>28</sup>*Guardianship of Infants Act* 1925 Geo. V. 15 & 16 Ch, 45 S. 2.

<sup>29</sup>The principle remains a deciding factor in the modern era.

<sup>30</sup>A father retained the right to appoint a guardian who after the father's death act jointly with the mother to ensure the father's wishes in the education and religion of the children are carried out.

<sup>31</sup>[1925. T. 1299] [1926] Ch. 676.

one of her family. The father contributed maintenance and he agreed that the child should stay with her aunt 'until she wishes to leave of her own accord.'<sup>32</sup> When the child was seven years old, he father applied for the return of his daughter. The court upheld the appeal of the father on the grounds that the claims, of a father must prevail.

Modern day feminists support this argument. Julia Brophy contends, the Act illustrated a subset of narratives around the welfare principle and the power of the state to maintain mothers in an economically and socially subordinate position to fathers.<sup>33</sup> The terms of the Act reinforced reflected an emerging shift in the narratives of motherhood, childhood and a growing intrusion by professionals in the area of childcare and increasing scientific approaches to the child and childhood. Indeed, following the thinking of Jacques Donzelot<sup>34</sup> there is an argument that the welfare principle shrouded increased state regulation and the reinforcement of the separate spheres and the subordination of mothers within the private sphere as this next part discusses.

The Revolutionary Reforms to Family law: 'an ungodly jumble' <sup>35</sup>

Reactions to the reforms raised conflicting opinions. In 1909, Edward Jenks described this area of family law as an 'ungodly jumble' and privileged wives and mothers.<sup>36</sup> He raised similar concerns in 1928. Jenks suggested that the Acts in the nineteen twenties were 'of a revolutionary character.'<sup>37</sup> He argued,

within the last two years, the institutions of the family, one of the pivots of the social system, has been subjected to drastic alteration by several Acts of Parliament which contain provisions of a revolutionary character, [and] have rendered family law as it stood

---

<sup>32</sup>[1926] Ch. 676.

<sup>33</sup>Brophy, J.A., 'Parental Rights and Children's Welfare: Some of the Problems of Feminsits' Strategy in the 1920s' 1982 *International Journal of the Sociology of the Law* 10 p150; Brophy, J.A., *Law, State & The Family The Politics of Child Custody Law* PhD Thesis Sheffield University 1985 DX 185403 p46.

<sup>34</sup>Donzelot, J., *The Policing of Families* (London: Hutchinson, 1979) and discussed in Chapter 1.

<sup>35</sup>Jenks, E., *Husband & Wife In The Law* (London: J.M.Dent & Co., 1909) pv.

<sup>36</sup>Jenks E., *ibid*, p 33.

<sup>37</sup>Jenks, E., 'Recent Changes on Family Law' 1928 *The Law Quarterly Review* 44 p314.

at the beginning of the nineteenth century almost unrecognizable. [he continued] certain important changes made by these statutes, which from the point of view of the jurist, appear to be either unworkable or diametrically opposed to public opinion.<sup>38</sup>

Jenks' most critical arguments were against the contradictions within the law and bias towards wives and mothers in legal separation and child custody laws. He illustrated his reasoning through the terms of the 1925 *Summary Jurisdiction (Separation & Maintenance) Act and Guardianship of Infants Act 1925 S 3*. Under the *Summary Jurisdiction Act*, a married woman could make an application for separation and maintenance orders<sup>39</sup> yet still reside with her husband. In a similar vein the *Guardianship Act S 3, 1 & 2* also gave the courts the power to make an order for sole custody of the child and maintenance to the mother while still living with the father. Jenks pointed out that if the wife obtained the orders, she would be in a unique position,

These [orders] she keeps in her pocket, or on the mantelpiece, as a perpetual reminder to her husband that she has it in her power to leave him and reside at his expense elsewhere.' He continued, 'Could there be any provision more exactly calculated than this to turn a working-class household into a hell for the wife and children?'<sup>40</sup>

Nevertheless, as he confirmed, the orders were not enforceable while the wife lived with her husband and ceased to be effective if they continued to live together after three months. However, to apply for an order, a wife must prove neglect or abuse by the husband to her or her children, that caused her to leave, or that he was a habitual drunkard.<sup>41</sup> However, Jenks made it clear he was not without sympathy for abused wives or children. The fault, he stated lay in a system that was open to exploitation.<sup>42</sup>

---

<sup>38</sup>Jenks, E., op.cit. pp314-6.

<sup>39</sup>That is the legally separating but not legally allowed to remarry.

<sup>40</sup>Jenks, E., op.cit. p319.

<sup>41</sup>*The Summary Jurisdiction (Separation and Maintenance) Act 1925*.

<sup>42</sup>Jenks, E., op.cit. p319.

The laws were ‘unworkable’ and despite the ‘revolutionary’ reforms they remained an ‘ungodly jumble.’

Eleanor Rathbone<sup>43</sup> was also vociferous in her criticisms of the reforms, and of Edward Jenks. Rathbone confirmed that there was no doubt that the legal position of wives had improved to some extent, nevertheless, legal inequality and particularly financial inequality remained an issue. Writing at that time she pointed out, while there was space for mothers to be included in the determination of the welfare of the child there was little understanding of the realities of the outcomes particularly for the working classes. She argued ‘It is easy to see that in practice the parent who holds the purse strings will have a great power of control over the arrangements for the children’s upbringing.’<sup>44</sup> In this, the power of the father remained through maintenance. She argued:

If those who built up the fabric of British law had been guided less by sex bias and more by considerations of natural equity, they might have been expected to use the law to redress the unfair balance of advantage which the economic arrangements of society give to the father who supports his children by his remunerated labours outside the home over the mother who supports it by her unremunerated labours inside. Instead, they acted on the principle “to him that hath shall be given” and rested the whole weight of the law on the side of the father.<sup>45</sup>

Rathbone argued, the so-called ‘privileges’ are ‘only to dishonest and unscrupulous women.’<sup>46</sup> For the ordinary married woman she maintained, ‘it is untrue that she now

---

<sup>43</sup>Eleanor Rathbone, was born in 1872 to a wealthy and Liberal merchant family in Liverpool. In the late nineteenth century, she helped establish a social service enterprise for women and children, was the first woman elected to Liverpool City Council and a leading suffragette in the area. After the First World War, she became President of the National Union of Societies for Equal Citizenship. She was a significant feminist campaigner and politician and campaigned tenaciously for the introduction of family allowances e paid to the mother. Pedersen, S., *Eleanor Rathbone and the Politics of Conscience*, (New Haven: Yale University Press, 2004).

<sup>44</sup>A father would more than likely be in paid employment whereas a mother’s employment in the home would have no economic remuneration. Rathbone, E., op.cit. p199.

<sup>45</sup>Rathbone, E., *ibid*, p199.

<sup>46</sup>A point Jenks argued in his study *Husband & Wife In The Law* 1909 and discussed in ;Rathbone, E., *ibid*, p198.

suffers from no serious disabilities imposed by the law and preposterously untrue that it gives her all the protection she needs.’<sup>47</sup> The only means a working class wife had to leave an abusive or neglectful husband was, as Rathbone pointed out, to abandon the family home and then apply for separation and maintenance order and custody of the children. ‘But [she added] the conditions under which such orders are granted are in many respects very gravely unsatisfactory.’<sup>48</sup> Indeed, the requirements to apply to the courts were complex and contradictory. As Rathbone emphasised and Jenks observed, the orders were not enforceable while the wife lived with the husband and thus a wife must first leave the family home before applying for separation and maintenance orders. Yet this she suggested was more likely to prohibit wives from leaving. ‘The worse the husband, the less likely that she will be willing to leave the children alone with him.’ Alternatively, leaving with the children would be difficult. ‘The wife has no legal right to take her children with her and even if she could by stealth, often knows no one whom she could ask to take in the whole family without payment.’<sup>49</sup> As she pointed out, that after the First World War the economic practicalities of this move were a real issue and added to the difficulties of a wife trying to escape an unhappy marriage.

There were other problems. In Rathbone’s view the meagreness of the amounts, the maximum maintenance the courts could order was 40 shillings per week, and 10 shillings<sup>50</sup> for each dependent child presented another obstacle for women. Added to which the likelihood of non-payment would further detain a wife back from making an application. She explained that magistrates were generally hesitant to award the full amount. If the husband found the orders too much of a liability he could easily avoid payment. This would leave the wife in a dilemma. She could take legal action against her husband for non-payment with the probability of his imprisonment for non-payment, or remain hopeful of the husband paying the maintenance. Either way the wife would continue to be financially disadvantaged.<sup>51</sup> Notwithstanding the practical economic issues, there remained a strong stigma of shame, disgrace and

---

<sup>47</sup>Rathbone, E., *ibid*, p198.

<sup>48</sup>Rathbone, E., *op.cit.* p201.

<sup>49</sup>Rathbone, E., *op.cit.*p202.

<sup>50</sup>After decimalisation 40 shillings would be £2 and 10 shillings 50p per week in UK currency.

<sup>51</sup>Rathbone, E., *op.cit.* pp201-2.



social exclusion.<sup>52</sup> Thus, for married working-class women taking the step to apply for legal separation and custody of their child was a desperate measure. Tied socially, legally and financially working class women more often had no choice but to remain in unhappy, poverty-stricken and often-abusive marriages.

The root of the problem was economics and the power of control of family economics. The majority of married women were not part of the formal economy, although they could have been part of the informal economy, such as looking after other children and taking in laundry. Their life generally revolved around the unpaid care of the family and the home. Therefore, the family wage would be the husband's wage. Consequently, breaking up the family home would mean dividing the meagre family income with less for each party to live on. Moreover, since the income would be the husband's, it is more than likely he would be in control of the family finances. This would have been particularly grim for women and their children. Rathbone argued, 'if she has no income of her own and is prevented by the burden of family cares or jealousy of male competitors from earning one, she may find legal equality but a fleshless bone.'<sup>53</sup>

Little published evidence remains of the harsh lifestyle and poverty of separated mothers and their families during the inter-war period although the original case studies in this thesis will of course add to the knowledge. Nevertheless, the results of the research by the Women's Co-operative Guild in their evidence to Royal Commission on Marriage and Divorce in 1911 provided some indication of the difficulties for separated mothers before the war. For example,

Brother, going to see his married sister and two little girls, found them starving. He at once took them to his home. Because she had left her husband, he (the husband) refused to pay anything towards her maintenance, but offered to take the two children, one a year and the other two years old. This happened nine years ago, and she

---

<sup>52</sup>See evidence from the Women's Cooperative Guild on Martin, Anna, *Working Women and Divorce The Married Working Woman* (New York: Garland Publishing Inc., 1980 Reprint of 2 works originally published in 1911, the 1<sup>st</sup> by D. Nutt, London; the 2<sup>nd</sup> by The National Union of Women's Suffrage Societies, Westminster) p1.

<sup>53</sup>Rathbone, E., Foreword to Reiss, E., ( Barrister) *Rights and Duties of Englishwomen A Study of Law and Public Opinion* (Manchester: Sherrat Hughes, 1934) pviii-ix,.

has never received a penny from him, but supported herself and the children.<sup>54</sup>

The study of family budgets in the same period by Maud Pember Reeves, *Round About A Pound A Week* also included evidence from one deserted mother. Although the court had issued a maintenance order against her husband, it was never paid. Thus, the mother paid a neighbour to look after the children to enable her to work and the family existed on her meagre wages. Thus, their housing conditions and diet were poor and the health of the children ‘extremely delicate.’<sup>55</sup> Increasing unemployment during the inter-war period indicate that conditions were similar. The research findings on the health and conditions of working-class wives by Margery Spring Rice<sup>56</sup> in 1939 reveal harsh reality for working class wives. and for separated mothers, the conditions were likely to be considerably poorer. The original evidence uncovered in this thesis aims to fill this gap.

However, other feminists commended the achievement of women’s legal equality. In 1936, Ray Strachey argued, ‘And so another long fight which had begun as far back as 1839 came to an end’<sup>57</sup> thus, suggesting the legal reforms represented full gender equality. Taking a similar viewpoint, Dr Erna Reiss declared the *Guardianship Act 1925* swept away ‘the remaining vestiges of inequality.’<sup>58</sup> Dr Reiss acknowledged that reforms were still vital particularly in the economic field as such, she argued women’s equality would be complete. Nonetheless, in the Foreword to Reiss’ study Eleanor Rathbone pointed out that ‘history is seldom so neat-fingered, and it will take longer than that.’<sup>59</sup> Of course, perspectives inform attitudes and opinions. Thus, Rathbone’s background, working amongst women and children in the poverty-stricken docklands area of Liverpool was different to Reiss a barrister and political

---

<sup>54</sup>Martin, A., op cit Appendix II p74.

<sup>55</sup>Reeves Pember, M., *Round About a Pound a Week* (First published by G. Bell & Sons Ltd., 1913 this copy London: Virago Ltd., 1979) pp129-30.

<sup>56</sup>Rice Spring, M., *Working Class Wives* (Harmondsworth: Penguin Books Ltd., 1939).

<sup>57</sup>Strachey, R., Ed. *Our Freedom and Its Results by five women* (London: Leonard & Virginia Woolf at the Hogarth Press, 1936) p91.

<sup>58</sup>Reiss, E., (Barrister) *Rights and Duties of Englishwomen A Study in Law and Public Opinion* (Manchester: Sherrat & Hughes, 1934) p103.

<sup>59</sup>Rathbone, E., Foreword in Reiss, E., *ibid* ppviii-ix.

commentator. Ray Strachey, a feminist writer with political interests was a keen advocate on the rights of educated women to enter the professions and for equal pay.<sup>60</sup>

Yet as pointed out in Jenks' arguments above, there were other anomalies within the law and not without apparent prejudice against husbands of which the, *Licensing Act 1902* was a clear example. The Act provided the only grounds in which a husband could obtain a separation order against his wife as a habitual drunkard and consequently seen as a bad wife. Nonetheless, the courts would order the husband to pay maintenance to the wife. However, if a woman neglected her duties as a wife and mistreated her children but was not a habitual drunkard, there was no legal redress for her husband to apply for a legal separation.<sup>61</sup> Furthermore, Reiss<sup>62</sup> pointed out, the *Guardianship of Infants Act 1925* did not include the rights of the father to apply for custody. The 1886 Act gave power to the court to make an order of custody and access to the mother. At that time, the rights of the father over his wife and family were absolute therefore there was no need to consider a situation where the father did not have that right. The debates around the 1925 Bill did not consider the issue, and this underlines the confidence of the dominant narratives and the absolute rights of the father. It was not until the Administration of Justice Act 1928<sup>63</sup> that the courts resolved this and gave equality to both parents. The law would indeed appear to be an 'ungodly jumble.'

The judiciary also added their comments to the debates as the case of *Gottliffe v Edelston*[1930] 2K.B. 378 illustrates. In this case, the wife sued her husband for injuries she sustained in a motor accident before they married, while he was driving. Although 'it was admitted' that the real defendant was the insurance company the case is striking for the comments made by the judge. The case compelled McCardie J. to remark that 'This action calls, 'in striking fashion, for a review of the legal results that follow from marriage in England at the present day.'<sup>64</sup> McCardie J. continued:

---

<sup>60</sup><http://www.oxforddnb.com/articles/38/38017>.

<sup>61</sup>Discussed in Rathbone, E., op.cit. p203.

<sup>62</sup>Reiss, E., op.cit. p103; and discussed in Cretney, S., *Family Law in The Twentieth Century* (Oxford: Oxford University Press, 2003) pp570-1.

<sup>63</sup>18 &19 Geo V, c.26, s 16.

<sup>64</sup>[1930] 2 K.B. 379.

So great, however, is the confusion of the law that the point is, in my view, one of some doubt and difficulty. It calls for a consideration of legal history, of theological influence, of ambiguous decision and of obscurely worded legislation. The state of the law to-day as to the relations of husband and wife seems to me to be fraught with inconsistency and injustice.<sup>65</sup>

As an example, the judge pointed out that under the *Married Woman's Property Act* 1882 S. 2 a married woman shall be able to be liable for any contract and of suing and being sued separately from her husband.<sup>66</sup> Yet the Act did not allow a husband to sue his wife. McCardie J argued that the legal reforms relating to women and social changes meant, 'We are probably completing the transition from the family to the personal epoch of women.'<sup>67</sup> [and] I find the privileges given to a wife which are wholly denied to a husband, and I find that upon the husband there has fallen one injustice after another.'<sup>68</sup> There is no doubt that the law was 'fraught with inconsistencies' and appeared as an 'ungodly jumble' of legislation such as property rights, summary jurisdiction, legal administration, and licensing statutes that informed the laws of legal separation. Certainly, wives and mothers had more grounds to apply for a legal separation than husbands did, however, the idea that there was positive discrimination against husbands and fathers fails to recognise the inconsistencies of the terms of the laws and economic vulnerability of women. Thus, as pointed out above, the idea of a woman as 'the spoilt darling of the law' was in economic reality the opposite for some women and particularly for working class wives.<sup>69</sup> Yet, despite the realities of poverty and the stigma of shame and guilt, the demographic trends show that wives and mothers were making the decision to leave their marriages. The next part of this section examines the demographic trends to provide an overview of the general patterns. Arguments suggest that the figures were notoriously unreliable,

---

<sup>65</sup>[1930] 2 K.B. 381.

<sup>66</sup>945 & 46 Vict. C.75 S.2).

<sup>67</sup>[1930]2 K.B. 384.

<sup>68</sup>[1930]2 K.B. 393.

<sup>69</sup>Smart. C., *The Ties That Bind* (London: Routledge & Kegan Paul, 1984) p32.

nevertheless they provide an indication of the trends and all that remains and should not be dismissed entirely.<sup>70</sup>

## **Demographic Trends and Class Distinctions: Marriage, Divorce, Infant & Child Custody Petitions**

### Marriage, Legal Separation & Divorce

Marriage during the inter-war period was popular and generally romantic or companionate marriages rather than arranged marriages.<sup>71</sup> Marriage no longer followed the traditional ideas of the separate spheres. For example, in the marriage of politicians Jennie Lee and Aneurin Bevan Lee continued her political career and both had independent lives.<sup>72</sup> Feminist author Vera Britten and academic George Catlin had a similar marriage. She lived and worked in the UK and he lived in America. Indeed, writing in 1928 Britten argued,

Many recently married men and women have already realized that marriage has been too long the synonym for one domestic ménage, instead of symbolize the union of two careers and two sets of ideals. They now understand that true comradeship means something more than being always in one 'another's company, that it signifies a deeply rooted sympathy of minds, an identity of aim though pursued by different methods.<sup>73</sup>

---

<sup>70</sup>Cretney, S.M. 'What Will Women Want Next?' 1996 *Law Quarterly Review* 111 p133; McGregor, O.R., Blom-Cooper, L., & Gibson, G., *Separate Spouses* (London: Gerald Duckworth & Co. Ltd., 1970) pp35-8.

<sup>71</sup>This shift is supported by the increasing letters from working class parents to Dr Marie Stopes for advice on birth control. The fear of pregnancy amongst the poor and working classes, the high risk of infant and more significantly maternal mortality rates was a concern. *Mother England*, (London: John Bale, 1926) p178.

<sup>72</sup>Hollis, P., *Jennie Lee A Life*, (Oxford: Oxford University Press, 1997).

<sup>73</sup>Britten, V., Letter to The Evening News 4 May 1928 in Berry, P., & Bishop, A., Eds. *Testament of a Generation The Journalism of Vera Britten and Winifred Holtby* (London: Virago Press Ltd., 1985) p131.

Their marriages were representative of a shift towards equality in partnerships, at least for some women during this period. Yet, despite claims of moral freedom,<sup>74</sup> marriage, in these ‘men-depleted’ years was important particularly for working-class women where being married awarded a higher status than spinsterhood than being ‘left on the shelf’.<sup>75</sup> Indeed, rather than remain unmarried, many single women immigrated to the colonies to marry. Amongst the upper classes and aristocracy, a suitable marriage and financial support was just as important. Statistics show that in 1925, there were 295,689 marriages by 1930 this had risen to 315,109 and in 1935 to 349,536.<sup>76</sup> The low figures for legal separations and divorce support this argument. As discussed in Chapter 2 there was a two-tiered system to deal with legal separation and divorce; legal separation and the magistrates’ courts for the poor and working classes, and divorce for the wealthy and social elite through the County or higher courts.<sup>77</sup>

The statistics for legal separations and indeed maintenance orders are given in Criminal Statistics in Proceedings to Quasi-Criminal Matters from the Court of Petty Sessions. Figures for applications for separation orders rose from 7,041 in 1925, to 10,251 in 1929 yet decreased thereafter to 8,178 with by 1935.<sup>78</sup> In comparison over the same period, there were 105 applications made by husbands in 1925, 43 in 1929 and 14 in 1935.<sup>79</sup> These figures obviously do not take into account the numbers of husbands who simply left their families. There is a distinctive rise in the figures for legal separation up until 1929 reflecting changing attitudes following the war and the legal reforms introduced, yet a decrease after 1929. A number of factors can offer an explanation such as, the impact of the economic depression; women’s restricted financial opportunities; the continued stigma of separation and the reinforcement of the concept of domesticity. However, as pointed out, there was a two-tiered system

---

<sup>74</sup>Russell, B., *Marriage and Morals* (New York, USA: Liveright PaperBound Edition 1970 Copyright C R 1957 by B Russell 1929 by Horace Liveright Inc. Manufactured in the USA) p84.

<sup>75</sup>Beddoe, D., *Back to Home and Duty* (London: HarperCollins Publishers, 1989) p99; Lewis, J., *Women in England 1870-1950* (Sussex: Wheatsheaf Books Ltd., 1984) pp3-4.

<sup>76</sup>*Registrar General Statistical Review of England and Wales 1925-39*.

<sup>77</sup>Jenks, E., *op.cit.* p318.

<sup>78</sup>Ref and Figures for 1924 are defined differently and separate figures for applications for legal separation on the grounds of habitual drunkenness.

<sup>79</sup>*Courts of Summary Jurisdiction-Proceedings in Quasi-Criminal Matters Part II Other Quasi-Criminal Orders Separation Orders*.

and legal separation forms only one. The next part turns to examine the other part of the trends in divorce.

## Divorce

Between the years 1916-20, wives instigated 33% of divorce figures.<sup>80</sup> Following the Matrimonial Causes Act 1923, statistics show an increase of 50% during the nineteen twenties. The numbers of petitions for divorce stood at 4,572 in 1924. This increases to 8,036 in 1928, and remained steady throughout the rest of the decade.<sup>81</sup> The figures for divorce in 1930 showed 7,126 cases, this rose to 8,574 in 1934 and dropped slightly to 8,138 in 1935. The Matrimonial Causes Act 1937 widened the grounds for divorce. Drawing on the recommendations of the Gorell Commission, adultery was no longer the sole ground for divorce and included other grounds such as cruelty, incurable insanity and desertion after three years. The changes removed the controversial 'hotel' adulteries that had become the subject of public and media satire. If a husband and wife agreed to divorce, generally the husband paid and arranged to be 'caught,' by a third party in a hotel bedroom with another woman. Therefore, on a sworn statement by the third party there were sufficient grounds for divorce. However, Prime Minister A.P. Herbert argued that the intention of the reforms was not to make divorce easier, but provide a source of stability; remarriage and a more stable relationship would be easier and no doubt preferred. Undoubtedly, the reforms contributed to the increase in the numbers of divorce cases.

Again, the increase in the divorce figures reflected changing attitude after the First World War<sup>82</sup> alongside the impact of the *Matrimonial Causes Act 1923* and *1937*.<sup>83</sup> Generally, the upper classes had a laissez-faire attitude towards life, marriage and divorce.<sup>84</sup> Divorce for some of the social elite was a procedure, the subject of public

---

<sup>80</sup>Halsey, A.H. Ed. *British Social Trends since 1900* (London: Macmillan, 1988) at 80 and discussed in Pugh, M., *Women and the Women's Movement in Britain 1914-1959* (Hampshire: Macmillan Press Ltd., 1992) p217.

<sup>81</sup>*Registrar Generals Statistical Review of England and Wales*.

<sup>82</sup>Stone, L. *Road to Divorce England 1530-1987* (Oxford: Oxford University Press, 1990) pp390-6. See Chapter 1 for discussion on individualisation.

<sup>83</sup>Giving equality to wives to petition for divorce on the same grounds as husbands.

<sup>84</sup>Shifts in social attitudes and class distinctions considered further below in this section.

and media attention before remarriage.<sup>85</sup> During the nineteen twenties, the magazine *Punch* regularly satirised the trends in divorce. Symptomatic of this were their cartoons. For example, “‘I’ve been married fifteen years, so I think I’ve well earned a divorce.’<sup>86</sup> [and] “‘Friend: So glad you got your divorce, dear.’ Actress: Yes. But not a word in the papers-they’ve no room for anything but this stupid election. I might as well never have had it!’”<sup>87</sup> It was the age of ‘The Bolter,’<sup>88</sup> the notorious mother of the narrator Fanny in the novels of Nancy Mitford, *The Pursuit of Love*, *Love in a Cold Climate* and *Don’t Tell Alfred*.<sup>89</sup> The novels in fact mirrored the life of Idina Sackville who married and divorced five times.<sup>90</sup> Idina left her young children and moved to Kenya. There she established the ‘Happy Valley’ set, a group of elite expatriots, notorious for their drink and drug-fuelled parties, adultery and promiscuity. Their hedonistic lifestyle reflected in their attitudes to marriage, divorce and children.

London Society ignored discreet affairs, but not public scandal as Diana Mitford faced on leaving her husband Bryan Guinness for Fascist leader Oswald Mosley.<sup>91</sup> The same fate fell to Idina Sackville when she separated from her husband, politician Euan Wallace.<sup>92</sup> Female politicians, Jennie Lee, Barbara Castle and Ellen Wilkinson all had long relationships with married men during the inter-war period. Politically

---

<sup>85</sup>The case of *Russell v Russell*<sup>85</sup> is not least for the scandalous nature of some of the evidence. The case involved the heir to the third Baron Amptill and his wife Christine. The husband made the case that a child born to his wife was not his son since he had not had had ‘no connection with her at’ at a time when she could have conceived the child. After a 8 day trial and an 11 day re-trial the husband was granted a divorce on the grounds of his wife’s adultery. The Court of Appeal dismissed her appeal but an appeal to the House of Lords dismissed the petition for divorce. The couple remained married. In 1935 the wife petitioned for divorce on the grounds of her husband’s adultery with a woman in a London hotel. The husband did not contest the petition. [1924] AC 687 and discussed in Cretney, S. “Sir John Swithers MP: the solicitor in private practice and public life in England between the wars” *Cambridge Law Journal* 2007.

<sup>86</sup>*Punch or The London Charivari* Col CLXVIII May 27, 1925 p587.

<sup>87</sup>*Punch or The London Charivari* Vol CLXVII October 29 1924 p480.

<sup>88</sup>The Bolter is a study by the great-granddaughter of Idina Sackville who divorced and married 5 times, her story traces through documentary evidence the life of her grandmother Idina Sackville and the Happy Valley set of social elite. Osborne, F., *The Bolter* (Great Britain, Virago Press, 2009) p8.

<sup>89</sup>A series of novels published by Nancy Mitford after the Second World War about an upper-class family in the inter-war period. The narrator is Fanny, her mother ‘The Bolter’. The first novel was *The Pursuit of Love*, *Love in a Cold Climate* and *Don’t Tell Alfred* published in 1945, 1949 and 1960 respectively and discussed in the book. Osbourne, F., *The Bolter* (Great Britain, Virago Press, 2008) pp8-9.

<sup>90</sup>James Fox’s book *White Mischief* told the story of the murder of Josslyn Hay, 22<sup>nd</sup> Earl of Erroll, Idina’s third husband, in 1940.

<sup>91</sup>De Courcy, A., *Diana Mosley* (London: Vintage:2004).

<sup>92</sup>The classic case here is of the Edward VIII and Mrs Wallis Simpson and the extent the Government and media went to conceal the affair and the subsequent abdication of the king to fulfil his wish to marry a divorcée.



and socially, they could not risk a divorce it would destroy their careers, marriage would as Patricia Hollis pointed out, would 'limit their political freedom'..<sup>93</sup> Divorcees were shunned and banned from Court presentations and Royal circles.<sup>94</sup> The relationship between Mrs Wallis Simpson and Edward VIII is a classic example of the double standards amongst not only the upper classes, but also the absurdity of the 'hotel' divorces and differences between lower class attitudes to divorce or separation. Although the relationship between the King and Mrs Simpson was widely accepted by their social circles and widely acknowledge abroad, when the story eventually broke in the British press there was extensive public disapproval. Indeed, this was a classic case of a 'hotel' bedroom divorce with Mr Simpson providing the evidence. However, in contrast to earlier periods divorce was not only just about the adult parties in the relationship. The following part of this section looks at the figures for child custody applications.

### Child Custody

The statistics for applications to the magistrates' courts are complex to collate as a consequence of changes to the terms of reference. In the magistrates' courts figures, applications for child custody were not *per se* but as orders for family maintenance. In addition, here they are compiled side by side with the orders *without* enforcement and orders *with* enforcement of imprisonment. Figures for maintenance show that in 1925, there were 13,353 applications made and 9,566 orders, those enforced by imprisonment totalled 3734. The figures peaked in 1930 with 15,991 applications, 11,296 orders and 4,274 enforced by imprisonment orders. Figures for 1935 show there were 13,603 applications, 9,718 orders made and 3,135 enforced by imprisonment orders.<sup>95</sup>

---

<sup>93</sup>Hollis, P., op.cit. p76.

<sup>94</sup>Horn , P., op.cit.pp 40-1.

<sup>95</sup>*Courts of Summary Jurisdiction Certain other Proceedings* Table XI; Under the *Maintenance of Children Act 1908* secs. 22, 75 and 82 and *Education Act, 1921* sec 6;*The Children Act, 1908* sec 20, 21,23, 58 (7) and 59 and *the Education Act 1921*, secs. 65 and Poor Law: Orders for Maintenance of Wife, Family or Relatives.

Categorising the figures through maintenance applications clearly indicates some mothers, despite the financial repercussions were making the decision to leave unhappy marriages. At the same time, imprisonment orders illustrate the impression of a ‘crime’ reflecting the gravity of the situation and adding to the stigma and shame of separation. Indeed, the statistics for petitions for legal separations and maintenance are found amongst criminal statistics for the magistrates’ courts. Moreover, the figures reinforce Eleanor Rathbone’s arguments that the threat of non-payment and imprisonment of a husband was a harsh reality for large numbers of working-class mothers. The figures for maintenance also illustrate the gendered roles of parents reflecting the narratives of domesticity, the division of labour and the public and private spheres. Mothers were the primary carers and in need of financial support. . However, as indicated above, the level of maintenance was minimal. Yet there were a number of solutions. As the testamentary evidence will show, some separated mothers depended on their extended family financially and for support with childcare. For others, adoption was another alternative. A common practice was for other members of the family or indeed, friends to adopt children informally.<sup>96</sup> Religious and charitable organisations, such as the Roman Catholic Church, provided the infrastructure for formal adoption procedures, as demonstrated in the case of *re J.M. Carroll (An Infant)* 1 K.B. 317 below. Indeed many charitable groups such as the Salvation Army and Dr. Barnardo’s actively recruited children from poor families, both single parent or ‘intact’ families, for adoption. The charities then sent the children to Australia, Canada, and South Africa as cheap labour and as recently uncovered, many suffered physical and sexual abuse.<sup>97</sup> Thus, the reforms that purported to give mothers measures of legal equality were, as Eleanor Rathbone argued, ‘a fleshless bone.’<sup>98</sup>

However, in the higher courts there was a different approach. Despite the increase in figures for divorce, there were few reported cases of child custody disputes in the higher courts. The law in effect contributed to this outcome. The Custody of Infants Act 1873 gave the courts’ discretion to grant a mother, adulterous or not, the custody

---

<sup>96</sup>Rice Spring, M., op.cit. p127.

<sup>97</sup>Pugh, M., *We Danced All Night* (London: The Bodley Head, 2008) pp193-5. The charities also deliberately destroyed the identities of the children thus making it difficult or impossible to trace their families. Recently Governments, certainly Australia and the UK have made formal and public apologies for the sufferings of the thousands of children sent abroad.

<sup>98</sup>Rathbone, E., op.cit. ppviii-ix,

of her child. The moral conduct of either parent was no longer an issue in the decisions of child custody, particularly the mother. At the same time, the absolute rights of the father no longer bound the courts. Generally, custody was arranged outside the court without the need for legal action. Nevertheless, there is another argument, the few reported cases link with the historical and aristocratic concept of the child and of childhood. Amongst royalty and the aristocracy, children had little personal contact with their parents. Nannies provided the day-to day care of the younger children, older sons went to boarding school and girls educated by a governess.<sup>99</sup> As discussed in Chapter 1, a number of arguments have offered different interpretations of the historical development of the concept of the child and childhood. This included ideas that the child was born out of original sin, thus naturally evil and needed to learn discipline and submission. This was generally an impression accepted by the upper classes across history although undoubtedly there were exceptions. The emerging ideas of the mother/child bond and the welfare principle typically had little impact on the upper classes. Thus, the issue of child custody was not a consideration in divorce; the child was in the care of others. This would seem in contrast to the discussions on Caroline Norton, undeniably an upper class mother who went to great lengths (and indeed changed the law) in order to maintain contact and access to her children. Through the close analysis of the studies by Miss Jane Gray Perkins and Alice Acland, the Norton household did have servants and Caroline's lifestyle would indicate that there was help in the daily care of the children. The distinction is that Caroline Norton had no choice, as a married woman in the nineteenth century she had no legal rights to apply for custody and access to her children or in the practical care of her children.

Nevertheless, the few reported cases reflected the continuance of the idea of the absolute rights of the father. Although reported prior to the 1925 Act the case of *B v B*. [1924] P. 176 is useful to demonstrate this practice. The court granted the husband a divorce, on the grounds of the mother's adultery, and custody of the child. The judge refused the mother access but on appeal, the higher court overturned the decision. Pollock, M.R. stated, 'Although her mother has fallen she remains her mother. Under these circumstances, therefore, I think that in the interests of the child

---

<sup>99</sup>As in the case of *Idina Sackville*.

it would be right to allow the mother to have access to her daughter.’<sup>100</sup> Aitkin L.J. added ‘to my mind the love and affection of a mother outweigh many foolish or indiscreet acts on the part of the parent in question.’<sup>101</sup> Therefore, although the court recognised a mother’s love for a child, in this case the judges granted the mother access, not custody or joint custody. The judges’ comments on the concept of the ‘fallen’ mother remained an issue and the father retained custody of the child.

In the case of *re Thain (an infant) Thain v Taylor*, the father also held custody of his child. In this case, after the death of his wife the father accepted his sister-in-law’s offer to bring up his daughter, then eight months old, with her own children. The father contributed financially and a number of years later, confirmed by letter that his daughter should remain with her aunt and uncle, ‘until she wishes to leave of her own accord.’<sup>102</sup> Yet in 1925 when the father remarried, he took action for the return of the child now seven years old. In a counter petition, the next friend of the infant took out a summons to make her a ward of court with her aunt and uncle as guardians during her minority. Despite counsel for the plaintiff arguing that the child would in fact rarely see her father and primarily cared for by her little known stepmother, the father’s claim was held on the evidence that he had never given up his parental right. Considering the evidence in the lower court, Eve J. stated that there was no question of unfitness of the father,

the claim of a father must prevail, unless the Court was judicially satisfied that the welfare of the child required that the parental right should be superseded [and] the rule of law did not state that the welfare of the infant was to be the sole consideration, but only the paramount consideration the parental right of an unimpeachable parent stood first<sup>103</sup>

Lord Hanworth M.R. agreed and upheld the father’s claim repeating Eve, J’s comments,

---

<sup>100</sup>B. v B. [1924] P. 176 at .180.

<sup>101</sup>B. v B. [1924]P. 176 at 191

<sup>102</sup>*In re Thain (an infant) In re M.M. Thain Thain v Taylor* [1925. T. 1299] [Court of Appeal] [1926] Ch 676

<sup>103</sup>Thain, op.cit. p676.

it was said that the little girl would be greatly distressed at parting from Mr. and Mrs Jones. I can quite understand it may be so, but at her age, one knows from experience how mercifully transient are the effects of partings and other sorrows and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days and kind friends, and I cannot attach much weight to this aspect of the case.<sup>104</sup>

The strength of the wishes of a parent overturned an earlier decision in the case of *re J.M. Carroll (An Infant)* [1931] 1 K.B. 317. In this case, the unmarried mother held her appeal. The mother a Roman Catholic had her illegitimate child baptised in that faith but gave her for adoption. A Protestant couple adopted the child but the mother appealed against the child being brought up in the Protestant faith. The mother's appeal was held on the grounds that 'the Court cannot, in the case of a child too young to have any views of its own, disregard the desire of its only parent unless that parent has so neglected his or her duty as no longer to deserve consideration.'<sup>105</sup> Thus, in all three cases the decisions buttressed parental rights as against the welfare of the child. The decisions also indicate the diversity of emphasis and interpretation by the judiciary to the welfare principle. Alongside this, the cases indicate the underlying continuance of the rights of the father and decisions made on the moral conduct of the mother. Thus, despite legal reforms, the continuities of embedded practices persisted and as such regulated parenting post-separation.

Thus far, the statistics, through class distinctions, have given the broader picture of the trends in marriage, divorce, and legal separation following the legal reforms of the nineteen twenties. It has considered the questions of maintenance and child custody disputes. Undoubtedly, the wealthy had a choice not open to the poor and working classes; although this has probably been the same throughout history. Yet, working class mothers were making the choice to legally separate despite the very real risk of poverty and the stigmas of shame and guilt. However, legal reforms alone do not

---

<sup>104</sup>Eve J. *In re Thain(an infant) In re M.M. Thain Thain v Taylor* [1925.T. 1299] [Court of Appeal] [1926] Ch. 676.

<sup>105</sup>[1931] K.B. 317.

drive changes and certainly in the trends of marriage and divorce. The changes were set within a rapidly changing social context following the First World War and thus it is to this the next section turns.

### **Social and Political Context of the Inter-War Period**

The overall picture of the period between the nineteen twenties and nineteen thirties is generally one of economic depression, political and social discontent. Yet the roots of unrest lay in the late nineteenth and early twentieth centuries with shifts in the global economic markets and a loss of the heavy traditional industries to other markets such as the US and Germany. Although there was a short, economic boom after the First World War,<sup>106</sup> growing unrest re-emerged and culminated in the General Strike of in 1926. Indeed, miners stayed out on strike for seven months in attempts to hold off further cuts in working hours and wages driving them and their families into deeper misery, poverty and hunger. Claims for Irish Home Rule were high on the political agenda as military conflict gained momentum between the Ulster Unionists and nationalists.<sup>107</sup> There was a real fear of a revolution.

The global recession following the crash of the New York Stock Market in 1929 drove Britain further into economic depression, mass unemployment and a weakening of Britain's financial market. It became clear that the economic crisis was not going to follow a pattern of recovery and had seriously undermined the organisation of industrialist society.<sup>108</sup> By 1933, there were nearly three million unemployed in the UK. Poverty, squalor, hunger and poor health were a reality for large sections of the population.<sup>109</sup> As Harry Pollitt argued, 'The stark reality is that in 1933, for the mass population, Britain is a hungry Britain, badly fed, clothed and housed.'<sup>110</sup> While Allen Hutt declared, 'The working class are condemned to exist under the intolerable

---

<sup>106</sup>The boom enabled Lloyd George's promise of a 'country fit for heroes' to be at least partially fulfilled. Branson, N. & Heinemann, M., *Britain in the Nineteen Thirties* (St Albans: Hertfordshire:Granada Publishing, 1973) p11; Thorpe, A., *Britain in the 1930s* (Oxford: Blackwell, 1992) p335; Schama, S., *A History of Britain 3, 1776-2000 The Fate of the Empire* (London: BBC Worldwide Ltd, 2002) p310.

<sup>107</sup>Schama, S., op.cit. pp293-338.

<sup>108</sup>Branson, N., & Heinemann, M., op.cit. p16.

<sup>109</sup>Branson, N., & Heinemann, M., ibid p17.

<sup>110</sup>Pollitt, H., Introduction to Hutt, A. *Condition of the Working Class in Britain* (London: Martin Lawrence Ltd., 1933) pxii.

conditions [and] that a numerically tiny class of very rich people, the big capitalists, may live in idleness and luxury.’<sup>111</sup> Using the literature of the period, George Orwell recounted the extent of the poverty in *The Road to Wigan Pier*,

At the back of one of the houses a young woman was kneeling on the stones, poking a stick up the leaden waste-pipe which ran from the sink inside and which I suppose was blocked. I had time to see everything about her, sacking apron, her clumsy clogs, her arms reddened by the cold. She looked up as the train passes, [and] She had a round pale face, the usual exhausted face of the slum girl who is twenty-five and looks forty, thanks to miscarriages and drudgery; and it wore, for the second in which I saw it, the most desolate, hopeless expression I have ever seen.<sup>112</sup>

The background of politicians was changing. The landed gentry were fast disappearing from government with the newer professional classes and business industrialists gaining power.<sup>113</sup> During the nineteen twenties, the Liberal Party were in decline and the emerging Labour Party in disarray. In 1931, the Prime Minister Ramsay MacDonald resigned from Government and with other Labour leaders, crossed the floor of the House to form a coalition government with the Tory Party.<sup>114</sup> Consequently, under the leadership of Conservative leader Stanley Baldwin, the government was again in the hands of older men born in the Victorian era with their ideas of returning to pre-war Britain.<sup>115</sup> There were other serious challenges to government from within other political parties. Sir Oswald Mosley originally in the Conservative Party crossed to the Labour Party then formed the British Union of Fascists in 1932 attracting wide support. Alongside this women were entering Parliament. The first MPs were from the Conservative Party and the aristocracy. Later women such as Independent Labour Party member Jennie Lee, Margaret Bonfield, independent member Eleanor Rathbone and socialist Eileen Wilkinson joined the small group of women MPs during the inter-war period.

---

<sup>111</sup>Hutt, A. *Condition of the Working Class in Britain* (London: Martin Lawrence Ltd., 1933) p236.

<sup>112</sup>Orwell, G., *The Road to Wigan Pier*, First published by Victor Gollancz 1927. (London: Penguin Books, 2001) p15.

<sup>113</sup>Thorpe, A., op.cit. p87; Schama, S., op.cit. p310.

<sup>114</sup>Thorpe, A., ibid, p 87; Branson, N., & Heinemann, M., op.cit. p19; Schama, S., op.cit. p310.

<sup>115</sup>Branson, N., & Heinemann, M., op.cit. p29; Schama, S., op.cit. p336.

## The Inter-War Period: An Age of Contradictions and Class Distinctions

Alongside the political and economic unrest, this was also an age of contradictions. Despite the political upheavals and social discontent of this period, it would seem that there were positive developments in some areas particularly for women. Notwithstanding the economic recession, there was regional economic growth. The development of the lighter industries, mainly located in the southeast, brought prosperity to these regions and gave women the opportunity to join the labour force.<sup>116</sup> Many of the new jobs emerged from the centralisation of government and local authorities dealing with health, pensions, transport and education and provided women with work in the clerical sector. Other changes ran parallel. The development of the transport system allowed workers to move away from the slum conditions of the cities to new council and private housing estates creating suburban areas. The new houses had gas and electricity, thus housework was easier with new labour-saving equipment.<sup>117</sup> For some of the working classes, family income and life conditions improved and gave a better standard of living.<sup>118</sup> Indeed, financially the gap between some working and middle classes decreased. Consequently, the ways individuals organised their family lives changed. As Diana Gittens suggests, ‘perhaps inadvertently, the state was actually defining what family structure and home life should be.’<sup>119</sup>

However, no study of the inter-war period can overlook the issue of class and class distinctions. The impact of the war dramatically challenged class and gender barriers. It was as Robert Roberts suggested, that ‘the millions lying lately dead in Flanders had somehow made a contribution.’ Men and women became ‘almost incidentally, the first ‘moderns’ of the twentieth century.’<sup>120</sup> Certainly, attitudes changed after the war and a measure of financial independence after the war gave women a sense of freedom. They challenged their sexuality and gender differences. Young women threw off the cumbersome clothes of the Edwardian period, bobbed their hair and followed a fashion that emphasised slim, athletic figures and an air of ‘manliness’.

---

<sup>116</sup>This industry includes household goods such as refrigerators, cookers and radios. Beddoe, D., op.cit. p749; Gittens, D., *The Fair Sex* (London: Hutchinson Publishing Group, 1982) pp 44-5.

<sup>117</sup>Beddoe, D., op.cit. pp54-5 & 115; Gittens, D., op.cit. pp40-1 & 89-95.

<sup>118</sup>Beddoe, D., *ibid*, at Chapters 4 & 5; Gittens, D., *ibid*, at Chapter 2.

<sup>119</sup>Gittens, D., op.cit. pp47-8.

<sup>120</sup>Roberts, R., *The Classic Slum* (London: Penguin Group, 1990) p234.



The 'flapper' personified this new image of women.<sup>121</sup> As a foil to the idea of the masculinity of women, some young men adopted an almost effeminate lifestyle with their ever-widening oxford bags and foppish attitudes.<sup>122</sup> As Susan Kingsley Kent argues, 'the mobilization of gender and sexuality in the efforts to recast postwar society had a decisive effect on the way many men and women felt they must represent themselves as they went about their everyday lives.'<sup>123</sup> Yet the impact affected the social classes in different ways.

### Social Elité and the Aristocracy

Although as illustrated above, some standards of etiquette were required the upper classes and social élite embraced the 'new freedom' with a laissez-faire attitude. The development of the motor industry gave easier access to 'shoots' and country-house parties. 'Coming out' and the London season resumed their importance to the calendar after the war as did the presentations at Court of debutantes. Nightclubs were opening up, to accommodate the drinking and dancing circles of the aristocracy and the social élite. For women the changes were particularly significant. Some women were also striking out for independence and challenging traditional conventions.<sup>124</sup> They ventured abroad with skiing parties in the winter and trips to the Riviera in the summer. Indeed, life for the high society appeared to be one long extravagant party.<sup>125</sup> Yet for some of the landed gentry funding declining incomes or heavy death duties resulted in the sale of larger properties and possessions to fuel their lifestyles.<sup>126</sup> Some of the highest socialites needed to earn a living. Nancy Cunard, Lady Diana Cooper, the Mitford sisters for example all turned to journalism and writing. For the middle classes life was slightly different.

---

<sup>121</sup>Beddoe, D., op.cit. pp22-3; Kent Kinsley, S., op.cit. pp287-8.

<sup>122</sup>Roberts, R., op.cit. p224; Kent Kinsley, S., ibid, pp287-8.

<sup>123</sup>Kent Kinsley, S., ibid, p287.

<sup>124</sup>Beddoe, D., op.cit. p1; Kent Kinsley, S., ibid pp287-8; Osborne, F., op.cit. p 8.

<sup>125</sup>Discussed in Branson, N., & Heinemann, M., op.cit. pp172-6; Beddoe, D., ibid, p 5 & Chapter 5; Horn, P., op.cit. pp24-35.

<sup>126</sup>Horn, ibid at 44-5.

## Middle Classes

The 'new freedom' did not affect the middle classes to the same level as the social elite. Although travel at home and abroad was becoming a popular feature for this social group, leisure activities came with restrictions.<sup>127</sup> However, the middle classes encompassed a wide range of social and economic bands. For women this included elementary school teachers, teashop owners, typists and shop assistants, the 'blackcoated' workers and the clerical workers. Education was important to maintain that level or indeed climb to a higher level. Entry to university for many middle class women was their goal.<sup>128</sup> Nevertheless, while education allowed women to take up teaching and civil service posts, a marriage bar reinforcing the idea of the separate spheres and the division of labour.<sup>129</sup> Indeed, the media promoted the home as the 'woman's workshop'. Popular fiction included *Woman's Own*, *Good Housekeeping* and *The Lady* and contributed to the image of the wife and mother as the homemaker as did the developing film industry.

## Working Classes

The experiences of working class women differed again. Working class girls had opportunities to earn more money and to buy into new cheap fashions, cosmetics, and magazines. The cinemas and new talkie films provided an escape from the drudgery of their working lives.<sup>130</sup> Probably even more attractive were the dance halls. They provided glamorous settings and places to meet future husbands.<sup>131</sup> As indicated above, some working class women had opportunities to remain in the workforce, a measure of financial independence and good housing. However, many young working class women found, after marriage, life was much the same as the previous generation. For some the housing conditions were poor. For example, as Margery Spring Rice uncovered some families with eight children live in one room. Another woman has 'six rooms in her house, nine children her husband and father. There is no

---

<sup>127</sup>For example, there was an unwritten rule that eating out without a male escort after 10pm was not socially acceptable and discussed in Beddoe, D., op.cit. at Chapter 5; Horn, P., op.cit. pp181-3.

<sup>128</sup>For example and discussed in Beddoe, D., ibid, at Chapter 5; Branson, N., & Heinemann, M., op.cit. pp172-6; Horn, P., ibid, p50-3.

<sup>129</sup>Horn, P., ibid, p64.

<sup>131</sup>Beddoe, D., op.cit. pp115-8; Branson, N., & Heinemann, M., op.cit. p258.

back door to the house and refuse has to be carried through the house.’<sup>132</sup> Indeed, for working class women, their daily lives revolved around managing the home, the daily household budget and the care of their children.<sup>133</sup> One mother in Spring Rice’s findings stated, ‘My life for years consisted of being penned in a kitchen 9 feet square, every fourteen months a baby [and] It isn’t the men are unkind. It is the old idea we should always be at home.’<sup>134</sup> As Deidre Beddoe argues, ‘the single most arresting feature of the inter-war years was the strength of the notion that women’s place is in the home.’<sup>135</sup> Indeed, comparing the results of the 1913 study by Maud Pember Reeves,<sup>136</sup> with Spring Rice’s study in 1939, for married working class women, little had changed. The idea of the separate spheres reinforced the division of labour and narratives of parenting in particular motherhood persisted.

Certainly, the approach to married women in some of the professions supported these dominant narratives, for example in teaching and the civil service women had to leave after they married. A number of factory owners followed the same policy. George Cadbury, the chocolate manufacturer advocated that a wife’s first duty be to her husband, therefore on marriage women employees had to leave his factories. The extent of banning married women from the labour force led some women to hide the fact they were married from their employers and colleagues.<sup>137</sup> As Vera Britten argued, these arguments rested on the assumption that employment was an occupation for women between school and their ‘real’ role in life marriage and a family.<sup>138</sup> Thus, despite the *Sex Disqualification (Removal) Act 1919*, social policy discouraged working married women ensuring the division of labour reinforcing the idea of the separate spheres and the ‘duty’ of mothers to stay at home give birth and look after her children. There was another perspective to this argument. There was a decline in the birth rate. In the midst of an economic depression and prior to the emergence of

---

<sup>132</sup>Rice Spring, M., op.cit. pp142-3.

<sup>133</sup> Beddoe, D., op.cit. pp115-8.

<sup>134</sup>Rice Spring, M., op.cit. p94.

<sup>135</sup>Beddoe, D., op.cit.pp3 & 14-5.

<sup>136</sup>‘There appears to be some grounds for anxiety in regard to the working-class mother, as always, bears so much of the burden of industrial poverty.’ This is clearly borne out by figures that show in 1935, 3000 women died in childbirth and 64 out of every 1000 babies died before they are twelve months old.

<sup>137</sup>Horn, P., op.cit. p75.

<sup>138</sup>Britten, V., letter to the Manchester Guardian 27 September 1928 and published in Berry, P., & Bishop, A., Eds. *Testament of a Generation The Journalism of Vera Britten and Winifred Holtby* (London: Virago Press Ltd., 1985.) p126.

the welfare state, health and education were expensive. Therefore, many young couples, working and middle class chose to have smaller families. Alongside this, the increasing accessibility of knowledge and availability of contraceptives gave couples a choice in the size of their families. Yet, the government gave little support to birth control clinics initiatives rested with bodies outside the state.<sup>139</sup> The decrease in the birth rate gave concern amongst population analysts and government of a decline in population and fear of the future of the British Empire.<sup>140</sup> Therefore, it would appear that regardless of the health of the mother the health of the nation came first.

This action reflected increasing state interest in the family as an agency of social control correlates with the thinking of Foucault and Donzelot and the use of power to structure society as discussed in Chapter 1. Consequently, despite the social changes and legal reforms for equality, the era was not entirely one of progress particularly for married mothers and most certainly not for separated mothers. As Winifred Holtby argued, ‘Whenever society has tried to curtail the opportunities, interests and powers of women, it has done so in the sacred name of marriage and maternity. Exalting women’s sex until it dominated her whole life, the State then used it as an excuse for political or economic disability.’<sup>141</sup>

The discontinuities and the continuities of socio-legal changes caught women and particularly mothers between the ‘new freedom’ and the embedded and indeed dominant gendered practices of parenting and the reinforcement of the separate spheres. As Winifred Holtby argued, ‘Throughout long centuries they have been told that a woman’s first and only duty is domestic. It is not possible in one or two generations to counteract that long tradition.’<sup>142</sup> Women, she pointed out were clearly being ‘torn between conflicting definitions of her duty, oppressed by the three emotional complications-inferiority, chivalry and slump complexes-undoubtedly [she] finds this a hard and puzzling world.’<sup>143</sup> Holtby’s arguments offer an understanding of the deeper complexities of the contradictions women had to deal with in their everyday lives.

---

<sup>139</sup> Beddoe, D., op.cit. pp106-7.

<sup>140</sup> Branson, N., & Heinemann, M., op.cit. pp182-3.

<sup>141</sup> Holtby, W., op.cit. p119.

<sup>142</sup> Holtby, W., op.cit. p103.

<sup>143</sup> Holtby, W., *ibid*, p119.

Yet there were contradictions for men too. In his study *Marriage and Morals* in 1929, Bertrand Russell raised concern of the bias towards women. He argued, ‘Modern society, although it is still patrilineal and although the family still survives, attaches infinitely less importance to paternity than ancient societies did. And the strength of the family is enormously less than it used to be.’<sup>144</sup> He deplored the loss of the authority of the father in the home. As Russell commented,

In the modern world, the great majority of fathers are too hard-worked to see much of their own children. [and] In the serious business of caring for the child, fathers can seldom participate; in fact this duty is shared between mothers and the education authorities. [and] But whatever the case from the father’s point of view, from that of the child this is a play relation, without serious importance.<sup>145</sup>

In addition, Mrs C. Gasquoine Hartley, a renowned commentator on the family wrote of the ‘superfluous father.’ She argued the father was ‘a disturber’ to the family home. ‘He upsets the order and balance of the nursery [and] Nature herself seems to condemn the man in his capacity as father.’<sup>146</sup> Gasquoine Hartley also issued a stern warning to men.

Superfluous in the family, from one point of thought, his influence is nevertheless of the most urgent importance. The father thus needs to preserve his rights and duties within the home. If women had to fight for the vote and the open door to the profession, the father may have to fight for the love of his children and the key to the nursery. He must refuse to be regarded as superfluous.<sup>147</sup>

---

<sup>144</sup> Russell, B., op.cit. p32.

<sup>145</sup> Russell, B., ibid, p181.

<sup>146</sup> Gasquoine Hartley, Mrs. C. *Women, Children, Love and Marriage* (London: Heath Granton Ltd., 1924) p56.

<sup>147</sup> Gasquoine Hartley, Mrs C., ibid, 1441, p57.

This argument links with the emergence of scientific theories that emphasised the mother's central role in the family and the father's role as the breadwinner and on the peripheral of the family circle. However, mass unemployment challenged men's identities as the breadwinner of the family. Fathers lost their role of the breadwinner within the family. However, in a letter Vera Britten briefly indicated that there was an emergence of 'the modern advocacy of fathercraft'. She did not expand on the subject but merely underlined that in general a father's responsibility to his young children continued to be minimal if at all.<sup>148</sup> Therefore, any ideas of shifts in parenting narratives for fathers would appear to be limited and certainly not widely recognised thus reinforcing the gendered narratives of parenting and a distinction between the control of children and the nurture and daily care of children. Therefore, Thus, the 'revolutionary' changes towards legal equality for women, alongside the dramatic social and economic changes during the nineteen twenties raised contradictions for men and women. As feminist Ray Strachey argued in 1928,

The sudden development of the personal, legal, political, and social liberties of half the population of Great Britain within the space of eighty years has inevitably crowded tendencies, causes, results, and consequences one upon the top of another in the most bewildering fashion, and it has been difficult to disentangle them all sufficiently to indicate at once their separate progress and their mutual interaction.<sup>149</sup>

Feminist thought and political arguments contributed to the challenges for women. As such, this final part of Section 1 considers the feminist perspective during the inter-war period.

---

<sup>148</sup>Britten, V., Letter to the Editor *Time and Tide* published in Berry, P., & Bishop, A., op.cit. p135.

<sup>149</sup>Strachey, R., op.cit.p 5.

## Gender Politics and Feminist Writings of the Inter-War Period

After the ‘revolutionary’ legal reforms for formal legal equality in the nineteen twenties, feminist political activities diminished from the level during the pre-war period. There were no more great marches or hunger strikes. Feminism took on a different perspective in the form of peace initiatives and an emphasis on the benefit of the individual rather than the majority. Indeed, the health of mothers and the welfare of the family were feminists’ primary concerns. Eleanor Rathbone was one of the most politically active in this field. She campaigned religiously for family allowances to alleviate poverty amongst the women and children in the working and poorer classes.

Almost certainly, there was a backlash against feminism, women’s legal equality. Indeed, Vera Britten<sup>150</sup> stated, ‘The feminist movement of the present day is not very popular. It has a good many openly declared enemies.’ Opposition, she argued, is obvious and articulated through,

the contemptuous indifference of women undergraduates at universities, in the complacent lethargy of the mass of unoccupied or semi-occupied middle-class married women, and in the open hostility of certain sections of the press. [and] Feminists are told, in the words of a weekly paper, that ‘all the strongholds of the enemy have been taken, all the big battles fought and won’ Nowadays there is nothing left for the fighting feminist but to magnify minor grievances’<sup>151</sup>

Winifred Holtby supported Britten’s arguments and suggested the backlash to feminism manifested itself through a number of channels. ‘A sense of bitterness infects many public utterances, speeches and articles, made on the subject of women’s

---

<sup>150</sup>Vera Britten and her close friend Winifred Holtby met at Oxford and were prolific feminist authors and writers during the inter-war period. Their novels, based on their personal histories reflected their feminist politics. They were enthusiastic activists in the peace campaign. It was after Holtby’s untimely death that Britten completed her best novel *Honourable Estate*.

<sup>151</sup>Britten, V., *Why Feminism Lives* Pamphlet published by the Six Point Group 1927 published in Berry, P., & Bishop, A., op.cit. p97.

position in the state.’<sup>152</sup> In addition, she added the reaction emerged in a tangible way, through fashion. In the nineteen thirties, there was a complete turn around from the mannish style of the nineteen twenties to ‘sweet feminine silhouettes.’ She argued,

The post-war fashion for short skirts and bare knees[and] cropped hair and serviceable shoes is waging a defensive war against this powerful movement to reclothe the female form in swathing trails and frills and flounces, to emphasise the difference between men and women-to recall Woman, in short, to Her Duty-of what?<sup>153</sup>

Nonetheless, feminist thought continued through women’s literature and political writings. Authors and journalists such as Rose Macaulay, Vera Britten, Virginia Woolf, Ellen Wilkinson and as already discussed, Winifred Holtby and Ray Strachey retained feminist perspectives in the public debate. Through their published works, they explored the realities of the social, political and legal reforms, the blurring of gender roles and the complexities of women’s search for independence. For example, Virginia Woolf based her novel *Night and Day*<sup>154</sup> on questions of love and marriage within the changing political context for women. Later *A Room of One’s Own*, revolved around gender differences and the need for women’s financial independence. Woolf uses her novels to highlight the restrictions on women’s ability to be a creative writer through their limited education and social experience. A woman, Woolf argued ‘must have money and a room of her own if she is to write fiction.’<sup>155</sup> Ellen Wilkinson based her novel *Clash* against the backdrop of the General Strike in 1926. It is a romantic novel, with the central character Joan Craig a working-class woman, involved in the trade unions and with hopes of entering Parliament, contemplating living with or marrying Tony Dacre an upper-class author and giving up her class,

---

<sup>152</sup>Holtby, W., op.cit. p7.

<sup>153</sup>Holtby, W., ibid p119.

<sup>154</sup>Woolf, V., *Night and Day* (First published by The Hogarth Press Ltd., 1919 this edition London: Grafton Books, 1978).

<sup>155</sup>Woolf, V., *A Room of One’s Own* (First published by The Hogarth Press, 1929 this edition London: Penguin Group, 1993) p3.



politics and freedom to be a married woman.<sup>156</sup> Wilkinson's novel reflected her own life and relationship with a married man.<sup>157</sup>

Vera Britten's novel *Honourable Estate* is particularly pertinent to this thesis and represents a reflection of the contradictions for men and women during this period. It is a long novel reflecting Britten's feminism and pacifist politics. The novel deals with the conflicts for women and men affected by the 'social revolution,' the impact on marriage and women struggling for their autonomy.<sup>158</sup> As Britten points out in the Foreword, '*Honourable Estate* purports to show how the women's revolution-one of the greatest in history-united with the struggle for other democratic ideals and the cataclysm of the War to alter the private destinies of individuals.'<sup>159</sup> George Catlin, Britten's husband, disliked the novel since Britten used his mother's diary and based the work on his parents' relationship. Catlin's mother had indeed left her son and husband and he believed it presented a picture of his father, the Reverend Catlin as 'grossly libellous.'<sup>160</sup>

The novel covers two generations and interwoven with true events such as women's struggles for enfranchisement, the great strikes, the First World War and the demise of some of the landed rich. The novel follows the courtship and marriage of a young woman Janet Harding and an older Thomas Rutherford, a clergyman. Janet soon discovered the binding ties of matrimonial law and the marriage were unhappy for both parties. The birth of their son did nothing to alleviate her anxieties of feeling trapped within marriage and the family. 'I hate my child and all the work he gives me! I hate my home, and housework, and everlasting devotion to "duty".'<sup>161</sup> Legal separation was not a consideration socially and financially and the novel describes how Janet increasingly threw herself into campaigning for the suffragist movement further alienating her from Thomas. Much later as her son finishes university, Janet moves out of the family home, unable to contend with the strain of a marriage where

---

<sup>156</sup>Wilkinson, E., *Clash: A Novel* (London: Harrap, 1929) and discussed in Ayers D., *English Literature of the 1920s* (Edinburgh: Edinburgh University Press, 1999) pp123-8.

<sup>157</sup>Hollis, W., op.cit. p81.

<sup>158</sup>Britten, V., *Honourable Estate* (London: Virago Press, 2000 First published in Great Britain by Victor Gollancz in 1926 ) p1.

<sup>159</sup>Britten, V., ibid, p2.

<sup>160</sup>Britten, V., ibid, pxvi

<sup>161</sup>Britten, V., op.cit. p41.

‘he regarded what he always called his ‘rights’ as a matter to be regulated solely by his own desires, irrespective of my wish or ability to respond.’<sup>162</sup>

The novel intertwines the Rutherford family with the fate of the Allendyne family wealthy factory owners from the Potteries in Staffordshire drawing on Britten’s own background. The focus of this part is on the Allendynes’ daughter Ruth and her struggle to be educated as her brothers, enter university and have her independence and the family opposition. Ruth declared,

Unfairness and injustice rage like prowling lions about this earth, seeking whom they may devour! The man who works is honoured and respected, but the woman who does the same is rejected and despised. Behold I show you a mystery, the time is at hand when women will all work and all be changed! When that which is perfect is come, that which is unfair and unequal shall be done away!

The story goes on to follow Ruth’s life as an active suffragist, her service in the First World War and her political ambitions afterwards. The last part of the novel brings Ruth Allendyne and Denis Rutherford together, her fight to become a Member of Parliament and his support towards her ambitions. In the background, the story tracks the rise and fall of the fortunes of the Allendyne business, the loss of their country mansion and the new working class homes invading what was one family’s extensive property. In this, Britten’s work is representative of the value of literature as credence of the social and indeed legal contexts at the time writing.<sup>163</sup> It is a story of class distinctions and gender differences amidst a rapidly changing society following the First World War. It circumvents historians’ versions of events and similar to the Victorian women authors draws on real issues and experiences (for example here the diary of Catlin’s mother and Vera Britten’s own experience) to offer an insight to differences, injustices and contradictions, for men but in particular for women, in the inter-war period in class divisions and gender politics.

---

<sup>162</sup>Britten, V., *ibid*, p182.

<sup>163</sup>Dolin, K., *A Critical Introduction to Law & Literature* (Cambridge: Cambridge University Press, 2007).

Thus far, Section 1 has considered the debates for and against the ‘revolutionary’ reforms to the laws of marriage, divorce and child custody during the nineteenth and early twentieth centuries. It has considered the demographic trends and explored the social and political context and the impact of the First World War. The changes raised contradictions across class and gender divisions and difficulties for women and men. The wider arguments are significant, and provide the backdrop to the case studies analysed in Section 2 and will offer an understanding of the experiences of the separated mothers and fathers involved.

## Section 2

### **The Cases of Two Families: Annot & Sam Robinson, Kitty Trevelyan & Johann Georg Götsch**

The private papers of Annot Robinson and Kitty Trevelyan<sup>164</sup> speak for themselves. They offer vital evidence of the reality and gender contradictions for some separating parents during the inter-war era. As suggested in Chapter 1, the ‘relatability’<sup>165</sup> is more important than the generalisation or representative of the studies. However, to reiterate the earlier arguments of Danaya Wright and John Tosh<sup>166</sup> however incomplete, it may be all that may remain and an invaluable insight that aims to add to the legal and social history of the era and contribute to the contemporary debates in residency and contact law.

#### Annot and Sam Robinson

Annot Erskine Wilkie was born in 1874 one of five or six children who survived infancy. Although her birth certificate recorded her first name as Annie she was known as Annot all of her life. Her father John was the son of a laird who lost his

---

<sup>164</sup>See Primary Resources in Chapter 1 Introduction for details.

<sup>165</sup> Bassey, M., ‘Pedagogic research: on the relative merits of the search for generalisation and study of single events.’ *Oxford Review of Education* 7 1 p85 cited in Bell, J., 4<sup>th</sup> Ed. *Doing Your Research Project* (Maidenhead: Oxford University Press, 2004) p11.

<sup>166</sup>Discussed in Chapter 1 Historical Research Methods.

share of the family wealth through failed railway investments. His family bought him a drapery business in Montrose and subsequently severed all connections with him. John married a butcher's daughter Catherine Jane Erskine who by then was a teacher in a village school outside Montrose, an inter-class marriage however, with no contact with his family, approval was not an issue.<sup>167</sup> Despite the dominant ideas of the separate spheres and the gendered division of labour, Annot's mother continued to teach after marriage and while bringing up a family. Annot attended Montrose Academy and graduated as an external student from St. Andrews University with an Arts degree.<sup>168</sup> According to her daughter, Helen Wilson, teaching amongst the poverty-stricken children in Montrose instigated her mother's political awareness in Socialism and a Dundee dressmaker Miss Agnes Husband, a Socialist and suffragist influenced Annot's interest in the struggles for women's emancipation. Annot joined the Women's Social & Political Union in Dundee and became its first secretary; it was through her public speaking with the suffragist movement that she met Sam Robinson.<sup>169</sup>

Sam was the antithesis of Annot. He came from a working class background in Salford. His immediate family were his father, stepmother, an 'aunt' who was really his sister and an illegitimate child of no recorded parentage. His father was often drunk and physically abusive to his mother. His experiences too undoubtedly influenced his political beliefs.<sup>170</sup> Sam Robinson spent most of his working life in a variety of unskilled jobs. He was a respected propaganda secretary of the Independent Labour Party (ILP) and a strong supporter of women's rights. A number of feminist history studies mention Sam as having given 'valiant support' towards the

---

<sup>167</sup>Reid, N., Part 1 of a draft manuscript, The manuscript, of 148 pages long and 8 chapters and a conclusion given to Annot's granddaughter Celia Caldicot. The draft formed a biography of Annot and published in a shorter form that did not refer to the letters between the sisters. Reid, Dr. N. & Reid T.D.W. 'Annot Erskine Robinson' in Bellamy, J., & Saville, J., Eds. *Dictionary of Labour Biography* Vol VIII (Basingstoke: Macmillan, 1987) at 214-9; Reid's defended thesis did not refer to the letters but did focused on the contribution Sam and Annot made to the ILP. Reid, N., PhD Thesis *The origins and development of the Independent Labour Party in Manchester and Salford 1880-1914* University of Hull, 1981.

<sup>168</sup>An LLA or Lady Literature in Arts, English, French Astronomy, Comparative Religion with Honours and History with First Class Honours.

<sup>169</sup>Reid, N., *Annot Erskine Robinson Suffragist and Socialist (1874-1925)* part of a draft manuscript of the biography of Annot Robinson and in the possession of Annot's granddaughter Celia Caldicott op cit at 1. Reid, N., PhD Thesis *The origins and development of the Independent Labour Party in Manchester and Salford 1880-1914* University of Hull, 1981.

<sup>170</sup>Reid,N., *ibid*, p2.

campaigns for women's legal rights. Indeed, copies of letters from Emmeline Pankhurst show the extent of his involvement in organising suffragist meetings.<sup>171</sup> It was through this work Sam met Annot. They married in 1908 and lived in Manchester, an area of strong support for the women's suffrage movement of which Annot became deeply involved.. Annot was a popular speaker and both Annot and Sam counted Keir and Lillie Hardy, Ellen Wilkinson Emmeline and Sylvia Pankhurst, Hannah Mitchell and Annie Kennedy amongst their friends and colleagues.<sup>172</sup>

Annot was an active member of the women's movement and took part in a number of demonstrations. Indeed, taking part in a 'furniture van lobby raid' of the House of Commons Annot was arrested for 'using insulting behaviour and resisting the police.'<sup>173</sup> Found guilty she was sent to prison for six weeks. Within a short space of time, she was arrested again in another militant demonstration and sent to prison for 3 weeks. Prison life took its toll on Annot's health but it also gave her time to consider and question the narrow perspectives of the WSPU. From then she focused on support for the ILP, the Women's Labour League and the National Union of Women's Suffrage Societies.<sup>174</sup>

Annot's relationship with Sam was becoming increasingly difficult. She was the main earner working as a temporary secretary for the NUWSS and in addition earned a small income from journalism. Furthermore, she had the responsibility of providing for their two daughters, Cathie born in 1909 and Helen in 1911. In June 1913, Sam left to go to Canada to make a new life for himself and his family. However, by August, he was back without even disembarking from the ship, on his return their relationship deteriorated even further before Sam left for war duty in India.<sup>175</sup> Over the next few years, Annot was an active campaigner in a number of women's groups and travelled widely. She was a founder of the Women's War Interests Committee, and a number of campaigns on women's issues. For example, she argued against the idea of women as stopgaps in the workforce during the war. Annot also campaigned

---

<sup>171</sup>Mitchell, G., Ed., *Hard Way Up* (London: Faber & Faber, 1968) at 128, 247-8; Liddington, J., *One Hand Tied Behind Us* (London: Virago Press Ltd., 1978) pp128 &190.

<sup>172</sup> Reid, N., op. cit. pp8 & 15.

<sup>173</sup>This incident involved driving a furniture van as close as possible to the entrance of the House of Commons from where the women entered Parliament. Reid, N., op. cit p2.

<sup>174</sup>Conversations with Celia & Brian Caldicott, Celia and her husband Brian spent considerable time pursuing the life history of his wife's grandmother. Also discussed in Reid, N., op.cit. pp20-1.

<sup>175</sup> Sam was a solidiers'librarian in India.

for financial payments to wives and mothers; assisted with relief work for nursing mothers; and was a pacifist working for the Women's International League for Peace and Freedom.<sup>176</sup> Thus, notwithstanding her personal problems Annot was politically active. However, as her correspondence shows this was only possible with support from her sisters, friends and a dog. According to her daughter Cathie, when her mother went to political meeting if, there was no available help for the children Annot left the children with the dog. Reflecting on their childhood Cathie was critical of her mother and her neglect of them as children. Helen took a different view and was proud of her mother's work and her struggles.<sup>177</sup>

It is in the series of letters mostly to her sister Nellie with a few to her other sister Peggy and date from 1916-1922 that provide original documentary evidence of the difficulties Annot faced and the contradictions in terms of gender politics and her role as a single parent. Annot's letters are an intimate record of the deterioration of her marriage, her health problems and her struggles to cope financially as a single mother. Throughout the letters, Annot does not use Sam's name but refers to him as 'her husband.' However, they also reveal an independent and determined woman following her principles that were often unpopular at that time to achieve her goals,.

The first letter dated 11<sup>th</sup> September 1916, gives an early description of Annot's feelings on her the state of her marriage and her concerns for her health. At this point Sam and Annot Annot had been married eight years and the children seven and five years old. In this letter, she wrote of her breakdown in her health and blames Sam. 'My work has not broken me down-nor the children, but my husband's conduct. [and]'The sheer necessity of providing for these children and the determination not to become dependent myself or allow them to suffer has kept me going.' Yet Annot did not wish to make her ill health or her disintegrating marriage public knowledge.<sup>178</sup> In her draft manuscript of a biography of Annot Erskine Wilkie Naomi Reid, argues,

---

<sup>176</sup>Reid, N., op.cit. pp28-9.

<sup>177</sup>Reid, N., op.cit. p 23.

<sup>178</sup> Letter from Annot to her sister Nellie dated 11<sup>th</sup> September 1916.

there was a real concern on her part, where imaginary or not, of criticism from her colleagues at work or in politics.<sup>179</sup>

Reinforcing her feelings of discontent, in 1917 Annot confided in her sister,

if my husband comes back to me, I do not intend to set up house with him. I should want to leave here I suppose although I should be unwilling but it would be the only way to avoid scandal & publicity. I am therefore contemplating a change of job that will enable me to move at the right time<sup>180</sup>

On his return from war in 1918, Sam's life was marked with bouts of heavy drinking, bad temper with no interest in his previous political life. Annot wrote that she was glad her husband had found work immediately and therefore mostly out of the house. Nevertheless, she expressed her fears for the safety of the children and their housekeeper Mrs Edwards after Sam had struck Cathie. Yet she added 'when I am in he is afraid of me I have established a sort of mastery' She continued,

I am trying to make up my mind to go and consult one of the magistrates privately as to the getting of a separation order but cannot bring my pride to it yet.' [and] 'He is consumed with the thoughts that everyone is 'illusing him' and is burned up with jealousy of my success & the fact that the children love me.'<sup>181</sup>

---

<sup>179</sup>Reid, N., op cit p31. It is clear in the *draft* manuscript (148 pages) Naomi Reid did see Annot's letters to her sister but only referred to them as 'letters to her sister' no detail of individually letters or quotes were given. This manuscript was later published in a shorter form Reid, Dr. N., & Reid D., in Bellamy, J., & Saville, J., *Dictionary of Labour Biography* Vol VIII Eds. (Basingstoke: Macmillan Press Ltd., 1987) pp215-9.

<sup>180</sup>Letter from Annot to her sister Nellie.

<sup>181</sup>Letter not dated from Annot to her sister Nellie

Coping with the situation, Annot stated, ‘An income of your own and a complete indifference are good weapons.’<sup>182</sup> The comments of Annot support the earlier arguments of the findings of the Co-operative Women’s Guild in their evidence to the Gorrell Report and to the commentaries of Eleanor Rathbone. The law that gave mothers rights of equality to apply for separation, maintenance and custody of their children did not take account of the contradictions and the social and economic injustices this would raise. This was of course argued later by Eleanor Rathbone and her argument that ‘if she (a married or separated mother) has no income and is prevented by the burden of family cares or jealousy of male competitors from earning one, she may find legal equality a fleshless bone.’<sup>183</sup> This does raise the debate that changes in the law do not stand-alone, shifts in wider society also need to take place particularly economic shifts and women’s involvement and equality in the formal economy. Alongside this, without legal rights would a mother be in a better formal position regarding her marriage, custody of her children and employment? The case studies and discussions above prove the opposite. Therefore, underpinning legal reforms and claims of women’s bias in the law are powerful narratives resilient to changes that maintain the subjective position of women.

By 1920, Sam had left the family home. He remained in the area but after 1922, he did not meet Annot again.<sup>184</sup> In 1921, through lack of funding her post as Organising Secretary of the Women’s International League (WIL) was at risk and she began to look for other employment. Annot considered a lecture tour of 6 months or a year to America to earn money. To enable her to do this of course, she needed help. She wrote to Nellie asking if she would look after the children. It is clear Annot did not want to leave her daughters yet wanted to ensure they did not ‘have the poverty stricken girlhood’ she had experienced. Yet there was another angle to Annot’s plans. She confided that she ‘felt competent and I want to try my powers also.’<sup>185</sup> Yet, arranging her visit Annot wrote of her fears of Sam gaining a ‘footing’ in the house while she was away. The children went up to Scotland and loyal friends, including

---

<sup>182</sup> Letter not dated from Annot to her sister Nellie and obviously on Sam’s return from the war in 1918.

<sup>183</sup> Rathbone, E., in Reiss, E., *op.cit.* viii-ix.

<sup>184</sup> Reid, N., *op.cit.* p35.

<sup>185</sup> Letter to Nellie from Annot 7/9/1921.



the Wilkinsons (Ellen and Annie), would keep 'the eagle eye' on the situation.<sup>186</sup> However, her American tour lasted only 6 weeks and further plans for a longer visit, cancelled.<sup>187</sup>

The majority of Annot's later letters in the collection relate to the debt she owed to her sister Nellie, financially and for the care of her children. Her position at the WIL was at risk and in 1923 Annot returned to teaching. She was able to find a post as a teacher in the remote area of Loch Torridon Scotland. The job was open to her as a deserted wife and there were no other applicants. Although the job came with a house, the children were again living with their aunt. It was a lonely time for Annot without her children and any social stimulation amongst a close inter-knit community. In 1925, Annot moved to a teaching post in Fife, again with a house and the children were able to join her. However, Annot died during an operation in September 1925 and her sisters brought up her daughters.<sup>188</sup> Sam died in 1937 and in an obituary G Mitchell described him as 'The beloved vagabond.'<sup>189</sup> Hannah Mitchell wrote that he never prized public or socialist views thus it was perhaps easier for him to be in a supporting role to strong militant women of the WSPU. However, it was Sam's support and work for the WSPU that was better documented rather than of Annot's work.<sup>190</sup>

It is evident that Annot was an articulate and well-educated woman, determined and strong character. She was a leading suffragist, supported by her husband and unafraid of taking the lead in demonstrations and confident making speeches. Annot's strength of character displays a woman confident in taking on responsibilities. Letters to her sister reveal the fears of the stigma of a disintegrating marriage and her lack of courage to consider a legal separation. However, by choice or as inevitable solution she made the decision to live as a single mother with two young children and take financial responsibility for them. Indeed, the women in this case study challenge the idea of the separate spheres and the gendered division of labour. Annot's mother, her

---

<sup>186</sup>Letter to Nellie from Annot 23/4/1922.

<sup>187</sup>Reid N., op.cit, p41.

<sup>188</sup> Reid N., ibid pp46-7.

<sup>189</sup>Reid, N., op.cit. p51.

<sup>190</sup>Reid,N., ibid, p52.

aunts and Annot, were all in paid employment and Anott, the primary breadwinner. Nevertheless, the letters also reveal the financial hardships the family endured in her coping as a single mother, the isolation and disempowerment of her financial and social life. Nevertheless her correspondence regarding her trip to the US expose a real contradiction in terms of her not wishing to leave her daughters but at the same time a desire to achieve autonomy. The evidence undoubtedly provides an insight into the complex contradictions for separated mothers at that time and indeed the contradictions for separated fathers. Although there is no evidence of Sam's experiences, there can be some sympathy for him, returning from war, coping with a strong and independent wife, unemployment and the loss of his identity as a working class man and father. The testimonies have provided a unique opportunity to uncover the realities for separated working and middle-class women and men facing the contradictions during this period regarding women's independence but also the continued stigma of guilt and shame.

Kitty Trevelyan and Johann Georg Götsch

This case study is from a different class and later in the inter-war period than the experiences of Annot and Sam Robinson. The original documents and the mother's published work offer a different perspective for separated mothers and fathers during the inter-war period. Kitty's book and letters describe the struggle of her coping with married life and the contradictions she faced as an independent woman not only in England but also intensified by the fact she lived in a country where gender politics totally denied women's legal rights to equality. The only evidence available of Geo's position is through Kitty's recollections and the correspondence.

Katherine (Kitty) Trevelyan married Johann (Geo) Gottfried Götsch in 1932. The couple lived in Germany and had two daughters the first born in 1933 and the other in 1935. They divorced in 1938. Kitty was from an aristocratic background. Her father came from a long line of country gentlemen involved in the political scene or ordained clergy<sup>191</sup> while her mother's background was from wealthy intelligent and

---

<sup>191</sup>The Trevelyan family origins are depicted in a large tapestry banner by Lady Mary Katherine (Molly) Trevelyan (Kitty's mother) that hangs in Wallington Hall See Cannadine, D. *G.M. Trevelyan A*

public-spirited women. Kitty's father Charles Philip held a number of senior political appointments in the Liberal and Labour Governments.<sup>192</sup> On retirement from politics, he took the role of country squire at Wallington and became Lord Lieutenant for the County of Northumberland. Kitty's mother Mary Katherine (Molly) Bell was the daughter of industrial businessman, Sir Hugh Bell and his second wife Florence Olliffce. Molly was the half sister of Gertrude Bell.<sup>193</sup> Molly and her sister Elsa followed in the tradition of young women from wealthy aristocratic families and led a glittering social life before marriage unlike the adventurous life of Gertrude. Molly and CPT (Charles Philip Trevelyan) married in 1904 and settled down to commuting between their home in London, moving in the city's high social and political circles, and their home in Northumberland following country pursuits, entertaining and fulfilling their roles as country aristocracy<sup>194</sup> It was this privileged background Kitty was born into.

Charles and Molly had eight children and Kitty was their third child and second daughter. In her book, Kitty described her earliest memories and recollected a happy family with loving parents, an idyllic childhood with the freedom of the extensive gardens and local village of Cambo. Yet, like other upper-class parents Molly Trevelyan, did not deal with everyday household duties or see to the children's needs

---

*Life in History* (London: Fontana Press, 1993); Trevelyan, H. *Public and Private* (London: Hamish Hamilton, 1980); Trevelyan, R.(1978) *A Pre-Raphaelite Circle*, London: Chatto & Windus Ltd., for fuller accounts of the history of the Trevelyan family. The Trevelyans inherited Wallington from the Blacketts, of Newcastle, members of an increasing number of industrials who bought their way into the aristocracy. Wallington had originally been a Border castle. It had been bought by Sir Walter Blackett from the Jacobite family of Fenwick and rebuilt in 1688 as a shooting box. A complete remodelling began in 1738 and before long-according to the traveller Arthur Young-it became 'a piece of magnificence of William and Mary and early Georgian styles, in its serene and stately grounds...Capability Brown went to school in the local village of Cambo and he was responsible for the ornamental lake at Rothley, part of the Wallington estate.' R. Trevelyan, *A Pre-Raphaelite Circle* (London: Chatto & Windus Ltd.,1978) pp16-7.

<sup>192</sup>In his early political career he was the Liberal M.P.for Elland joining the Labour Party in 1918 he was M.P. for Newcastle Central until 1931. In 1924 C.P. became the President of the Board of Education and contributed largely to the formation of primary and secondary education See Trevelyan, *ibid*, 161, pp132-4.

<sup>193</sup> See *Gertrude Bell Project* <http://www.gerty.ncl.ac.uk/home/> for further information of her life and achievements.

<sup>194</sup>Molly supported her husband in his political life and took a keen interest in local Women's Institute. She was a dedicated needlewoman spending much of her time to the completion of the family tapestry. Molly's social skills, her knowledge and languages appeared to be rather intimidating to some of the guests that visited Wallington. James Lees-Milne stayed at Wallington during the Second World War and recalled that after dinner Lady Trevelyan, with rapidity, fired general knowledge questions at the family and guests. Lees-Milne was 'amazed and impressed by her mental agility' to the point of being alarmed and almost overwhelmed by this entertainment.

and their father involved in politics. After boarding school Kitty went up to Somerville Oxford however, although her academic life was short lived and she set off for a more adventurous life hitchhiking and camping in Canada.<sup>195</sup> On her return, she had the opportunity to go up to Girton Cambridge. However, in 1931, Kitty travelled to a music college in East Germany and met Johann Gottfird Götsch (Geo), Direktor of the Musikheim. During WWI Geo had been a Russian prisoner of war for five years, the effects of which damaged his long-term health.<sup>196</sup> and on his return to East Germany took up teaching. He and Kitty married in Northumberland in 1931 and she became a German citizen through marriage.

In Germany, growing support for Hitler's Nazi regime was gaining strength. The global economic markets and political turmoil affected Germany like the rest of Europe. The depressed state of employment led to growing disillusionment with the democratic government. The Nazi party under the leadership of Adolf Hitler seized the opportunity and offered a manifesto that would return the German nation to its imagined former glories. As Kruml argued, 'The National Socialist party was a catalyst for creating this atmosphere, but also manipulated it to win over a population.'<sup>197</sup> Pre-1933 there was a strong feminist movement in Germany and women held high office in politics, the professions and civil service. Indeed, the number of women in the Reichstag was a higher proportion than in any other country.<sup>198</sup> In 1919, the first speech by a female deputy in the Reichstag of the new Weimar Republic, Marie Juchnacz, declared, 'I should like to say that the 'Woman Question' in Germany no longer exists in the old sense of the term; it has been solved. [and] We women now have the opportunity to allow our influence to be exerted within the context of party groupings on the basis of ideology'.<sup>199</sup> However, the Nazi party destroyed women's propaganda campaigns and advocated the 'cult of motherhood' to strengthen a pure Aryan nation.<sup>200</sup> Geo strongly supported the Nazi ideology.<sup>201</sup> His decision became a major step in the break-up of their marriage.

---

<sup>195</sup>Trevelyan, K., *Fool in Love*, (London: Victor Gollancz, 1962) pp70-1.

<sup>196</sup>In 1934 Molly wrote to CPT, 'though he doesn't look well-he has and always will have a strained look of a man who has been through a terrible ordeal.' May 27 1934.

<sup>197</sup>Kruml E. <http://www.loyno.edu/histody/journal/Kruml.html>.

<sup>198</sup>Holtby, W., op.cit. pp151-3.

<sup>199</sup>Anderson, B.S., & Zinsser, J.P. *A History of Their Own* (London: Penguin Books, 1988) p397.

<sup>200</sup>Kruml E. <http://www.loyno.edu/histody/journal/Kruml.html>.

<sup>201</sup>,Trevelyan, K., op.cit. p86.

Kitty argued, 'There was the fundamental gap between Geo and myself-between the unconscious democratic British ways which I surprisingly found so strong within me, and knuckling under to totalitarianism in Hitler's Germany.'<sup>202</sup>

Thus, early in their marriage Kitty, pregnant with their first child, described herself as trapped in marriage and in another country. This is clear in letters between her parents. Lady Trevelyan expressed her doubts about Kitty and Geo's future together. Yet, despite her feelings towards the Nazi regime, and difficulties in the transition Kitty appeared to settle after the birth of their first daughter.<sup>203</sup> These were difficult times and the Trevelyan family not immune to the fears of Nazism even more so with a daughter married and living in Germany. In one letter, CPT raised his concern with Kitty's life in Germany, and asked her to consider not giving birth to any further children in Germany and brought up as German citizens.<sup>204</sup> Nevertheless, Kitty returned and soon afterwards was pregnant with her second child. However, on a visit to England with her baby daughter in the early months of 1936, Kitty acknowledged her homesickness for England and her deteriorating relationship with her husband.<sup>205</sup> By the winter the family moved to a remote and 'primitive' house near Zellerfeld. Her letters describe her life as 'bleak amiability' with her husband ill, two small children and hardly the basic domestic facilities in the depths of a German winter. It was during this time that Geo suggested that he gave up work at the Musikheim and bought some land with Kitty's money. Unhappy with this proposal Kitty suggested that she and the children separate from him for a time. The next morning Geo announced that if Kitty took the children away he would 'take legal steps' to ensure that Erika, their elder daughter, would not be taken out of the country.<sup>206</sup> Geo left the house shortly afterwards and Kitty immediately organised to leave with the children. With the help of friends, Kitty and the children travelled to Berlin then to England and

---

<sup>202</sup>Trevelyan, K., *ibid*, 93.

<sup>203</sup>Trevelyan, K., *ibid*., 84.

<sup>204</sup>This conversation would appear to have taken place in 1934 and illustrates the feelings of the threat of war. Trevelyan K., *op.cit.* p99.

<sup>205</sup>In fact Lady Trevelyan, according to Kitty's study, said of her leaving 'It is good to think of you going back to Germany, willingly and happily this time-not as in the earlier days when you went so sadly.' Trevelyan, K., *ibid*, p135.

<sup>206</sup>Trevelyan, K., *ibid*, pp136-8.

Wallington.<sup>207</sup> On meeting them at Wallington, CPT's secretary remarked, 'Your father has waited YEARS for you to do this.'<sup>208</sup> Kitty aware of the enormity of her actions began legal actions to retain custody of her children.

The series of letters during 1937 between Kitty and her father, Messrs. Chas. Percy and Sons Solicitors in Alnwick,<sup>209</sup> CPT and Geo, deal with petitions for divorce and custody of the children. The letters offer a different perspective from Annot and Sam Robinson and one that accounts for class difference in the ability to afford divorce. They also represent a slight shift from the stigma of guilt and shame of separation from the earlier period. The previously unseen letters provide original evidence and an insight into the experiences of the processes and concerns of separation during the inter-war period. In one of the first letters to his solicitors, CPT wrote of Kitty's plans,

She has determined that she cannot and will not attempt to live there any more[and]she is determined to keep the children in England with her if she can. Therein I entirely sympathise with her, whatever the legal position may be. Here the two little girls will have every chance of a good education and satisfactory life. In Germany they would be without a mother, probably not living with the father even, and condemned after a very little limited education in Hitlerite schools, to be decent little German has-fraus with the narrowest outlook.<sup>210</sup>

The correspondence also shows the English solicitors contacted their German counterparts for advice. The German solicitors argued that theoretically, there was no prospect of the mother having the children. In German law at that time, the mother

---

<sup>207</sup>Her friend Annemarie took Kitty and the children to Berlin by car. There arrangements were made to travel to England before a call was made to Geo's 'right-hand man' at the Musikheim to calm the situation while Kitty and the girls left. Trevelyan, K., *ibid*, p139..

<sup>208</sup>Trevelyan, K., *ibid* p141.

<sup>209</sup>The closest I could get to handling the legal correspondence was to track and talk to Les Turnbull the senior partner of the firm shortly before the firm closed. Mr Turnbull informed me he could recall a huge furniture van coming to his home to remove and destroy all the firms' papers. This would have included the Trevelyan papers.

<sup>210</sup> C.P. to Chas. Percy and Son, Solicitors, Alnwick,, Northumberland, 9<sup>th</sup> January 1937.

only had custody of the children up until the age of four years. The father was the exclusive legal representative of the children during his lifetime regardless of being divorced and the appointment of a legal guardian illegal and only if the father withdraws his paternal authority. From the correspondence, the concern of Kitty and her father of her obtaining custody of the children was critical. C.P.T. had evidence that Geo had an illegitimate child (before his marriage). The child living in Germany with its mother had no contact with that child. This C.P.T. added would add strength to Kitty's case for custody. In reply, the English solicitor pointed out that this would not affect the husband's position in his claim in the English Courts for custody but underlined that the English Courts would have an absolute discretion and the information 'will most certainly be of value to the mother'.<sup>211</sup> Kitty applied to have her British nationality restored and by deed poll reverted to the family name Trevelyan that the children automatically took.<sup>212</sup>

However, it is in a letter from CPT to Geo illustrates the gender politics that underpinned the breakdown of Kitty and Geo's marriage. CPT suggests,

I am inclined to think that the fundamental difficulty is that you regard a wife as a haus-frau to whom her husband's life whatever it is should be sufficient. Whereas Kitty comes from a world where women are fast becoming the equal of men and ought to lead lives and have occupations and responsibilities of their own. Kitty cannot live in Germany, because she happens to be the freest product of a free land [and]. This I do not think you will agree with but you must try to understand that it is the reality.<sup>213</sup>

---

<sup>211</sup> Correspondence between C.P. Trevelyan and Chas Percy & Son Solicitors Alnwick the first dated 9<sup>th</sup> January 1937 listing questions on obtaining a divorce in England from a German national; the 10<sup>th</sup> January 1937 dealing with the steps to naturalize K.T. and her children as British citizens; 15<sup>th</sup> February 1937 letter from a German agent, Leader Plunkett and Leader that sets out the law of Germany on divorce and custody of children and the 19<sup>th</sup> February 1937 relating to the absolute discretion of the English courts in the decision of custody. .

<sup>212</sup> 'I have received also, a letter from the Secretary of State, to say that he does not raise any objection to Mrs. G. and her children prolonging their stay (or taking employment) in the United Kingdom.' Letter from Chas. Percy and Son, Solicitors, Alnwick., Northumberland to C.P. 15<sup>th</sup> February 1937.

<sup>213</sup> Letter not dated but confirmed by the trustees as following the batch of legal correspondence in 1937 from C.P. Trevelyan to Geo, Kitty's estranged husband following legal correspondence in 1937.

This letter forms the crux of the arguments of this thesis. The statement provides the proof of evidence of the contradictions for women dealing with the impact of the striking social and legal changes in their everyday lives. Kitty was from a privileged background and had the opportunity of her class to embrace the opportunities of the 'new freedom' that were denied to Annot through financial constraints and class distinctions. Yet, for Kitty, since she had married a German citizen and lived under a political regime that had abolished women's rights and by law reinforced by women's inequality and role in the separate sphere of the home, the challenges were intensified.

In 1937, Geo agreed to divorce on the grounds of Kitty's desertion if Kitty paid the costs. In a letter to Kitty<sup>214</sup> her father warned her to take care of the motives that lay behind this move in saving costs of divorce Geo (and Rolf)<sup>215</sup> would have the money to recover custody of Erika through the English courts and 'beat you at any point they can'.<sup>216</sup> Kitty was certain that Geo would have custody of their elder daughter since she was a German citizen and he was divorcing her.<sup>217</sup> The fear was even greater since the threat of war with Germany. However, in 1939, their divorce was finalised. In August that year, Geo asked to see Kitty and the children, and despite some misgivings on Kitty's part, they met. She described her decision, 'My inner judgment was against this meeting, but since he has as much right to his judgment as I had to mine, I agreed.'<sup>218</sup> The meeting appeared to have gone without acrimony but with sorrow between the two of them. However, the outbreak of the Second World War halted any further thoughts of claims for custody of the children or any further meetings.

It was clear from Kitty's family letters and her account that despite her family background, as a single mother life was not without its financial problems, socially

---

<sup>214</sup>Who paid for the divorce letter to Kitty from her father, C.P.Trevelyan 9/11/1939.

<sup>215</sup> Unknown no further references to him in papers.

<sup>216</sup>At that time the father was the legal representative of his children even if they did not live with him and entitled to choose where the children are educated even if there is a divorce. 'In theory, there is no possibility of the Court deciding that the children have to stay with the mother, in particular, if the marriage has been divorced in the mother's fault as will be the case here because if the wife's refusing to re-establish married life without cause.' Letter from Leader Plunkett and Leader, Berlin W35, Potsdamerstr. 28 February 11<sup>th</sup> 1937 to Messrs Chas. Percy and Son, Solicitors, Alnwick, Northumberland. Letter from CPT to Kitty 9<sup>th</sup> November 1937.

<sup>217</sup> Kitty for custody of their children especially the elder daughter, by then six years old and in German law the mother only had custody of their children up until the age of four.

<sup>218</sup>Trevelyan, K., op.cit. p152.



isolating and her health raised concern amongst the family. Yet Kitty made another life for herself and the children. She had a different style of life to her mother and recalled making the children's clothes and running a home without any domestic help.<sup>219</sup> This provides a picture of the dramatic changes from the idea of the Victorian 'angel in the house' to the independent and 'new freedom' for wives and mothers in the inter-war period. She moved from Northumberland to a rented cottage in Surrey near the children's school. At the outbreak of war, Kitty undertook voluntary hospital work while her daughters stayed with their grandparents in Northumberland. By 1942, the correspondence showed that Kitty and the children moved to a flat in Edinburgh above the school the children attended and where she taught in the kindergarten. Kitty like Annot took a post that came with a home and allowed her to be with her children. Kitty devoted herself to looking after the children and her recollections showed a deep affection between Kitty and her daughters 'my children are the joy of my life'. After the war, links with Geo were renewed and Kitty and her daughters visited Germany a number of times.<sup>220</sup> This continued up until a few months before Geo's death in 1956.

It was not until they had grown up that Kitty took up a professional career. Kitty took up writing and was an active member of the Christian Community. It was through her writing and broadcasting that Kitty became involved with the BBC religious department and regularly contributed to programmes. Later Kitty became involved with the London Healing Mission. Thus, the testamentary evidence provides a clear picture of the experiences of Kitty as a single mother with the responsibility of custody of her children. Despite the privileges of her family life, Kitty chose to be independent for the financial responsibilities and care of her daughters. In a letter to one of her uncles, she wrote, 'It's going well. A very busy life: indeed I have to do so much that I achieve nothing, and yet the that daily stuff must be done, We are very happy and I am as proud of my 3 rooms as of a castle.'<sup>221</sup>

---

<sup>219</sup> Trevelyan, K., op.cit. p147.

<sup>220</sup>Trevelyan, K., op.cit. p192.

<sup>221</sup>Letter from K.T. to R. Trevelyan 3/10/1942.

There are a number of similarities in the cases of Kitty and Annot, They both sought autonomy and had difficulties in their marital relationships as they struggled to deal with the complex contradictions women faced in a changing society. Both women recognised the stigmas of guilt and shame in separation and single motherhood. Indeed, Annot chose not to petition for legal separation for that reason. Yet, she was a strong feminist and suffragist campaigning for women's legal rights, thus emphasising the power of broader opinions on single motherhood. Nevertheless, both mothers took the responsibility of becoming the primary breadwinners and carers and coped with the difficulties of single parenthood, social isolation and financial restrictions in their lives.

Geo divorced Kitty, although she paid for the petition and legal costs. As her background above shows, she too was an independent woman. She grew up in a period, where the 'revolutionary' legal reforms, social and changes in attitudes gave women a certain amount of freedom, particularly the upper classes. Kitty was a well-educated young woman from a wealthy background and had the financial ability to make her own decisions. Yet in Kitty's case, on marriage she gave up her autonomy to live in Germany under the dominant Nazi policies of domesticity, thus the contradictions for Kitty were more acute. The correspondence and her book clearly illustrate her frustrations.

Neither of the case studies came to court to settle dispute over custody of the children. It was not a consideration for Annot and in Kitty's case, both parties were taking steps to seek custody of the children. However, the outbreak of the Second World War intervened and demonstrates the way major events can impact on personal circumstances. Their meetings after the war illustrated his wish to continue making contact and his role as a father albeit from a distance.<sup>222</sup> In contrast, Sam was on the periphery of the family circle whether by choice or otherwise is unclear. Thus, in Sam's case, there is clear testimony of the impact of the socio-economic changes discussed earlier in this chapter and the arguments made by Bertrund Russell, and Mrs C. Gasquoine Hartley of the loss of men's traditional role as breadwinner and

---

<sup>222</sup>In a letter to the trustees following my request for permission to use the family papers Kitty's eldest daughter commented, 'I myself was very interested, as you may imagine, to realise the danger I was in of being shipped back to Geo and turned into a Hitlerfraulein, A reason to be grateful for the outbreak of war.' Letter to Robin Dower from Erika Trevelyan, Kitty and Geo's elder daughter 22/06/2004.

challenges to a father's historical patriarchal position. Indeed, the experiences of Sam are a sharp distinction from the overarching historical patriarchal role of the father outlined in the Chapter 2, the powerful narratives of the church and the state that supported this role.

The experiences of Kitty and Annot personalise the feminist perspectives challenging the historical ideas of the nuclear and the functionalist model of the family, and personify the arguments of Winifred Holtby and Ray Strachey. Both Holtby and Strachey emphasised the impact of the legal reforms and striking social changes colliding with embedded cultural practices and the powerful historical narratives of motherhood. This is explicit in Winifred Holtby's statement that 'Whenever society has tried to curtail the opportunities, interests and powers of women, it has done so in the sacred name of marriage and maternity. Exalting women's sex until it dominated her whole life, the state then used it as an excuse for political and economic disability.'<sup>223</sup> This was similar to the opinions of Ray Strachey, 'the sudden development of the personal, legal political and social liberties of half the population of Great Britain within the space of eighty years has inevitably crowded tendencies, causes, results and consequences.'<sup>224</sup> As demonstrated above Annot was a determined and independent woman; undoubtedly, she had the ability to act under the law to legally separate from Sam but no financial opportunity. Alongside this, the evidence points to the strength of the stigma of the shame of separation, a stigma that Annot deliberately chose not to experience. Annot was not a passive feminist yet despite her strong feminist beliefs and her capabilities to apply for a legal separation, the financial opportunities were clearly not available and the social stigma of shame an indicator of the cultural embedded ideas of motherhood and the contradictions and difficulties for separated mothers. It is indeed a timely reminder of the social estrangement and economic difficulties Caroline Norton dealt with in the nineteenth century and indeed a different life of Annie Besant without her children.

Although there were class distinctions between Annot and Kitty there were also similarities. Kitty was also a strong educated independent woman. She made a

---

<sup>223</sup>Holtby, W., *Women and a Changing Civilisation* (London: John Lane The Bodley Head Ltd., 1934) p119.

<sup>224</sup>Strachey, R., *Our Freedom and Its Results by five women* (London; Leonard & Virginia Woolf at the Hogarth Press, 1936) p5.

choice to marry and live in Germany and later a choice to leave her husband. Unlike Annot, Kitty had the financial opportunity to seek a divorce and custody of her children. The evidence showed that the stigma of shame was not a consideration. As indicated in the correspondence between her solicitors and her father, the 1925 Act did strengthen her case, as the outcome proved.<sup>225</sup> The Act undoubtedly gave Kitty the ability to apply for custody of her children and through the concept of the best interests of the child and the welfare principle to legal rights to custody of her children. Given Kitty's circumstances, of birth and education, there are arguably claims that the case was unusual. However, the case studies represent an insight into the shifts towards individualisation and resonate in the contemporary era. The case studies illustrate the contradictions and difficulties for some women as they struggled with the freedom of their new politics as against entrenched gender practices. The letter from CPT to Geo is particularly significant. To quote C. P. T., 'Kitty comes from a world where women are fast becoming the equal of men and ought to lead lives and have occupations and responsibilities of their own.' The evidence clearly demonstrates the impact of the social changes, legal reforms and the collision with the embedded gendered cultural practices of parenting. As indicated in Chapter 1 and will be explored further in the following chapter, women now have opportunities to higher education, employment and their desire for autonomy. As such, the case studies provide, and in particular Kitty Trevelyan's case a unique insight to the gender contradictions that have followed through to the contemporary era and manifest in contested cases of residency and contact law.

The analysis of original testamentary evidence has uncovered the complex contradictions as women sought their independence within marriage during the inter-war period. It has shown the difficulties men and women faced adjusting to the changes in their everyday lives. In addition, the case studies exposed the realities of the blurred gendered roles for the mothers coping as single parents following separation. Of course, the case studies represent only snapshot view and cannot be generalised. Nevertheless, as Robert Roberts suggested men and women of this generation became 'almost incidentally, the first 'moderns' of the twentieth

---

<sup>225</sup>Letter to C.P.T. from Chas. Percy & Son Solicitors Alnwick 19<sup>th</sup> February 1937.

century.<sup>226</sup> As such, the case studies offer an insight to the contradictions and experiences for some separated mothers and fathers in a changing society and an understanding of the gender contradictions and difficulties that underpin the debates in the contemporary era.

History and the law do not stand still. The final section of this chapter considers the rebuilding of a fractured society following the Second World War with the family as an important building block. However, the war had an impact on the numbers of divorce petitions and this section examines the debates for further changes to the laws of divorce and the consequences for the laws of child custody.

### **Section 3**

#### **Divorce and the Children: Stabilising Society, The Debates Solving The Contradictions of Family Ideologies 1945 to 1956**

##### **Social Changes: Women and Women's Work**

In a similar situation to the First World War, the Second opened up employment opportunities for women. However, this time changing attitudes resulted in many women wanting to remain in employment or at least part-time employment. Supporting this, there were no longer marriage bars for women to some professions. Likewise, there were also calls that women returned to their duties of the home and family. Indeed, there was a strong emphasis on the reconstruction of family life and ways to encourage parenthood, such as family allowances and indirectly insufficient day-care schemes reinforced this policy.<sup>227</sup> Nevertheless, legislation in the nineteen fifties made a definite move to encourage married women workers into the labour force. The Factories (Evening Employment) Order 1950 enabled married women to work a 'twilight' shift as a way of enabling married women to combine paid employment with their domestic household tasks. The nuclear family was an important building block in rebuilding the fractured society and economy.

---

<sup>226</sup>Roberts, R., op cit p234.

<sup>227</sup>Family Allowance Act 1945; Day care schemes discussed in Lewis, J., *Women in Britain Since 1945* (Oxford: Basil Blackwell Inc., 1992) p9.

Consequently, the narratives of the separate spheres and the gendered division of labour were again in dominant strengthening the family and glorifying the image of motherhood.<sup>228</sup> The gender divisions clearly defined women's roles as wives and mothers and 'reproductive and domestic.'<sup>229</sup> As in the nineteen twenties and thirties the father's role was secondary and as the breadwinner and supporter to the mother. The ideas link with the philosophies of discussed in Chapter 1 of Talcott Parsons' functionalism and indeed the arguments of Frederick Engels in the nineteenth century. The media, films, novels and magazines such as *Good Housekeeping* reinforced the ideas. Therefore, despite the interruptions of the war and women's work in the war state policies through the law generally placed married women back in the home and in a subordinate position to men. Yet, demographic trends exposed changes. The next part turns to consider the shifts in the divorce trends and explore the legal changes and debates around the shift in the trends.

### Demographic Trends

Marriage was popular in the period after the Second World War.<sup>230</sup> However, there was increasing anxiety by government and social policy makers of the rising numbers of divorce petitions. Similar to the end of the First World War figures showed an immediate increase in applications for divorce following the Second World War. Statistics showed that in 1937 there were 5,750 petitions filed for divorce, 2,765 by husbands and 2,985 by wives. By 1944, this had risen to 18,390, 10,254 by husbands and 8,236 by wives. In 1946, the figures increased substantially totalling 41,704, 26,249 by husbands and 15,275 by wives. There was a slight decrease in 1948 to 18,456 applications by husbands and 18,619 by wives. For the first time wives were the main instigators of divorce petitions a practice that has continued. However, by 1950, the figures had decreased to 15,889 petitions for divorce by wives and 13,207 by husbands. A further decrease in 1956 showed there were 15,215 applications for divorce by wives and 12,538 by husbands.<sup>231</sup>

---

<sup>228</sup>Winton, K., 'The Spoilt Darling of the Law: Women and Canadian Child Custody Law and the Postwar Period (1945-1960)' 2003 *Canadian Journal of Family Law* 19 p196.

<sup>229</sup>Charles, N., *Gender Divisions and Social Change* (Hemel Hempstead: Harvester Wheatsheaf, 1993) p4.

<sup>230</sup>Statistics shown in Chapter 1.

<sup>231</sup>*Civil Judicial Statistics* (London: HMSO).

The introduction of the welfare state in 1948 provided a new means of support for families<sup>232</sup> and following the Report of the Rushcliffe Committee in 1949 the legal aid scheme came into place therefore, divorce was more financially accessible.<sup>233</sup> The outcomes, as shown above are evident. Notwithstanding the social stigma of shame and disempowerment economically and socially, many married women were no longer willing to stay in unhappy marriages and made the decision to divorce. Nevertheless, there were criticisms. In a speech to the National Marriage Guidance Council, Lord Justice Denning warned that while women's equality with men had great possibilities for society, whether this would be of any benefit remained to be seen. The English law, he argued, privileged married women, they had greater personal independence and property rights yet husbands were obligated to support their wives whereas she was not duty-bound to support him. If they separated or divorced, the law could enforce the husband to continue to support her, unless the wife had sufficient means or forfeited that right by her behaviour. Lord Justice Denning stated that 'She is now indeed the spoilt darling of the law and he the patient pack-horse.'<sup>234</sup>

There were also criticisms of the Legal Aid Scheme. Claude Mullins, a respected magistrate with long experience of dealing with matrimonial difficulties, argued 'there is now a State-assisted road to divorce for most of those who would otherwise have applied to a Magistrates' Court.' He argued neither the scheme nor the divorce courts offered social support. Under the Act, lawyers would give legal advice, yet as Mullins pointed out, lawyers have generally no training in social work. He added 'the high powered systems in conciliation' developed in the magistrates' courts would be ignored.<sup>235</sup> The scheme, Mullins stated, 'has been hailed with enthusiasm.' In fact,

---

<sup>232</sup>Following the Beveridge Report in 1942 and through the National Insurance Act 1948 the welfare state was established and provided free education and a health service.

<sup>233</sup>May 1945 Cmd.6641. Cretney traces the origins of legal aid from The Suing in forma pauperis Act 1495, 11 Hen7 c.12, removed in 1973 by the Statute Law (Repeals) Act that provided exemption for the poor of court fees. According to Cretney, 'This fact may be regarded as providing some support for the notion that unimpeded access to the courts is a common law constitutional right. The demand for Poor Persons' Procedure grew and by 1918, the rise in the number of divorces after WWI put particular strain on the provisions. A Committee in 1919 and again in 1924 [and] the latter assumed that the legal profession had a 'moral obligation' to render 'gratuitous legal assistance [and] in return for the monopoly in the practice of the law which it enjoys.' Cretney, *S. Family Law in the Twenty First Century* (Oxford: Oxford University Press, 2003) pp306-12 & in fn, 229, 230 & 256.

<sup>234</sup>Lord Justice Denning 'Cost of Sex Equality' *The Times* 13/5/1950 p3.

<sup>235</sup>Mullins, C., *Marriage, Failures and The Children* (London: Epworth Press, 1954) p28.

the success rate of judgments through the scheme *The Times*<sup>236</sup> reported was over ninety per cent. As Mullins suggested, considering that out of 20,102 applications to the Scheme 19,083 cases were matrimonial ‘the words ‘success rate’ seem most inappropriate.’ He continued,

That a decree of divorce should be considered a ‘success’ shows only that those who applaud legal aid do not understand the social aspects of the scheme. Far from being ‘successes’, many of these divorces may well have been harmful to the parties and disastrous to their children.<sup>237</sup>

However, despite the condemnation, the first reaction to the increases in the numbers of petitions for divorce was to deal with the stress on the court system. Under the leadership of Lord Denning, the Committee on Procedure in Matrimonial Causes set out to examine the *administration* of the court system. Although the laws of divorce were not in their remit, the Committee commented on the ‘deplorable increase’ in the numbers of divorces and that ‘The mere mechanics of everyday life have become so exhausting for women as to have an immeasurable effect, through weariness, on married happiness.’<sup>238</sup> As Carol Smart argues, ‘Marriage and the family were ideologically construed as the very foundation of society; with the breakdown of marriage it was prophesied that numerous other social ills would follow.’<sup>239</sup> Indeed the threat to family life became a major concern amongst politicians, the church and legal commentators such as Mullins. Hence, in 1951 The Royal Commission on Marriage and Divorce (the Morton Report)<sup>240</sup> was set up to look into the need for reform of the divorce laws.

---

<sup>236</sup>*The Times* 23 June 1953.

<sup>237</sup>Mullins, C., *op.cit.* p28.

<sup>238</sup>The Committee on Procedure in Matrimonial Causes in Cretney, S., *Family Law in the Twentieth Century* *op.cit.* pp321-2, fn. & pp12, 13 & 16.

<sup>239</sup>Smart, C., *The Ties That Bind* *op.cit.* p33.

<sup>240</sup>*The Royal Commission on Marriage and Divorce 1956 Cmd. 9678* The Morton Report.



## The Royal Commission on Marriage and Divorce 1956: The Morton Report

In their terms of reference, the Commissioners stated that while their duty was to the divorce laws, they had to bear in mind ‘the need to promote healthy and happily married life and more importantly to safeguard the interests and well-being of children.’<sup>241</sup> They added,

life-long marriage is the basis of a secure and stable family life, and that to ensure their well-being children must have that background. We have therefore had in mind throughout our inquiry the importance of seeking ways and means of strengthening the resolution of husband and wife to realise the ideal partnership for life.<sup>242</sup>

Evidence from the Women’s Co-operative Guild supported this ideal. The Guild argued that [the] ‘Sanctity of marriage must be upheld [and] and will help to make people more conscious of their responsibilities as partners to a life-long contract.’<sup>243</sup> Nevertheless, the Guild acknowledged individual human needs and the ‘relief’ gained from the formal legal break-up of a marriage. As indeed did the Commissioners. The Report also recognised the extensive social changes, and the Commissioners stated,

greater demands are now made of marriage, consequent on the spread of education, higher standards of living and the social and economic emancipation of women, The last is probably the most important. Women are no longer content to endure the treatment which in past times their inferior position obliged them to suffer. They expect of marriage that it shall be an equal partnership; and rightly so. But the working out of this ideal exposes marriage to new strains. Some husbands find it difficult to accept the changed position of women: some wives do not appreciate that their new

---

<sup>241</sup>The Morton Report *ibid*, s7 para 37.

<sup>242</sup>The Morton Report, *op.cit.* s 7 para 37.

<sup>243</sup>Minutes of Evidence taken before the *Royal Commission on Marriage and Divorce*, 5<sup>th</sup> day Tuesday 27<sup>th</sup> May 1953.

rights does not release them from their obligations arising out of marriage itself and indeed, bring in their train certain new responsibilities.<sup>244</sup>

This statement emphasises clearly the contradictions for women and men in a changing society. It also suggests that some married women were less than serious about their duties and recognising the new responsibilities of their changing status. Nevertheless, for wives the reality of being in a position to face responsibilities, particularly financial, would be problematic. Although it would appear that women had formal legal equality, there were disparities. Despite the fact that the *Sex Disqualification (Removal) Act 1919* gave women the formal right to enter the professions gender discrimination denied them opportunities to earn a realistic income. There was no right to equal pay. Therefore, even if she worked, a women's financial contribution to the family income would be limited. Alongside this, facing up to the responsibilities of life as a divorced woman would have serious implications for the wife and particularly for the mother. At that time, building societies would not lend money for a mortgage, indeed in applying for a mortgage only the husband's salary was involved. In addition, tenancy agreements were inevitably in the name of the husband.<sup>245</sup> Consequently facing their responsibilities as a divorced wife would have grave connotations and for the children. However as the statistics above suggest that far from taking not taking their responsibilities seriously divorced mothers accepted an economically weak position.

### Child Custody

In their terms of reference, the Commissioners stated that while their duty was to the divorce laws, they had to bear in mind 'the need to promote healthy and happily married life and more importantly to safeguard the interests and well-being of children.'<sup>246</sup> The Commissioners argued that while each parent applies for custody

---

<sup>244</sup>The Morton Report, op.cit. para, 45.

<sup>245</sup>Smart, C., *The Ties That Bind* op.cit. pp29-30.

<sup>246</sup>The Morton Report, op.cit. s7 para 37

there is a risk that the parties involved may not be doing so in the interests of the child but from spiteful motives..<sup>247</sup> The Commissioners added,

life-long marriage is the basis of a secure and stable family life, and that to ensure their well-being children must have that background. We have therefore had in mind throughout our inquiry the importance of seeking ways and means of strengthening the resolution of husband and wife to realise the ideal partnership for life.<sup>248</sup>

In this statement, there is a clear indication of the recognition of the effects of divorce on children. This ran parallel to the development of childhood and the growing interest of the sciences of psychology earlier on the century as discussed in Chapter 1. Indeed, the Report from the National Association for Mental health strengthened this argument. They argued,

Childhood should be passed in an atmosphere of stability, consistent of affection and security where the extremes of neglect and indulgence are excluded. Emotional harmony, warmth and devotion in the home are the greatest factors contributing to good mental health in an adult. For any child to be deprived of such a background can often be shown to have serious effect on his subsequent personal development and mental health out of all proportion to the apparent disturbance.<sup>249</sup>

Therefore, despite the inclusion of the welfare principle in the 1925 Act it was employed as a political tactic to retain the rights of the father and the subjective position of the mother. In the Morton Report, there was a shift in emphasis towards the legal regulation of children post-separation, with the focus on the child. The

---

<sup>247</sup>The Morton Report, *ibid*, s104 Para 366.

<sup>248</sup>The Morton Report, *ibid*, s7 para37.

<sup>249</sup>The Morton Report, *op.cit.* para 361.

Report had taken considerable time to prepare and its conclusions indecisive. One half of the Commissioners proposed that divorce on the grounds of a complete breakdown of a marriage would give the opportunity to make more stable second marriages and remove the need the term ‘matrimonial offence.’<sup>250</sup> While the other half argued this could undermine the stability of marriage. Only one Commissioner, Lord Walker suggested irretrievable breakdown of marriage should be the sole grounds for divorce.<sup>251</sup> The Report was criticised for lack of vision<sup>252</sup> and a narrow reflection of the legal professional views. The latter comment brought the heaviest criticisms. According to Stephen Cretney, this would ensure that any further research into marriage and the family must include research from the social science.<sup>253</sup> However, the Report failed to bring any major legal reforms and the Conservative Government made only minor and administrative changes<sup>254</sup> with no plans to reform the divorce laws. As Smart argues the Report covertly reinforced the dominant narratives of domesticity.<sup>255</sup>

The Morton Report was however an intuitive and far-reaching document. For example, the Commissioners suggested the need for marriage guidance schemes and conciliation services and the court welfare system already in place in London and extended to the provinces.<sup>256</sup> Furthermore, the Report emphasised the harmful effects of divorce on children. The law’s use of the sciences supported narratives of motherhood and the idea of the natural bond between the mother and the child and the gendered division of labour. The failure to recommend reforms perhaps resonated with the narratives of domesticity that were at their height during this period.<sup>257</sup> Nevertheless, it marked a new point in divorce law linking it with child custody laws that would prove to have far-reaching effects. Thus, notwithstanding the failure of the

---

<sup>250</sup>Diduck, A. and Kanagas, F., 2<sup>nd</sup> Edition *Family Law , Gender and the State* (Oxford: Hart Publishing, 2006) p512.

<sup>251</sup>Diduck and Kaganas note that Stone suggests that this idea gave grounds for further thought and in the 1960s the idea was developed by the Law Commission and the church in their debates for further reform of the divorce laws. Stone, L. *Road to Divorce* (Oxford: Oxford University Press, 1990) p409. Diduck, A., & Kaganas, F., op.cit. p512.

<sup>252</sup>Cretney, S., *Family Law in the Twentieth Century* op.cit. p203, at 342 fn, 147; Kahn-Freund, O., ‘Divorce Law Reform?’ 1956 *Modern Law Review* 19 p 573.

<sup>253</sup>Cretney, S., *Family in the Twentieth Century* op.cit. pp342-3.

<sup>254</sup>Cretney, S., *ibid*, p344 fn.163.

<sup>255</sup>Smart, C., *The Ties that Bind* op.cit. p40.

<sup>256</sup>The Morton Report, op.cit. s 2 & 105 at para 269.

<sup>257</sup>Smart, C., *The Ties That Bind* op.cit. p40.

Report to make any substantive changes, the recommendations were the building blocks of the family law reforms that emerged in the nineteen sixties'

The first section of this chapter outlined the series of revolutionary legal reforms that were introduced during the nineteen twenties that ostensibly gave wives formal legal equality to divorce and custody of their children. This included the right to vote and important changes to the laws of divorce and child custody. The section analysed the political and feminist debates around the introduction of the *Guardianship of Infants Act 1925* a significant watershed not only in child custody law but also in the regulation of parenting post-separation. The chapter then considered the reactions to changes that legal commentators applauded and criticised. The analysis exposed that despite discontinuities in the law continuities and inequalities remained. In granting mothers legal equality, far from empowering mothers the state through the law reinforced the separate and private spheres, the division of labour and mothers' subordinate position economically and socially. The original evidence from the case studies provides a unique insight into those experiences across the class divisions. The analysis exposed the realities of the contradictions and difficulties mothers faced following separation, divorce and dealing with the practicalities of the care of the children. At the same time, specifically in Annot and Sam Robinson's case offered an exceptional representation of the father's position. Unemployed Sam lost his breadwinner role, public role in politics and his role in the family home. The evidence uncovers the realities for separating parents challenging their culturally embedded gendered roles and the contradictions of the underlying narratives of parenthood. The last section of this chapter considered the need to rebuild a stable society following the end of the Second World War through a functionalist approach. However, women's increasing involvement in the workforce and the growing numbers of divorce petitions raised concerns and the need for debates in reforms to the divorce laws. Although no changes were immediately forthcoming, the debates undoubtedly informed future changes to the laws regarding the legal regulation of children post-separation.

The primary focus of this chapter has been on the revolutionary socio-legal changes of the inter-war period. The aim has been to fill a gap in the social and legal history

of the experiences for parenting post-separation. The massive social changes following the First World War instigated challenges to the traditional establishment, the impact of which initiated class and gender contradictions for men but particularly women. As the case studies show, the effects were particularly acute for separating parents and the regulation of parenting post-separation and the contradictions and gender politics were exposed. While the evidence has provided the opportunity to view a snapshot of the experiences, it illustrates the contradictions for mothers and fathers coping dealing with the practicalities of separation and post-separated parenting. The evidence exposes the blurring of the role of parents against the social construction of the embedded cultural practices the law and the state have reinforced.

The pioneering origins and revolutionary changes during the inter-war period are often lost amongst a broad sweep of legal and social history. Yet they should not be dismissed, since the period's revolutionary shifts that challenged traditional convention, can provide us with an understanding of the challenges in the contemporary debates. As we shall see in Chapter 4 the social, economic changes and legal reforms from the nineteen sixties dramatically accelerated the increases in divorce, cohabitation and the ways individuals structure their family lives. This thesis argues that much can be drawn from the experiences of separated mothers and fathers during the inter-war period that informs the debates in the modern era.

## Chapter Four

### Full Circle?

The Legal Reconstruction of the Post-Separated Family

1958-2009

‘This whole area of law is bedevilled by the complication and duplication of remedies and procedures which have developed according to no clear principle.’<sup>1</sup>

### Introduction

In the twenty-first century, previous contentions of ‘child custody’ and ‘access’ are no longer a matter of concern to either the state, law or separating partners. The terms quite simply no longer exist. *The Children Act* 1989 replaced the terms with the concepts of ‘residency’ and ‘contact’.<sup>2</sup> The Act abolished the historical idea of ‘parental rights’ and introduced the concept of ‘parental responsibilities’ to encourage negotiation rather than conflict. Following separation, parents are encouraged to maintain a meaningful relationship with their child and parenting shared and continual.

However, neither the change in language, nor indeed the concepts of shared and continual parenting, has significantly reduced the numbers of contested cases. Figures<sup>3</sup> show increasing numbers of applications from fathers (generally the non-resident parent) for their rights to share in parenting. As such, in the contemporary era, the post-separated family continues and increasingly is a site of conflict and confusion. Within family policy there is a new orthodoxy in parenting that is reinforced by law in parenting post-separation. Couched in terms of care, a new ‘father’ figure has emerged theorised within the structure of the principle of the

---

<sup>1</sup>The Law Commission Working Paper No. 96 *Family Law Review of Child Law: Custody*, Part 1 Introduction, para. 1.2. (1986).

<sup>2</sup>The Law Commission Working Paper No. 172 *Family Law Review of Child Law Guardianship and Custody* (London: HMSO, 1988) HC 594, S. 2.16.

<sup>3</sup>See Chapter 1.

welfare of the child.<sup>4</sup> Nevertheless, by law, fathers have always had legal rights to their children; the demand for legal rights to their children has been the struggle of separated mothers, now the struggle is that of fathers. Undoubtedly, as Law Reports show, there have always been private gender struggles between contesting parties, however in recent years the gender struggles have come to the forefront of political, legal and public debate. This chapter explores the contemporary reforms to the laws regarding the care of children post-separation. While to some extent this is a chronological line it will provide the background and identify key points of change in the broader narratives of parenting that have informed shifts in this area of family law.

The chapter is set out in three sections. The first section will focus on the decades following the Report of the Royal Commission on Marriage and Divorce 1956,<sup>5</sup> up until the introduction of the *Children Act* 1989. There were dramatic socio-economic changes in the UK during this period. For example, the trends in employment shifted with increasing numbers of women entering the labour market and increasing male unemployment. The impact has blurred the public and private divide, challenging gender relations and ideas of the nuclear family.<sup>6</sup>

Statistics show a dramatic rise in the divorce rates and consequentially increasing numbers of single-parent families.<sup>7</sup> Legal reforms have reflected these shifts. This section will chart the restructuring of the divorce laws and the impact on the legal regulation of the care of children post-separation. At specific points of change, reference will be made to similar situations in the inter war period.

The second section explores the contemporary period following the 1989 Act up until the *Family Law Act* 1996. The pace of change in family life has increased rapidly. Legislative reforms have given same-sex partners the same rights and responsibilities as heterosexual partners. Alongside this, there have been advances in reproductive technology. Together the changes have further challenged gender relationships, the structure of the family and parenting practices.

---

<sup>4</sup>Smart, C., & Neale, B., *Family Fragments?* (Oxford: Polity Press in Association with Basil Blackwell, 1999) p34.

<sup>5</sup>*The Royal Commission on Marriage and Divorce* (The Morton Report) Cmd. 9678 (London: HMSO, 1956).

<sup>6</sup> See Chapter 1 for wider discussion on debates of the changing ideas of the structure of the 'family'.

<sup>7</sup>As discussed in Chapter 1.



The third and final section will examine the period from 1997 and the election of New Labour into government, the introduction of the *Children and Adoption Act 2006* up to the present day. It will consider the political rhetoric that underpins the broader contemporary ideas of parenthood and shifts in family social policy that brought ‘the family’ to the forefront of political debate. As has been suggested, historically, the law has tended to reinforce the dominant narratives of parenthood, particularly motherhood in the regulation of children post-separation.<sup>8</sup> The contemporary era is no different. This section will focus on the impact of the shifts on residency and contact law and raise critical questions of the dynamics of gender politics that underpin the disputes.

## **Section 1**

### **The Rhetoric of Social and Legal Change 1960-1989**

#### **Social Changes & Legal Changes**

In the broader social context, the nineteen sixties seemed in stark contrast to the period of austerity following the Second World War. Attitudes were beginning to challenge the dominant traditional establishment.<sup>9</sup> There was an ‘atmosphere of liberal maturity.’<sup>10</sup> The decade became synonymous with the ‘swinging sixties’ of a new sexual freedom and a ‘permissive society’. In some respects, the period resonated with the patterns of social change during the inter war period. As discussed in Chapter 3 there was then a sense of ‘moral freedom’ that contested the traditional establishment. Yet the ‘freedom’ of the nineteen sixties challenged the boundaries further. In a clear example of this, authors and playwrights could publish without censorship. In the nineteen twenties, D. H. Lawrence’s novel *Lady Chatterley’s Love* had been considered indecent and obscene material and unavailable in the UK for three decades. In the nineteen sixties, Penguin Books republished the book fully aware they would probably face prosecution. Charged under the *Obscene*

---

<sup>8</sup>Boyd, S. B. *Child Custody, Law and Women’s Work* (Ontario: Oxford University Press, 2003) p4.

<sup>9</sup>Marwick, A., 4<sup>th</sup> Ed. *british society since 1945* (London: Penguin Books Ltd., 2003) p72.

<sup>10</sup>Master, B., *The Swinging Sixties* (London,: Constable, 1985) p14.

*Publications Act 1959*<sup>11</sup> it was a high profile trial and represented a confrontation between the old social order and a new mood of freedom.<sup>12</sup> Higher rates of employment, increased wages and cheap and easy credit generated an apparent affluent society. There was a new youth culture scene. Similar to the ‘flappers’ and young men of the nineteen twenties, the new youth culture of the nineteen sixties challenged the established traditional society through their music, fashion and seemingly immoral behaviour.<sup>13</sup>

In some respects, the law contributed to ideas of ‘moral freedom’ through change and the principle of legal consent. In the nineteen fifties, homosexual acts by law continued to be criminal offences. The increasing numbers of convictions and a number of high profile cases prompted a Government re-examination of the debates. The Wolfenden Report 1957 concluded that the criminalisation of homosexual acts was an intrusion on civil liberties.<sup>14</sup> As a direct result of the Report, *The Sexual Offences Act (England and Wales) 1967*, decriminalised homosexuality between two consenting adult males over the ages of twenty-one. A number of other reforms followed that endorsed a level of ‘deregulation of personal life’,<sup>15</sup> and a move away from strict legislation on private lives.

*The National Health Service (Family Planning) Act 1967*, allowed contraceptive advice to be more easily available, the development of the contraceptive pill made birth control easier. In addition, the *Medical Termination of Pregnancy Act 1967* (the Abortion Act), legalised abortion. Altogether, the three Acts represented a dramatic shift from the stigmas of guilt and shame that had persisted from the Victorian era and indeed during the apparent laissez-faire attitudes of the inter-war period. The

---

<sup>11</sup>7 & 8 Eliz. 2 Ch. 66.

<sup>12</sup>[1961] Crim LR. The case was acquitted on the grounds of literary merit despite or even because of the use of seemingly obscene language. The jury acquitted the publishers and the decision opened the way for other sexually explicit books to become more generally obtainable. As discussed in and Marwick, *ibid*, 9, at 118; Sandbrook, D., *Never Had It So Good* (London: Abacus, 2006) at xvi.

<sup>13</sup>For example fashion represented new boyish looks with short hair, mini skirts and flared trousers. Master, B., *op cit*. pp14-8; Rowbotham, S, *A Century of Women* (London: Penguin Group, 1997) pp54-6;

Marwick, A. *op.cit.* p9.

<sup>14</sup>*The Report of the Committee of Homosexual Offences and Prostitution Cmnd. 247.* (London: HMSO, 1957).

<sup>15</sup>Lewis, J., *Women in Britain since 1945* (Oxford: Basil Blackwell Ltd., 1992) p41.

deregulation brought subjects previously concealed into the public arena.<sup>16</sup> The reforms gave some men and women the right of choice. Thus, the nineteen sixties proved a significant period of change and a catalyst for the following decades. As Jonathon Green explained in *All Dressed Up: The Sixties and the Counter Culture*, ‘the Sixties seem to stand in the centre of it all, sucking up influences of the past, creating the touchstones of the future.’<sup>17</sup>

Despite campaigns for the return of traditional moral values,<sup>18</sup> the ‘permissive’ society did not disappear. Yet the next two decades were different. Although there was expansion for some, particularly in the service sector industries it was also a period of discontent for others. Employment trends were one of the greatest changes during the period. The downturn in economic trends led to a serious decline in the traditional heavy employment industries and increasing unemployment rates for men. Yet parallel to this, the shift to the service sector introduced a demand for married women as low cost and part-time employees.<sup>19</sup> Figures show that in 1951 26% of married women between the ages of 15-59 years were in the labour force. By 1961, this had risen to 35% and by 1971 to 49%.

Youth cultures of punks and skinheads were typically representative of the anger and violence that seemed to permeate society. Demonstrations, racial riots and bitter strike actions punctuated the nineteen seventies and eighties. Sectarian conflict continued in Northern Ireland and spread to the UK mainland. A change to a Labour Government in 1974-9 provided a different political climate. Although demonstrations and strikes continued, pressure groups achieved a measure of change against social and economic injustice and gender equality. However, Conservative politics dominated the political scene in the nineteen seventies and eighties. Thatcherism<sup>20</sup> introduced policies of self-help and prudence, deregulation and a free-market to reduce, the national deficit, and public spending that had severe social and economic consequences.

---

<sup>16</sup>Marwick, A. op.cit. p119.

<sup>17</sup>Green, J., *All Dressed Up: The Sixties and the Counter-Culture* (London: 1998) at ix, xiii as discussed in Sandbrook, D. op.cit. pxvii.

<sup>18</sup> Mary Whitehouse a right-wing supporter was an active campaigner throughout the three decades for a return of moral values.

<sup>19</sup> Roberts, Y. ‘Once upon another time’ *The Guardian* 2, 4/11/1996 pp4-5.

<sup>20</sup>Political thinking of Prime Minister Margaret Thatcher, Britain’s first woman Prime Minister.

Alongside this, the emergence of AIDS<sup>21</sup> raised serious concerns not only for those most at risk, but of the disease spreading to heterosexuals. The Conservative Government campaigns issued stark warnings against promiscuity and a return to moral values. Prime Minister Margaret Thatcher reportedly stated ‘We are reaping today what was sown in the Sixties [and] fashionable theories and permissive claptrap set the scene for a society in which the old virtues of discipline and restraint were denigrated.’<sup>22</sup> This statement typified the growing fears of politicians of threats to the stability of the family and the wider social cohesion. Indeed, as will be shown below social patterns were changing and the consequences impinging on the structure of family life. Demographic trends provide an overall picture of the shifts.

## Changing Trends in Marriage, Divorce, Cohabitation and Single Parent Families

### Marriage and Divorce

Drawing on the statistics in Chapter 1 despite the sense of a ‘moral freedom’, marriage remained popular during the three decades. Indeed, the greatest number of marriages was in 1971 with 367,000 registered. In contrast, the figures for divorce applications show a striking rise. Overall divorce figures more than doubled and wives continued to be the main instigators of divorce petitions. By 1984, the number of children involved in divorce had risen to 148,600 compared to 20,000 thirty years before.<sup>23</sup> The obvious consequences were increases in single parent families.

### Cohabitation

The statistics outlined in Chapter 1 indicate the increase in cohabitation as the figures of births registered outside marriage in joint names indicate. At the beginning of the nineteen sixties 38% of births registered outside marriage were in joint names. By the nineteen seventies, this figure had risen to 45% of births.<sup>24</sup> Yet there was another

---

<sup>21</sup> Acquired Immune Deficiency Syndrome

<sup>22</sup> Daily Mail quoted and discussed in Master, B., op.cit. p14; Cretney, S., *Family Law in the Twentieth Century* (Oxford: Oxford University Press, 2003) pp346 & 349.

<sup>23</sup> *The Law Commission Working Paper* No. 96, op.cit. Part IV 4.2 fn. 4 O.P.C.S. Monitor FM2 85/1, Tables 1, 5b and 7.

<sup>24</sup> *Social Trends* 1 Table 13 (London: HMSO, 1970); *Social Trends* 18 Table 2.23 (London: HMSO, 1988).

distinctive change in the trends of family patterns. The rates of births in single parent families began to rise.

### Illegitimacy

Trends show that in 1950, 5% of births registered were outside marriage. By 1961, this had risen to 5.8% and to 8.4% by the beginning of the nineteen seventies. Between 1971 and 1991, the numbers of single parent households rose from 570,000 to 1.3 million with 2.2 million dependent children.<sup>25</sup> Indeed the greatest increase emerged from 1987 when the numbers of single-parent families increased by 24%. The increased dependency on state benefits, to make up deficiencies in divorce maintenance, and to single mothers rose from 20% in 1961 to 67% in 1987. In 1971, 213,000 lone parents received benefits; by 1987, this had risen to 649,000. Alongside this, only 30% of single mothers received financial provision from the fathers.<sup>26</sup>

Indeed, over the three decades the increase in single-parent families and never-married mothers were major shifts in the trends of family life. Academic debates emerged of a growing 'underclass',<sup>27</sup> of lone mothers, absent fathers and their seemingly inadequately socialised children and a threat to wider social cohesion. The increase of dependency on and rising cost of state benefits became a matter of intense Government concern.

### Changing Attitudes

Changing ideas of intimacy and women's increasing involvement in the formal workforce and measure of financial independence are pivotal in this context. Wider opportunities to higher education allowed women to enter universities and professions such as politics,<sup>28</sup> law, medicine and academia although in general, women were more likely to work in the service sector, in semi and unskilled posts and married women in

---

<sup>25</sup> *Social Trends* 1 *ibid*, at Table 13 & 18 Table 2.23.

<sup>26</sup> Bradshaw, J., and Millar, J., *Children Come First The Government's Proposals on the Maintenance of Children* Lord Chancellor's Department Cm.1263 (London: HMSO, 1990) p78.

<sup>27</sup> Murray, C., *Losing Ground: American Social Policy 1950-1980* (New York: Basic Books, 1984).

<sup>28</sup> Barbara Castle, Shirley Williams and Jennie Lee all held high office on the Labour Government and Margaret Thatcher became the UK's first woman prime minister in a Conservative Government.

part-time employment.<sup>29</sup> Other factors also had an impact on women's changing attitudes regarding intimate relationships. The development of oral contraceptives allowed women autonomy to control the timing and size of their families. The increased trends in divorce and rates of illegitimacy signified shifts in women's attitudes towards marriage, divorce and the choice to proceed with a pregnancy and single parenthood. This was perhaps not only an indication of sexual freedom but also diminishing religious or parental pressures. Part of this shift was the outcome of the *Family Law Reform Act* 1987. The Act abolished the historical distinction between legitimate and illegitimate children.<sup>30</sup> As divorce rates increased and the general trend moved towards maternal presumption, logistically the rise in the numbers of single mothers may have reinforced the shift in attitudes. Therefore, the stigma of shame as a single mother was not such an important issue and women had a choice of intimate relationships outside marriage.<sup>31</sup> Nevertheless, as the historical analysis of this thesis shows the changes in women's attitudes were not entirely new. The Morton Report formally recognised changes in women's attitudes in the nineteen fifties<sup>32</sup> and a shift in women's attitudes is clear in the analysis of the inter-war period, not only in the broader discussions in Chapter 3 but also obvious in the case studies. To recall the letter from C.P. Trevelyan to Kitty's estranged husband Geo, he stated she 'came from a world where women are fast becoming the equal of men and ought to lead lives and have occupations and responsibilities of their own.'<sup>33</sup> Nevertheless, from the nineteen sixties, women were making choices, seeking autonomy, moreover in increasing numbers. Part of the shift of attitudes emerged from the re-surfacing of feminist thought and the next part of this section outlines the second wave of feminism and provides points of reference that relate to the influence of feminism regarding legal reforms and, consideration to issues of child custody disputes.

---

<sup>29</sup>Lewis, J. op.cit. p87.

<sup>30</sup>At common law a child was only legitimate if his parents were married when the child was born or at conception. As discussed in Chapter 1 historically a child born to unmarried parents was a *filius nullius*, a child of no known father and in the exclusive custody of the mother. S4.1 of the FLR Act 1987 stated that where the father and mother of a child were not married to each other at the time of his birth, the court may, on the application of the father, order that he shall all the parental rights and duties with respect to the child.

<sup>31</sup>Lewis, J. op.cit. pp60-2.

<sup>32</sup>The Commissioners pointed out that 'women were no longer content to endure the treatment which in past times their inferior position obliged them to,' *Report to the Royal Commission of Marriage and Divorce* Cmd. 9678 (London: HMSO, 1956) at para 45.

<sup>33</sup>In a letter to Kitty's estranged husband discussed in Chapter 3.

## The Influence of the Second Wave of Feminism on Social Change

The feminist movement re-surfaced in the early nineteen sixties. Similar to nineteenth century, authors used the medium of literature to draw attention to gender inequality and injustices. For example, the novelist<sup>34</sup> Margaret Drabble wrote of the anxieties of being a housewife and mother. However, French and US essay and novelists contributed directly to the emergence of feminism. Although first published in 1949, Simone de Beauvoir's contentious book, *The Second Sex* became one of the most influential studies of the second wave of feminism.<sup>35</sup> In the US, Betty Friedan published her controversial study *The Feminist Mystique*.<sup>36</sup> The outcome of an empirical study, Friedan identified that her own dissatisfaction in her primary role as a wife and mother was indeed widespread. It was 'the problem that has no name' a condition caused by their identity to their subordinate role. In addition, Marilyn French's novel *The Women's Room*<sup>37</sup> offered a first insight into the realities of women's lives in the US. Meanwhile in the UK, Ann Oakley challenged the ideas of the family through her classic empirical study *The Sociology of Housework*.<sup>38</sup> Her study of housewives and women's work in the home, brought motherhood and the concerns of women and women's subordination within the home into academic scholarship. The family and women's role in the family became the focus of feminist research as a site of power relations of men over women.

Each of these studies argued the same point, that women's subordinate position was socially constructed. Society, they declared constructed women's subordination. The authors argued for a women's need for autonomy. Feminists turned to women's history to provide an explanation of the oppression against women.<sup>39</sup> This time the 'woman question' had shifted. Rather than the collective demands of the earlier feminist campaigners, second wave feminists sought women's individual rights to choice. Feminists were not asking for legal equality with men, but autonomy and

---

<sup>34</sup>A *Summer Bird Cage* 1963; *The Millstone* 1965; *The Waterfall* 1969 reflected women's subordinate role in society.

<sup>35</sup>De Beauvoir, S., *The Second Sex* (London: Four Square Book 1960. Originally published in France by Librairie Gallimard 1949 and published in England by Jonathan Cape Ltd 1953).

<sup>36</sup>Friedan, B., *The Feminist Mystique* (London: Victor Gollancz, 1963).

<sup>37</sup>French, M., *The Women's Room* (London: Abacus Book, 1990, First published in Great Britain: André Deutsch, 1978).

<sup>38</sup>Oakley, A., *The Sociology of Housework* (London: Martin Robertson, 1974).

<sup>39</sup>Rowbotham, S., 3<sup>rd</sup> Ed. *Hidden From History* (London: Pluto Press, 1977).

liberation. The Women's Liberation Movement (WLM) emerged into the public arena.

Nevertheless, by the nineteen seventies, new feminist theories were surfacing. Drawing on US women's experiences in the Civil Rights Movement, debates were beginning to emerge on women's rights of individuality, race, class and sexuality. Universities provided a meeting place for feminist thought. Women writers and academics began to raise their voices for greater independence, equal pay, the right to choose a career, to marry, and/or motherhood and childcare issues.

### Feminist Influence on Legal Reform

Women did campaign and achieve a measure of success in their drive for legal reform. As noted above, in 1967 the *National Health Service Act (Family Planning)* and the *Abortion Act* allowed women a choice and autonomy of their own bodies. Women were able to access contraception advice more easily. The development of oral contraceptives allowed women to control the timing and size of their families. This was as Chapter 3, showed, far-removed from the lack of government policy on birth control during the inter-war period. However, while the *Abortion Act* allowed easier access to abortion, a stringent legal code in the Act called for two doctors to sanction an abortion on medical grounds. In a male-dominated male profession, the doctors were more than likely to be men. Therefore, the power over women's bodies remained with men.<sup>40</sup>

In the mid nineteen seventies, the political climate and Labour Government were more open to pressure groups for change. Indeed, reminiscent of the nineteen twenties, there were a number of reforms regarding gender equality supported by the feminist movement. *The Equal Pay Act 1970* and the *Sex Discrimination Act 1975* formally challenged gender discrimination in the workforce and the Equal Opportunities Commission established. Yet just as in the nineteen twenties, the reality was somewhat different indeed the continuing need for the Commission continues to remain some thirty years later.

---

<sup>40</sup>Smart, C., *The Ties That Bind* (London: Routledge & Kegan Paul, 1984) at 4; Master, B. op. cit. p 118; Lewis, J. op.cit. pp40-57.



Other legal changes had positive outcomes for married mothers. In stark contrast to the aggressive debates around the 1925 Act, *the Guardianship of Infants Act 1973* finally allowed *married* mothers the same rights and authority of their children as married fathers. *Social Security Pension and the Employment Protection Acts 1975* gave wives at home full pension rights and mothers paid maternity leave a statutory right. It would seem that women's struggle for equality, and financial independence had succeeded, women 'had it all' and it was suggested, particularly divorced wives.

### Divorce and Child Custody

Divorce and child custody were not specific concerns of the second wave of the feminist movement; as indicated above feminists were involved in raising other issues for women outside the family. Julia Brophy argued, 'the general response of the women's movement towards child custody issues has often been seen somewhat confused and ambivalent.'<sup>41</sup> Undoubtedly, in comparison to the non-existence of legal rights of wives and mothers before the nineteenth century, this area of law had been revolutionised. Legal reforms, legal aid and women's increased involvement in formal employment gave wives wider opportunities to divorce and they did in increasing numbers. Mothers no longer needed to struggle for their rights to custody of their children, maintenance and the matrimonial home. Divorced wives and mothers it would appear 'had it all' however, on closer examination the reality was somewhat different.

There are different perspectives to this argument. The courts' attempts to maintain a balanced financial position after separation or divorce proved complex. As Carol Smart argued, there was a general failure by the courts to understand the inequality of power and particularly financial power when a single income had to cross over two households.<sup>42</sup> Furthermore, despite legal reforms, gender inequality in pay remained and women. Therefore, financial dependency on their former husbands could prompt

---

<sup>41</sup>Brophy, J., 'Child care and the growth of power: the status of mothers in child custody disputes' in Brophy, J., & Smart, C., Eds. *Explorations in law, family and sexuality* (London: Routledge & Kegan Paul, 1985) p99.

<sup>42</sup>Smart, C. *The Ties That Bind*, op.cit. p92.

gender power relationships between the parties and reinforce women's subjective position.<sup>43</sup>

Academic studies<sup>44</sup> showed that in the majority of divorce cases and separations legal dispute of custody of children was not an issue. Arrangements for the care of children were generally resolved outside the courts and merely endorsed by the courts. There was a general unwillingness by the courts to disrupt the child's place of residence 'the status quo' therefore mothers remained with the children in the family home. Therefore, in uncontested cases, mothers tended to have custody of their children and continued as primary carers as they had in marriage. As such, the courts largely reinforced the gendered division of labour, women's roles as mothers in the private sphere of the home.<sup>45</sup>

Nevertheless, as Carol Smart suggested, rather than equality of rights or a privileged position, mothers merely had 'benevolent concessions' to custody of their children. Julie Brophy followed a similar argument. Married fathers including adulterous fathers have historically always had automatic rights to custody of their children. Although adultery was no longer sufficient to deny a mother legal custody of her child, where there was evidence of her adultery and she had left her children causing the breakdown of the family, a number of reported contested cases revealed that a mother's right to custody was not certain. In such cases where the father contested legal custody the decision in such cases rested on the courts' assessment of the wife's character. The courts' considered an adulterous mother who left her children resulting in the breakdown of the family evidence of her failure in her duties and responsibilities as a wife and mother. Therefore, a wife's legal rights to custody were dependent on her compliance with traditional legal, social and political ideas of mothers and the structure and purity of the family.<sup>46</sup> Two cases supported this argument. In the case *Re L*. Lord Denning argued,

---

<sup>43</sup>Diduck, A., & Kaganas, F., 2nd Ed., *Family Law, Gender and the State* (Oxford: Hart Publishing, 2006) p241.

<sup>44</sup>Eekelaar, J., et al *Custody After Divorce* (Oxford: Centre for socio-Legal Studies, 1977); Maidment, S., 'A Study in Child Custody' 1977 Vol.6 *Family Law* at 195-200; Eekelaar, J., & Maclean, M., *Children and Divorce: Economic Factors* (Oxford: Centre for Socio-Legal Studies, 1982) as discussed in Brophy, J., *Explorations in law, family and sexuality*, p99.

<sup>45</sup>Brophy, J. *ibid*, p99.

<sup>46</sup>Smart, C. *The Ties That Bind* op.cit. pp 92-4; Brophy, J. *ibid*, p102..

That whilst it is right to give great weight to the welfare of the children [and] it is the paramount consideration, it is not the sole consideration [and] one must remember that to be a good mother involves not only looking after the children, but making and keeping a home for them with their father, bringing up the two children in the love and security of the home with both parents. [and] In so far as she herself by her conduct broke up that home she is not a good mother.<sup>47</sup>

He continued, ‘It seems to me that a mother must realise that if she leaves and breaks up her home in this way, she cannot as of right demand to take the children from the father. [and] Whilst the welfare of the children is the first and paramount decision, the claims of justice cannot be overlooked.’<sup>48</sup> In the case of *H v H & C*<sup>49</sup> the father successfully appealed against the lower court’s decision that the mother have legal custody of the child. Danckwerts LJ., pointed out that the ‘striking thing about this case is that the mother has not had anything to do with the child for a considerable period.’<sup>50</sup> Salmon L. J. added

I do not myself think that, whether this marriage broke up because of the fault of the husband or of the wife or of both of them, is of any consequence whatsoever. But what, I am bound to say, impressed me is the fact, not that this mother committed adultery with another [and] but that she went off to live with him leaving her small child behind. [and] Many women who are very good mothers have left their husbands; but as a rule they take the child with them.<sup>51</sup>

Therefore, as in the nineteenth century, ideas of the ‘unfitness’ to mother remained. The courts’ primary concern was maintaining the traditional ideas of marriage and

---

<sup>47</sup>[1962] 3 All ER 2.

<sup>48</sup>Lord Denning, *ibid*, p4.

<sup>49</sup>[1969] 1 All ER 262.

<sup>50</sup>Danckwerts LJ, *ibid*, p263.

<sup>51</sup>Salmon, L.J. *H. v H. and C.* [1969] 1 W.L.R. 210.

indeed divorce upholding the ideology of the nuclear family structure.<sup>52</sup> Moreover, the father's appeal for custody strengthened if there was another woman, a relative or cohabitee to provide childcare.<sup>53</sup> Consequently, although legal reforms had challenged fathers' absolute authority of the rights to custody and legal reforms gave mothers a measure of equality, adulterous mothers who left their children that contributed to the break-up of the family the outcomes, as the case studies demonstrated were far from certain.

Nonetheless, shifts were emerging in the feminist movement. In some respects, the movement of the late nineteen seventies and eighties appeared to resonate with the predicament of the first wave of feminism in the inter war period. Following a period of progress of legislative reforms there was a loss of incentive to drive for change. The second wave of feminism splintered. Some factions sought a feminist ethos within a male dominated society.<sup>54</sup> Yet other women become more involved in political action through trade unions, pressure groups for civil liberties and action against poverty. In a move that mirrored the shift in feminism during the inter-war period, women joined peace movements and their tactics echoed those of the suffragists earlier in the century.<sup>55</sup> Other feminist campaigners against pornography, prostitution, violence and rape against women, struggled against a historically dominated masculine culture.<sup>56</sup>

On reflection, this 'splintered' feminism provides an understanding of the changing attitudes of women towards intimate relationships and the family. Some women chose to demonstrate their feminism through their autonomy combining marriage, a family with a career choosing the size and timing of their families or to be a lone mother.<sup>57</sup> Women's autonomy and the choice some women made to be single parents was a political choice and part of the context of feminism. According to Martin Pugh, politicians and the media used feminism as a scapegoat for social shifts and moral

---

<sup>52</sup>Smart, C. *The Ties That Bind*, op.cit p96.

<sup>53</sup>Brophy, J *Explorations in law, family and sexuality*,op. cit. p102.

<sup>54</sup>Pugh, M., 2<sup>nd</sup> Ed. *Women and the Women's Movement in Britain* (Hampshire: Macmillan Press Ltd.,2000).

<sup>55</sup>Feminist protestors set up camp outside the US missile base at Greenham Common and like the suffragists chained themselves to fences.

<sup>56</sup>Rowbotham S., op cit p496.

<sup>57</sup> Pugh, M., 2<sup>nd</sup> Ed. *Women and the Women's Movement in Britain* (Hampshire: Macmillan Press Ltd, 2000) pp334-5.

decline and the breakdown of the family.<sup>58</sup> However, as shown above during the nineteen sixties and early seventies, the feminist movement undoubtedly influenced attitudes of women and their demands for legal change.

The re-emergence of feminist thought also raised questions for men, their family, sexuality, and provided the genesis for the study of masculinities. Fathers' rights groups began to emerge during this period. In 1974, Families Need Fathers (FNF) and later Campaign for Justice on Divorce (1978) were established. The groups argued against a number of issues of legal injustice and their rights of equality in parenting post-separation.<sup>59</sup> They represented a shift in fathers' assertions of involvement in childcare,<sup>60</sup> and a move that was to have a significant impact on legal reforms to the laws regulating the care of children post-separation and the increasing numbers of dispute cases. It is against this background of complex socio-economic and legal shifts and changes in attitudes towards gender relationships that the calls to change the laws of divorce re-emerged.

## Legal Reforms 1960-1989

### Divorce Laws

Despite the failure of the Morton Report in 1956 to make any significant decision to change the divorce laws, lobbyists continued to call for legal reforms. Indeed, in 1962, Labour Member of Parliament Leo Abse introduced a Private Members' Bill.<sup>61</sup> His argument formed around the increasing numbers of children brought up with the stigma of illegitimacy, purely because their parents were unable to marry. Therefore, he proposed simpler divorce would allow cohabiting couples to marry and therefore stabilise the family.<sup>62</sup> The attempt failed.

---

<sup>58</sup>Pugh, M., *ibid*, p 335.

<sup>59</sup>Collier, R., "The Outlaw Fathers Fight Back' : Fathers' Rights Groups, Fathers 4 Justice and the Politics of Family Law Reform-Reflections on the UK Experience" in Collier, R., & Sheldon, S., Eds. *Fathers' Rights Activism and Legal Reform in Comparative Perspective* (Oxford: Hart Publishers, 2006) p55.

<sup>60</sup>Boyd, S., *op.cit.* p1.

<sup>61</sup>The Matrimonial Causes and Reconciliation Bill, Bill 19, 21 November 1962.

<sup>62</sup>Cretney, S., *op.cit.* pp346-7, fn 174.

Nevertheless, the judicial attitudes to divorce were changing. This was demonstrated in the decision in the case of *Blunt v Blunt*<sup>63</sup> In this case, the Lords declared that there was a contradiction between upholding the idea of the sanctity of marriage in the wider community and the recognition that a marriage had completely broken down. Indeed, as the Finer Report<sup>64</sup> stated the decision in this case stressed the importance of the recognition of the breakdown of a marriage and the ability of the courts' use of discretion to dissolve a marriage.<sup>65</sup> The Lords decisions in the cases of *Gollins v Gollins*<sup>66</sup> and *Williams v Williams*<sup>67</sup> reinforced this shift. In both cases, the Law Lords granted divorce decrees on the grounds of cruelty without the respondents being morally irresponsible. Thus, the breakdown of a marriage was becoming a factor in divorce applications and the courts' decision to deny a decree on those grounds diminishing. Yet alongside this, there were gradual shifts in decisions regarding child custody laws that inevitably influenced demands to reform the divorce laws.

#### Child Custody Law

The general trend remained towards maternal presumption, of the care of children post-separation continued throughout the late nineteen fifties and sixties. For example, in the case of *Re S*<sup>68</sup> Roxburgh J, stated, 'children of this tender age should be with their mother.'<sup>69</sup> Indeed the law generally supported maternal presumption. Certainly, ideas of an adulterous mother being 'unfit' to mother, had as a rule diminished. This reflected and reinforced the division of the public and private spheres and the narratives of domesticity at their height following during this period.<sup>70</sup>

---

<sup>63</sup>[1943] AC 517 (HL).

<sup>64</sup>*Report of the Committee on One-Parent Families* Cmnd. 5629 (London: HMSO, 1974) at para. 4.35 as discussed in Cretney, S., op.cit. pp270 and 346-7 and fn. 174.

<sup>65</sup>Both parties admitted committing adultery and quite clearly the marriage had broken down. *Blunt v Blunt* [1943] AC 517.

<sup>66</sup>[1964] AC 644 (HL).

<sup>67</sup>[1964] AC 698 and as discussed in Cretney, S., op cit p352.

<sup>68</sup>[1958] 1 WLR 391.

<sup>69</sup>The 'tender' years related to the very early years of childhood.

<sup>70</sup>Brophy J., *Explorations in Law, the Family and sexuality*, op.cit. p100.

By the late nineteen sixties, decisions by the Court of Appeal indicated a shift away from this opinion. This is illustrated in the cases *J v C*<sup>71</sup> and *H v H* and *C*<sup>72</sup>. In both cases, the courts considered that the moral conduct of the parents was of little consequence in making the choice of child custody decisions, and the welfare of the child should be paramount. Adultery by either party was no longer sufficient to deny either parent custody of their children after separation.<sup>73</sup> Yet the mood in politics was also changing towards divorce. The Conservative Government, whose long held mantra was the importance of the stability of family, began to look more favourably towards reforms to the divorce laws.<sup>74</sup> However, support for reforms to the divorce laws emerged from an unlikely source: the established Church of England and instigated direct action to reform the divorce laws.

Headed by the Archbishop of Canterbury a steering group published their *Report Putting Asunder, A Divorce Law For Contemporary Society, 1966*, advocating radical changes to the divorce laws.<sup>75</sup> Whilst they would not consider divorce by consent, since this would make marriage a contract between two individuals, the Group suggested that 'breakdown with inquest' should replace all other grounds for divorce. Furthermore, they were determined that breakdown of marriage should replace matrimonial offences as grounds for divorce.<sup>76</sup> Opposition to the Report was inevitable; particularly from the Roman Catholic Church however a change in government<sup>77</sup> brought strong support towards the legal reforms.

The new incoming Labour Government set up the Law Commission<sup>78</sup> with the remit to renovate and simplify the legal system and in particular, family law. The Law Commission published their own recommendations, *Reform of the Grounds for*

---

<sup>71</sup>[1969] 1 ALL ER 788.

<sup>72</sup>[1969] 1 WLR 208.

<sup>73</sup>Brophy, J., *Explorations in law, family and sexuality*, op cit p104.

<sup>74</sup>Cretney, suggests that the Conservative Government, under the leadership of Harold Macmillan wanted to lose the 'grouse moor' image of the Party. The image had been the focus of satirists and the need to update their image increased with the Earl of Home taking up leadership of the Party. Cretney, S., op.cit p46, fn 96.

<sup>75</sup>Cretney, S., op.cit. pp 354-5.

<sup>76</sup>Cretney, S., op.cit pp357-8.

<sup>77</sup>The Labour Government came into office in 1964, the Prime Minister Harold Wilson.

<sup>78</sup>The Law Commission was established through the Law Commission Act 1965. The Commission's remit was to 'take and keep the law under review, to see to its 'systematic development and reform' and to work towards the simplification and modernisation of the law.' Cretney, S., *Law, Law Reform and the Family* (Oxford: Clarendon Press, 1998) p1.

*Divorce, Field of Choice*.<sup>79</sup> The Commissioners advocated the sole grounds of divorce should be the irretrievable breakdown of marriage. They argued this would indeed support the stability of marriage rather than destabilise it. Indeed, this mirrored Leo Abse's earlier suggestions that easier divorce would encourage the stability of marriage and discourage 'informal unions'. Indeed, similar to the Morton Report the Commissioners acknowledged the effects of divorce on children as a deep concern. Thus, the proposed reforms would allow the dissolution of marriage with 'the maximum fairness and minimum bitterness, distress and humiliation' and new families to reform.<sup>80</sup>

The consensus in the debates on the Law Commissioners' Bill resulted in a swift conclusion and the Divorce Reform Act 1969 received Royal Assent and became law in 1971. The significance of the Act becomes clear with five facts the courts needed to be satisfied of before granting a decree of divorce:

- a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
- b) that the respondent had behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
- c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
- d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition [and] the respondent agrees to a decree being granted;
- e) that the parties have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.<sup>81</sup>

Considering that historically, prior to the *Matrimonial Causes Act 1857*, there was no divorce except through an Act of Parliament; the 1969 Act was indeed a radical shift. Indeed, the Finer Report pointed out it was 'the most radical measure in the history of

---

<sup>79</sup>*Report on a Reference under section 31(1)(e) The Law Commission Act 1965* (1966), Cmnd. 3123, Law. Com. No. 15

<sup>80</sup>*The Reform on the Grounds of Divorce: Field of Choice* (London: HMSO, 1966) at para. 15.

<sup>81</sup>*Divorce Reform Act 1969*, s. 2 (1)



our divorce law.’<sup>82</sup> The Act reflected the Law Commissions’ ideas that easier divorce would stabilise marriage. Indeed this mirrored Leo Abse’s suggestions in 1962. Yet as Jane Lewis points out, the Act did not follow a ‘deregulation’ of personal lives but a ‘transformation’ from a set of critical moral rules. The architects of the Act, she argued set out to retain the stability of marriage through a more lenient moral code that would encourage individuals to act ‘honestly and decently towards one another.’<sup>83</sup>

However, the shift of emphasis from retaining the stability of marriage to the importance of stronger individual relations shattered the discourses against sexual relationships outside of marriage. The barriers to divorce were easy to overcome. Indeed, regarding the divorce laws, the 1969 Act ‘tore apart the shroud of centuries,’ because ‘It offered freedom to both sexes from an irksome and unjust social control.’<sup>84</sup> It was as Dame Shirley Summerskill declared ‘a Casanova’s charter’.<sup>85</sup> Indeed, the idea of the ‘Casanova’s Charter’ could be seen to buttress the ideas of the ‘permissive society’ of the permissive’ society of the nineteen sixties.

In reality, ‘the Casanova’s charter’ may actually have had its genesis during the nineteen twenties and the laissez-faire attitude following the First World War. Yet even this idea may be stretched further back in history and a ‘Casanova’s charter’ would sit well with the ideas of Percy Bysshe Shelley and William Godwin in the early nineteenth centuries discussed in Chapter 2. Likewise, the ideas and proposals for easier divorce echoed those advocated by Robert Owen.<sup>86</sup>

Claims that the Act would support marriage and allow couples to remarry and legitimise their children would seem to have failed. *The 1969 Divorce Act* appeared to represent a gateway to an ever-increasing number of divorce petitions. This raised questions and debates to seek solutions to the ever increasing figures for divorce petitions and the obviously increasingly numbers of children involved. Therefore, further legislative changes to the divorce laws followed in the early nineteen seventies

---

<sup>82</sup>*Report of the Committee on One-Parent Families* Cmnd. 5629 (London: HMSO, 1974) Chairman The Hon. Sir Maurice Finer para. 4.42.

<sup>83</sup>Lewis, J., op.cit. p56.

<sup>84</sup>Marwick, A., op.cit. p119.

<sup>85</sup>Marwick, A., *ibid*, p119.

<sup>86</sup>See Chapter 2

with the introduction of the *The Matrimonial Causes Act 1973*. Following closely after the 1969 Act, a number of Acts sought to simplify family law. *The Administration of Justice Act 1970* abolished the Probate Divorce and Admiralty Courts and were renamed the Family Division of the High Court. *The Matrimonial Causes Act 1973* merged the 1969 Act and the *Matrimonial Proceedings and Property Act 1970*. Yet, further changes to divorce and child custody laws originated from a scheme rather than a reform of the law. In 1973, the Conservative Government introduced a 'special procedure' to some undefended cases of legal separation.<sup>87</sup> The 'special procedure' set out to simplify divorce. The intention was that divorce would be so straightforward that legal aid would not be required. Indeed, by 1977, this applied to all undefended cases. Thus, the scheme was also a cost-cutting exercise reducing the costs to public funds of the increasing numbers of divorce petitions. Certainly, there was a tendency for a 'clean break'<sup>88</sup> in divorce to allow a fresh start for both parties and new families to be form. The intention was for State benefits to make up financial deficits in the family income.

In an application for an undefended divorce through the 'special procedures' there was an assumption that undefended, the facts of the appeal were true. The system allowed the judge to examine the petitioner's allegations without the need for either party to be present, to ensure that the criteria of 'irretrievably breakdown' were met.<sup>89</sup> Questions of behaviour only arose if the situation was clearly unpleasant.<sup>90</sup> The procedure merely ensured the process was not simply a stamp of approval. However, research showed that in undefended and agreed cases, there seemed little point in these measures.<sup>91</sup> Yet the impact of the 'special procedures' effectually changed the whole foundation of divorce laws.<sup>92</sup>

---

<sup>87</sup>A divorce granted after the courts had examined the application forms without the parties being present, and the district judge satisfied.

<sup>88</sup>That is a one-off payment in lieu of maintenance.

<sup>89</sup>If the district judge was satisfied of the facts, a decree nisi could be granted and after six weeks, a petitioner could apply for a decree absolute. The procedures remain in force.

<sup>90</sup>*Camm v Camm* [1982] 4 FLR at 577.

<sup>91</sup>Elston, E., Fuller, J., & Murch, M., 'Judicial Hearings of Undefended Divorce Petitions' *The Modern Law Review* Vol. 38 November 1975 No. 6 at 609-640 and discussed in Cretney, S., op.cit. p381.

<sup>92</sup>As discussed in Cretney, S., op.cit. p383.

The aim of the 1969 Act, to allow divorce with ‘maximum fairness and minimum bitterness, distress and humiliation’<sup>93</sup> did not necessarily followed in practice. As Stephen Cretney argues, the introduction of the ‘special procedures’ in undefended cases did little to reduce the anger, bitterness and grief of the aggrieved party. He suggested that this was because there was no space to respond to accusations. Consequently, the ‘special procedures’ would appear to antagonise the situation between the parties; acrimony would then arise around issues of maintenance and care of children becoming the subjects of contention.<sup>94</sup>

However, this argument is indicative of historical perspectives of divorce. As shown in Chapter 2, in the analysis of nineteenth century cases women certainly had no space or ‘legal voice’ to respond to accusations or at least must do so through another male party. Furthermore, acrimony, maintenance and the care of children were points of contention. A number of cases demonstrate this point, for example, the cases of Henrietta and Benjamin Greenhill, Caroline and George Norton, and Annie and Frank Besant considered in Chapter 2. Of course, these are only the reported cases. As suggested, from the late nineteenth century up until the nineteen thirties there were few reported cases of child custody disputes. It was the general trend to grant mothers custody of the children. The decision reflected her role as primary carer, reinforced by the dominant narratives of parenting and the clear division of the public and private spheres.

Nevertheless, the Morton Report recognised the issues of contestation strategies between parents in dispute and the use of the children in the conflict. The Commissioners stated, ‘One party may contest the other’s claim to custody from spiteful or selfish motives. The children are then in danger of becoming pawns in the struggle of wills.’<sup>95</sup> Thus, despite the theories underpinning ‘special procedures’ the scheme had simply shifted the acrimony and bitter contestations in divorce and child custody disputes from the public to the private sphere. With increasing numbers of divorces decrees, there were growing numbers of children implicated in the process. As a result, there were growing fears by politicians of threats to the stability of the

---

<sup>93</sup>*Report of the Committee on One-Parent Families*, op.cit. at para. 4.42.

<sup>94</sup>Cretney, S., op.cit. p383.

<sup>95</sup>*Royal Commission on Marriage and Divorce 1951-1955* Cmd. 9678 (London: HMSO, 1956). Para.366.

family and the wider social cohesion. The next part of this section explores the policies and legal agendas that sought to address the issues.

### Social Policies and Legal Changes: Addressing the issues of Single Mothers and Absent Fathers

The idea of the traditional family<sup>96</sup> has long been the mantra of the Conservative Party. In a speech to the WRVS annual conference in 1981, Prime Minister Margaret Thatcher announced ‘it all starts in the family [and] it’s the place where each generation learns its responsibilities towards the rest of society.’<sup>97</sup> Thus, the family and the stability of the family were according to Thatcherism, vital to the stability of the nation. Yet under the Thatcher government the family became targets particularly single parent families to cut state expenditure. Social benefits were restricted and only available to full time workers. As the majority of women were part-time workers, they were therefore unable to apply for benefits. Parallel to this, the Social Security Act 1986 discontinued maternity grants and single payments for maternity goods to women on income support. Alongside this, the Government reduced child benefits. The ‘family’ were the problem and the family the solution.<sup>98</sup> The family suffered financially and single mothers the situation was more acute, poverty, as during the inter-war period, was a real issue.

Dealing with the problems around financial and social support linked with research on the effects of post-separated parenting. Indeed, in the US a number of studies had found conflicting results. For example, Goldstein, Freud and Solnit suggested that the idea of a ‘clean break’ was best for the children of broken families. There was they argued the need for ‘unbroken continuity of affection and stimulating relationships with an adult.’<sup>99</sup> However, other research on ‘mother custody’ families showed that children coped better when there was close contact with both parents post-

---

<sup>96</sup> The traditional ‘nuclear’ family discussed in Chapter 1.

<sup>97</sup> In Maclean, M., *The Green Paper Supporting Families, 1998* in Carling, A., Duncan, S., & Edwards, R., Eds *Analysing Families Morality & rationality in policy and practice*,. (London: Routledge, Taylor & Francis Group, 2002) p64.

<sup>98</sup> Gittens, D., 2<sup>nd</sup> Ed., *The Family in Question* (Basingstoke, Hampshire: Macmillan Press Ltd. 1993).

<sup>99</sup> Goldstein, J., Freud, A., & Solnit, A.J., *Before the Best Interests of the Child* (New York: The Free Press, 1973) as discussed in Maclean, M., & Eekelaar, J., *The Parental Obligation* (Oxford: Hart Publishing, 1997) p51

separation.<sup>100</sup> Yet while legal and social policy makers in the UK accepted that disputes between separated parents were harmful to children, in the best interests of the child contact with both parents was necessary.

At the same time, some fathers were making their voices heard. Fathers' rights groups that had emerged in the nineteen seventies supported the need for change and their rights to share in parenting post-separation. Thus, the demands from separated fathers corresponded with the state's need to address the social and financial issues of lone mothers and absent fathers. Therefore, the state turned to fathers as an answer to meet the growing financial and social problems.<sup>101</sup> Consequently, there was a shift from the mother as a potential victim to a reshaping of fathers through their financial responsibilities. However, public policy makers were not alone in addressing issues of the breakdown of the family. The Law Commission followed a similar direction. In light of the increasing rates of divorce applications, there was a need to address the issues of the growing numbers of children involved and the protection of those children, the following part explores the Commissioners' agenda.

### **The Law Commission Working Papers: Divorce and Child Custody Laws: the Framework for the Children Act 1989**

Between 1985 and 1988, the Law Commission<sup>102</sup> undertook a number of Working Papers to discuss reforms to divorce and child laws that significantly contributed to the background and introduction of the Children Act 1989. For example, in their Report *Facing the Future, A Discussion on the Ground for Divorce*<sup>103</sup> stated 'the present law fails to recognise that divorce is not a final product but part of a massive transition for the parties and their children.'<sup>104</sup> This represented a shift the ideas of

---

<sup>100</sup>Goldstein, J., Freud, A., & Solnit, A.J., *ibid*, p51; Smart, C., & Neale B., *op.cit.* p36.

<sup>101</sup> Lewis J., 'The problem of fathers: policy and behaviour in Britain' in Hobson, B., Ed. *Making Men into Fathers* (Cambridge: Cambridge University Press, 2002) p129.

<sup>102</sup>The Law Commission was set up as an independent statutory body to investigate legal change. In 1966, the Law Commission described its function to assist the Legislature and the public in considering questions described its function in considering questions of the implications of various courses of action in legal change.

<sup>103</sup>The Law Commission Com. (No. 170) *Facing The Future A Discussion Paper On the Ground for Divorce*. No.170. HC 479 (London: HMSO, 1988.)

<sup>104</sup>The Law Commission *ibid* at 3.50.

‘clean break’ and a formal recognition that parenting continues after separation with both parents actively involved in the care of their children. The conclusions linked with the outcomes of the Commissions’ other Working Papers considering the child care laws.

### Child Care Laws

In their Working Paper, *Family Law Review of Child Law: Guardianship and Custody*<sup>105</sup> the Commissioners set out to establish ‘the best solution for children[and] making it clearer, simpler and we hope, fairer for families and children alike [and] alongside Government’s review of the public law governing child care responsibilities of local authorities.’<sup>106</sup> The Commissioners suggested that the terms ‘legal custody’ and argued that ‘to talk of parental ‘rights’ is not only inaccurate as a matter of juristic analysis but also a misleading use of ordinary language.’<sup>107</sup> In any cases of child custody dispute, the Commissioners recommended that the welfare of the child remain paramount and a parent’s responsibility to ensure the welfare of their child.<sup>108</sup> In the second series of Working Papers, *Family Law Review of Child Custody Law*, the Commissioners focused on clarifying the laws of child custody. The Commissioners stated ‘This whole area of law is bedevilled by the complication and duplication of remedies and procedures which have developed according to no clear principle.’<sup>109</sup> One aim of the Working Paper was to deal with the risk of the effects of parental conflict on children. Despite agreeing that parents were usually the best judges of their children’s needs and welfare, the Commissioners pointed out that separation and divorce were emotive issues. Parents, they argued, could be pre-occupied with the stress of their own emotional upheavals, thus ‘it (the law) cannot sit back and let this be decided by the parents.’<sup>110</sup>

---

<sup>105</sup>The Law Commission Working Paper No. 91 *Family Law Review of Child Law: Guardianship* Vol. 10 (London: HMSO, 1985) Section 1.9.

<sup>106</sup>The Law Commission (No. 172) (1988) *Family Law Review of Child Law Guardianship and Custody* H C 594, S.1.1;1.2.1.3.

<sup>107</sup>The Law Commission Working Paper No. 91 op.cit. Section 1.11.

<sup>108</sup> The Law Commission ibid Section 1.11.

<sup>109</sup>The Law Commission Working Paper (No. 96) Vol.11 *Family Law Review of Child Law: Custody* (London: HMSO, 1985) Part I Introduction, para 1.2.

<sup>110</sup>The Law Commission Working Paper No. 96, ibid at Part IV 4.8.

The Commissioners drew on the case of *M v M (Child Access)*<sup>111</sup> to support their arguments. In this case, Lately J. stated ‘no court should deprive a child of access to either parent unless it was wholly satisfied that it was in the interests of that child that access should cease. [and] Access was to be regarded as a basic right of the child rather than a basic right of the parent.’<sup>112</sup> Further, ‘To deprive a parent of access is to deprive a child of an important contribution to his emotional and material growing up in the long term.’<sup>113</sup> The Commissioners recommended that ‘it will benefit the child to continue to have two parents; not to feel that one had abandoned or been denied to him [and] such evidence as there is supports the view that continued contact is associated with the best long-term outcomes for the child.’<sup>114</sup> They further recommended that joint custody was the best way forward. This would, they argued ensure the welfare and best interests of the child and eliminate the bitterness against the custodial parents ‘having it all’. There should, the Commissioners declared be ‘no winners’, both parents should play a role in the upbringing of their child.<sup>115</sup> Ideas of ‘no winners’ and formal legal equality had emerged with the introduction of the *Matrimonial and Family Proceedings Act 1984*. By Section 25A, apart from the welfare of the child, no other facts took precedence over any others. In their final report, *Family Law Review of Child Custody Law and Guardianship and Custody*<sup>116</sup> the Commissioners argued that the law, as it stood ‘did not adequately recognise that parenthood is a matter of responsibility rather than rights.’[and]‘Our present law has no coherent legal concept of parenthood as such.’ Furthermore, they suggested that the terms of guardianship and rights were ‘archaic and confusing rules.’<sup>117</sup> They suggested abolishing the concept of rights and ‘parenthood become the primary concept’<sup>118</sup> thus, the responsibility to agree on the best arrangements for their children lay fully with the parents. The Commissioners also recommended that the concept of ““possession” is not only unrealistic where an older child is concerned but it is also a concept more familiar to the law of property. “Care” is more consistent with the modern approach to looking after children.’<sup>119</sup> This shift would seem to

---

<sup>111</sup>[1973] 2 ALL ER 81.

<sup>112</sup>*M v M (child :access)* [1973] 2 All ER 81.

<sup>113</sup>*M v M (child :access)* [1973] 2 All ER 89.

<sup>114</sup>The Law Commission Working Paper No. 96, op.cit. Part IV 4.30.

<sup>115</sup> The Law Commission *ibid*, 103, at Part IV 4.35 & 4.36.

<sup>116</sup>The Law Commission No. 172 , op.cit. p100.

<sup>117</sup> The Law Commission *ibid*, at Part II 2.1 & 2.2..

<sup>118</sup> The Law Commission *ibid*, at S. 2.3.

<sup>119</sup>The Law Commission *ibid*, at, S.2.16.

represent a substantive change towards the interpretation of the ‘child,’ no longer a ‘possession’ linked with property rights but of the need of ‘care’ for the child and links with the discussion of the changing concept of the child and childhood in Chapter 1. At the same time, debates defending the rights of parents brought a different perspective and added to the debates.

Parental Power: Parental Rights and the Care of Children.

### Parental Rights

At the same time as the Law Commission discussions were taking place other perspectives contributed to challenging the ‘right’ of parents. A high profile case brought the subject of parental rights to the forefront of legal and public debate. In the case of *Gillick v West Norfolk and Wisbech Area Health Authority*<sup>120</sup> Victoria Gillick, the mother of four daughters, all under the age of sixteen, had sought a guarantee from the Health Authority that her daughters would not be able to receive contraceptive treatment without her knowledge or consent.<sup>121</sup> The Health Authority refused. Mrs Gillick took her case to court on the grounds that the recommendations by the Department of Health and Social Security were against the law and her rights as a parent. The House of Lords held that the court should not make any statement on the case. As such, the decision shattered the historical common law of parental rights. However, other debates on the rights of parents that emerged from tragic circumstances and significantly influenced changes to the laws regarding the legal regulation of children and indeed in issues of the rights of parents.

### The Care of Children in Public Law: Child Abuse

The Law Commission’s review of childcare law provided the opportunity to consider the public law relating to the State care of children. In the nineteen seventies and eighties, the tragic deaths of Maria Cowell, Tyra Henry, Jasmine Beckford and Kimberley Carlile raised concerns of the level of care by the Social Services. Despite

---

<sup>120</sup>[1986] AC 112 [HL].

<sup>121</sup>*The Family Law Reform Act 1967* lowered the age of majority to 18 and allowed a young person of 16 to have any treatment without the permission of their parent.



being in the care of local authorities, the children were in the physical care of their parents and stepparents at the time of their deaths.<sup>122</sup> It would seem that the support from the Social Services was clearly missing. There was intense criticism of the Social Services' handling of the cases. Following separate public inquiries,<sup>123</sup> there were strong recommendations that there needed to be changes to the legal system in dealing with the legal regulation of children in the care of the local authorities. Calls for change also came from a different perspective of child abuse.

### Sexual Abuse of Children

Events at Middlesbrough General Hospital in 1987 raised the need for a closer investigation into this area of public law. Paediatricians at the hospital with an interest in the sexual abuse of children began to use a new method to diagnose any abuse. The test and other supportive evidence resulted in large numbers of children identified as being victims of sexual abuse. Furthermore, the numbers of children allegedly involved were so great that the local authorities were in a precarious position of being unable to provide the necessary emergency care. Complicating matters even further, the local authority did not agree with the medical opinions or the evidence.<sup>124</sup>

The reaction to the accusations raised a public outcry. Parents, politicians, and the media led campaigns against the doctors with allegations of unprofessional conduct. A Government inquiry was set up under the leadership of Dame Elizabeth Butler-Sloss.<sup>125</sup> The findings were critical of the paediatricians' over-dependence on the method and their management of the cases. However, most of the cases did indeed

---

<sup>122</sup>Maria Cowell lived with her aunt after her father's death but was returned to the care of her mother. Maria died on 6<sup>th</sup> January 1973 starved and beaten by her stepfather. Tyra Henry died from injuries caused by by her father. Jasmine Beckford who died in 1984 and Kimberley Carlile who died in 1986 were both physically assaulted by their stepfathers and died of her injuries in 1986.

<sup>123</sup>*A Child in Trust, The Report of the Panel of Inquiry into the Circumstances surrounding the Death of Jasmine Beckford* (London: Brent Council, 1985); *A Child in Mind: Protection of Children in a Responsible Society (The Report of the Commission of Inquiry into the circumstances surrounding the death of Kimberley Carlile)* (London: Borough of Greenwich, 1987).

<sup>124</sup>In Middleborough General Hospital Drs Higgs and Wyatt undertook examinations of children using new methods to test for child sexual abuse. The doctors claimed that 165 children examined showed signs of sexual abuse. As discussed in Smart, C., *Feminism and The Power of Law* (London: Routledge, 1989) at 62; Diduck A. and Kanagas, F., op.cit. p356; Cretney, S., op.cit. p716.

<sup>125</sup>Butler-Sloss, Lord Justice *Report into the Inquiry into Child Sexual Abuse in Cleveland* (London: HMSO, 1987) Cm.412.

show other symptoms to support evidence of sexual abuse. The inquiry raised the concern that the sexual abuse of children was far more widespread than realised. It also recognised a need for changes to the supervision of cases by the local authorities and legislative changes to protect vulnerable and sexually abused children. Yet, as Carol Smart argued, ‘Although it appears on the surface to be a panic about child sexual abuse within the family, it was in fact a panic over parents’ rights. [and] What appeared to be a concern for children became deflected into a concern to protect the nuclear family from outside interference’. Indeed there was a suggestion that parents’ rights had suffered through the actions of the Social Services to protect children.<sup>126</sup>

Therefore, despite disparate approaches from lawyers, legal reformists, courts, government policy makers, and separated fathers there was a common demand for changes in the legal regulation of the care of children in public law, in parenting post-separation in private law and the rights and responsibilities of parenting in both public and private laws. The Cleveland Inquiry undoubtedly supported this action.<sup>127</sup> The Government responded with the White Paper *The Law on Child Care and Family Services* in 1987,<sup>128</sup> and the Children Bill followed. The concluding part of this first section looks at the introduction of the Bill, the changes to the Act regarding the legal regulation of children in private law and the primary contradictions that emerged.

### **The Children Act 1989**

Introducing the Children Bill, the Lord Chancellor, Lord MacKay of Clashfern stated, ‘by far the greater part of statute law will be here in a form which is simpler, more accessible to those who work with it and more comprehensible.’<sup>129</sup> He continued to argue that there was a need to have a legal framework in place that would provide valuable protection, to young and vulnerable children: ‘This balance has been shown

---

<sup>126</sup>Smart, C., *Feminism and the Power of Law* op.cit. p62 and comment by Mr Tim Devlin on presentation of the Report to Parliament: ‘we regard it as high time the Government introduced legislation going beyond the White Paper, giving parents effective rights over their children, and social workers a range of alternatives to breaking up families, thus reversing the current unpleasant situation in which an over-zealous local authority that suspends disbelief finds it easier in law to take a man’s[sic] children than to freeze his [sic] bank account’  
HC Deb 6 July 1988, c 1070.

<sup>127</sup>Hunt, J., Macleod, A., Thomas, C., *The Last Resort Child Protection, the Courts and the 1989 Children Act* (London: HMSO, 1999) p2.

<sup>128</sup>*The Law on Child Care and Family Services* Cm. 62 (London: HMSO, 1987).

<sup>129</sup>HL Deb 22<sup>nd</sup> December 1988 c 488-9.

to be missing from child care law at present.’<sup>130</sup> The Lord Chancellor declared that the concept of rights was no longer to be suitable for this area of family law and the term of ‘parental responsibility’ represented a more modern approach. He stated that ‘The phrase (‘parental responsibility’) recommended by the Law Commission, is apt to my mind. It emphasises that the days when a child should be regarded as a possession of his parent-indeed when in the past they had a right to his services and to sue on their loss-are now buried forever.’ Parenthood he argued was the responsibility of taking care of the bringing up a child to be a fully a physically, emotionally and morally fully developed adult.<sup>131</sup> It could be suggested that after nearly eighty years Edward Jenks’ allegations of the unworkable and ‘ungodly jumble’<sup>132</sup> of this area of family law and the Law Commissioners’ comment that this area is ‘bedevilled by the complication and duplication of remedies and procedures’<sup>133</sup> was finally to be simplified.

The main aims of the Act, implemented on October 14 1991, were:

- To bring together private and public law in one framework;
- To achieve a better balance between protecting children and enabling parents to challenge state intervention
- To encourage greater partnership between statutory authorities and parents;
- To promote the use of voluntary arrangements;
- To restructure the framework of the courts to facilitate the management of family proceedings.<sup>134</sup>

The Act reinforced the principle of the welfare of the child as paramount<sup>135</sup> and advocated that the wishes and the feelings of the child (considered in relation to the age and understanding of the child) should be included. Indeed a ‘checklist’ of specific factors to ensure the welfare of the child provided guidelines as a measure of evenness in judicial decisions in residency dispute cases. Under Section 1(3):

---

<sup>130</sup>HL Deb *ibid*, c 488-9.

<sup>131</sup>HL Deb *ibid* c 490.

<sup>132</sup>Jenks, E., ‘Recent Changes on Family Law’ 1928 *The Law Quarterly Review* 44 p314.

<sup>133</sup>The Law Commission Working Paper No. 96, *op.cit.* Part 1 Introduction, para. 1.2.

<sup>134</sup>Part 2 An overview of the Act.

<sup>135</sup> First introduced in the *Guardianship of Infants Act 1886* and reinforced in the *Guardianship of Infants Act 1925*

In the circumstances mentioned in subsection (4), a court shall have regard in particular to-

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;
- (d) his age, sex, background and any characteristics of which the court considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
- (g) the range of powers available to the court under this Act in the proceedings in question.

The Act abolished a number of historical terms, the rule that the father was the natural guardian of his legitimate child, 'residency and contact' replaced 'child custody and access' and 'rights' to custody of children with 'parental responsibilities'.<sup>136</sup> While mothers have automatic parental responsibility, defining the concept of 'parental responsibilities' the Act stated at Section 2 (1) Where a child's father and mother were married to each other at the time of his birth, they shall each have parental responsibility for the child. In s 3 (1) the Act states that 'parental responsibility means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.'<sup>137</sup> The responsibility of the care of children post-separation clearly lay with both parents. The Act struck a balance between family autonomy and minimising state intervention towards the care and protection of the child.<sup>138</sup> The child was now the vulnerable child<sup>139</sup> needing protection both in the public law and in private law where the vulnerability of the child linked with the breakdown of the family.

---

<sup>136</sup>Parental responsibility for children s. 2 (4).

<sup>137</sup>*The Children Act 1989* C. 41 s 3.

<sup>138</sup>Parry, M., Ed. *Studies in Law The Children Act 1989: Conflict and Compromise* (Hull: Hull University Law School Studies in Law, 1992) p3.

<sup>139</sup>See Chapter 1 for a discussion on the changing interpretations of the child and childhood.

The shift from rights to responsibilities also reflects the effort of social policy makers to promote the relationships between fathers and their children. Alongside this, the change also illustrates the strength of the economic policies in addressing the financial responsibilities of the family indeed, this led directly to the *Child Support Act 1991*.<sup>140</sup> As Smart pointed out there was an explicit aim of ‘social engineering’ in family law in setting out to reconstruct family life post-divorce.<sup>141</sup>

### From Rights to Responsibilities

Chapter 1 indicated that the shift to responsibilities was not only striking but also contradictory. There is no doubt that in the Act, the definition of responsibilities ‘parental rights’ remains a clear factor. In addition, the inclusion of the European Convention on Human Rights and Fundamental Freedoms into the UK’s constitution that emphasises the rights of an individual to a private and family life further reinforces the idea of rights,<sup>142</sup> the ‘rights’ argument has not entirely been abolished. Alongside this, the courts have found interpretations of the shift from ‘parental rights’ to ‘parental responsibilities’ complex and have been inconsistent in their interpretations of ‘parental responsibilities’. Two cases illustrate this argument. For example in the case of *Re S (A Minor) (Parental Responsibility)*<sup>143</sup> Ward L.J. he stated his concern at the increases in the numbers of appeals to the Family Division. The applications he added ‘have become one of these little growth industries of misunderstandings.’ He continued,

Misunderstanding arises from a failure to appreciate that, in essence, the granting of a parental responsibility order is the granting of status. It is unfortunate that the notion of “parental responsibility” has still to be defined by s 3 of the Children Act 1989 to mean “all the rights, duties, powers, responsibilities and

---

<sup>140</sup>Collier, R., & Sheldon, S., *Fragmenting Fatherhood* (Oxford: Hart Publishing, 2008) p115.

<sup>141</sup> Smart, C., ‘Wishful Thinking and Harmful Tinkering? Sociological Reflections on Family Policy’ 1997 *Journal of Social Policy* 26 3 p1.

<sup>142</sup>Eekelaar, J., *Family Law and Personal Life* (Oxford: Oxford University Press, 2006) p123; Herring, J., 3<sup>rd</sup> Ed. *Family Law* (Harlow, Essex: Pearson Education Ltd., 2007) p27.

<sup>143</sup>[1995] 3 FCR 225.

authorities which by law a parent has in relation to a child and his property.<sup>144</sup>

In this case, an appeal from the father against an earlier decision to refuse an application for parental responsibility was overturned. Ward L.J. added 'It is wrong to place undue and therefore false emphasis on the rights and duties and the powers comprised in parental responsibility and not to concentrate on the fact that what is at issue is conferring upon a committed father the status of parenthood for which nature has already ordained that he must bear responsibility.'<sup>145</sup> In contrast, in the case of *M v M (Parental Responsibility)*<sup>146</sup> the father, who had serious mental difficulties affecting his behaviour, became increasingly violent towards the mother. Therefore, the courts decided contact and parental responsibility were not in the child's best interests. However, in denying parental responsibility Wilson J. commented, 'I feel a real sense of discomfort at a conclusion which does not at least give him that status.'<sup>147</sup> The cases illustrate the contradictions and difficulties for the courts and indeed the idea that the responsibility of the father is a status rather than an active role in the care of the child.

Legal academics have also had difficulties with the shifts from rights to responsibilities. For example, John Eekelaar is particularly critical. He suggests that the introduction of the concept of 'parental responsibilities' to the 1989 Act had two different meanings. Firstly, it represented parents' duty of the care of their children and to clarify parents only had 'rights,' regarding their children. Secondly, the shift placed the responsibility of the welfare of the child on parents rather than the state.<sup>148</sup> Yet the welfare of the child remains paramount and parents' rights to implement their authority in the best interests of the child. For example, a parent's right on a decision regarding the child's education also demonstrates parental responsibility in making that decision. Thus, in some decisions the same factors, rights and responsibilities are

---

<sup>144</sup>*Re S (A Minor) (Parental Responsibility)* [1995] 3 FRC at 234.

<sup>145</sup>*Re S* ibid p234.

<sup>146</sup>[1999] 2 FLR 737.

<sup>147</sup>*M v M (Parental Responsibility)* [1992] 2 FLR 744.

<sup>148</sup>Eekelaar J., op.cit. p103.

in both.<sup>149</sup> Thus, as Eekelaar argues conceptually, parental responsibility cannot avoid being understood as anything other than ‘an enhancement of parent’s rights.’<sup>150</sup>

In addition, Stephen Parkers argues there is confusion on a theoretical level of the shift from the idea of ‘parental rights’ to ‘parental responsibilities’ that is inherent in both English and Australian Family law. Parker suggests there has been a shift from the idea of a ‘rights’ model in family law to a ‘utility’ model.<sup>151</sup> Historically, and drawn from a Kantian deontological framework<sup>152</sup> the law was articulated as the precedence of a ‘rights’ agenda particularly the rights of the father. However, following the philosophy of utilitarianism advocated by Jeremy Bentham<sup>153</sup>, a teleological liberal philosophy of a utility and functional model has gradually emerged through the needs of the welfare of the child. Yet the 1989 Act retains, in the terminology of Parker, a ‘utility’ as welfare approach and a ‘rights’ as justice’ approach. The contradictions he argues are ‘normative anarchy’ in this area of family law.<sup>154</sup>

John Dewar agrees. He contends that the ideas of rights and utility are different methods of making the decision on the care of children.<sup>155</sup> Yet he argues this is not a new dilemma in family law. The ‘chaos’ of family law is ‘a perfectly normal state of affairs’ since here the law deals with the emotion aspects of family life. The aspects are the dichotomy of each other, ‘love, passion, intimacy, commitment and betrayal’<sup>156</sup> thus there is confusion. As such perhaps the idea of simplifying the law through the reforms has not transpired. Therefore, it would appear that Edward Jenks ‘ungodly jumble’ of family law remains an issue.

However, is the shift from rights to responsibilities new? Certainly, challenges to paternal *rights* of the child emerged in the late nineteenth century as Chapter 2

---

<sup>149</sup>Cretney, S., & Probert, R., *Family Law* (London: Sweet & Maxwell, Thomson Reuters (Legal) Ltd., 2009) p242 11-002.

<sup>150</sup>Eekelaar, op.cit. p123.

<sup>151</sup>Parker, S., ‘Rights and utility in Anglo-Australia family law’ 1992, *Modern Law Review* 55 p312.

<sup>152</sup>Drawn from Kant’s belief that individuals are ends in themselves, individual rights and their protection should be over the common good.

<sup>153</sup>The principle of utility states that the action is right in so far that it produces the greatest happiness of the greatest number.

<sup>154</sup>Parker, S., op. cit. pp319-20.

<sup>155</sup>Dewar, J., ‘The normal chaos of family law’ 1998 *Modern Law Review* 61 at 471.

<sup>156</sup>Dewar, *ibid*, p468.

discussed. The shift did not give mothers the rights but conferred on her the *responsibilities* of the child's welfare. In addition, there is an argument that the Guardianship of Infants Act 1925 also recognised the responsibilities towards the care of the child. The 1925 Act emphasised that in cases of dispute, the welfare of the child was paramount, *parental rights were secondary*. Linked with this were the growing scientific debates around the importance of the mother/child bond, the welfare and the care of the child that were gaining status. This links with the Parliamentary debates at that time. There were claims that the Bill would bring a husband and wife on equal footing in relation to the raising of their children.<sup>157</sup> Clearly, this does not refer to legal custody but the *responsibilities* of the upbringing of children. Nevertheless, as the analysis has shown the idea of responsibilities was overtaken by the paramount principle of the welfare of the child. Therefore, the idea of responsibilities in the care of the child post-separation is not a new concept however, the equality of rights and responsibilities is now clearly evident. In this social policy is particularly useful to demonstrate this argument. Indeed, the concept of responsibilities and particularly a father's responsibilities has been a key factor continues to influence family policy and legal reforms in that the separated father, is now determined as a 'responsible' father meeting the financial and social needs of his children following separation.

Thus far, this first section has explored the dramatic social and economic changes over the last three decades. The shifts have undoubtedly affected men through employment trends, ideas of the 'new' father and men's responsibilities. Yet just as in the inter-war period, the impact has significantly impinged on women and particularly mothers. Women have increasingly entered the workforce and higher education, advances in birth control methods and easier divorce have allowed women a measure of financial independence and to make choices about their own bodies and their family life. Bolstered by the re-emergence of feminist women's attitudes have changed and their demands for autonomy. The impact has had an effect on intimate and family relationships with increasing single parent families.

---

<sup>157</sup> Colonel Greig H C Deb 6<sup>th</sup> May 1921 c1394-5.



It is against this background that policy changes and legal reforms that included the *Children Act 1989* were introduced. The Act dramatically changed the language and terms of the laws regulating the care of children post-separation. However, as Carol Smart points out, it was unforeseeable that encouraging fathers to take a more responsibility post-separation would instigate a revolution in the ideas of fatherhood and motherhood.<sup>158</sup> As such, Section 2 will explore the impact of the reforms and the direction of further legal and family policy changes in this area of family law up until the *Family Law Act 1996*.

## SECTION 2

### **The Politics of Parenting**

In the early nineteen nineties strike actions by miners and lower paid workers continued. However, some settlement of peace in was emerging in Northern Ireland. In politics, the Conservatives remained in power but Mrs Thatcher resigned and John Major became Prime Minister. One of the most striking features of the nineteen nineties has been the rapid change to the structure of family life. As increasing numbers of women have entered the work force, dual earner families are more commonplace and the divisions of the private and public spheres are blurred.

Furthermore, demographic trends<sup>159</sup> show rapid increases in the numbers of petitions for divorce, escalating numbers of remarriage, cohabitation and single parent and never-married mother families. Yet, as Jane Lewis argues men's rising unemployment rates and a growing culture of working long hours would certainly give women little financial reasons to choose marriage to the fathers' of their children.<sup>160</sup> Nevertheless, other forms of family structures have emerged. Legislation has given same-sex partners similar status and rights as married heterosexual couples. In addition and as discussed in Chapter 1, advances in reproduction techniques have

---

<sup>158</sup>Smart, C., 'The "New" Parenthood: Fathers And Mothers After Divorce' in Smart, C., Silva, E., *the new family?* (London: Sage Publications, 1999) p101.

<sup>159</sup>Demographic trends of Marriage, Divorce, Re-marriage and Cohabitation as outlined in Chapter 1.

<sup>160</sup>Lewis, J., op.cit. pp134-5.

contested ideas of traditional and gendered parenthood.<sup>161</sup> Assisted Reproductive Technologies (ART) challenges parenthood further. Through sperm donation and surrogacy there can be another father and another mother involved in the conception of a child. Thus, there are parents genetically linked to a child but others are social parents to that child. This is further complicated when ART's assist with conception in relationships other than heterosexual couples. The laws dealing with the legal responsibilities towards the children in this case are extensive and complex. Unquestionably, in the contemporary era, the gendered role of parents has become complicated, blurred and confused. Politicians were increasingly concerned with the threat to the stability of family life and a breakdown in the wider social context. In addition, the continued increasing divorce rates and the scale of the financial costs to the state in income support and benefits to never-married mothers added to their anxieties.

#### Family Stability and Government Policies

Motherhood and lone-motherhood became the target for political debate.<sup>162</sup> The Conservative Government retaliated with a 'back to basics' campaign. Indeed, a number of right wing political commentators were critical of the breakdown of marriage and ideology of the traditional family life. For example, Norman Dennis blamed young men for failing to make a lifelong commitment to marriage and parenthood<sup>163</sup> and Patricia Morgan asked was this '*Farewell to the Family?*'<sup>164</sup> She declared, 'We have a historically unprecedented crisis in human relations on our hands [and] But it is not marriage that is under threat-it is the family [and] Widespread failure of people to marry and rear children means a general collapse of all social continuity and membership[and] Civilisation is at stake.'<sup>165</sup>

---

<sup>161</sup>Bridge, S., 'Assisted Reproduction and the Legal Definition of Parentage' in Bainham, A., Day Sclater, S., & Richards, M. Eds. *What is a Parent?* (Oxford: Hart Publishing, 1999) at 74; Herring, J., op.cit. p306.

<sup>162</sup>Jagger, G., & Wright, C., Eds. *Changing family values* (London: Routledge, 1999) p30.

<sup>163</sup>Dennis, N., *The Invention of Permanent Poverty* (IEA Health and Welfare Unit, 1997).

<sup>164</sup>Morgan, P., *Farewell to the Family?* (London: IEAHealth and Welfare Unit, 1995).

<sup>165</sup> Morgan, P. 'Family Crisis Affects Us All' in Donnellan Ed. *Marriage and Divorce: Issues for the Nineties?*(Independence Educational Publishers, 1996) at 1-2, as discussed in Day Sclater, S., 'Re-Moralising The Family?-Family Policy, Family Law And Youth Justice' 2000 *Child and Family Law Quarterly* 12 2 p136.

## Addressing the Problems of Lone Mothers and Absent Fathers: Social and Legal Debates

Divorced mothers were considered less a problem as never-married mothers. The issues were two fold. Firstly, never-married mothers were seen a serious threat to the stability of society by politicians, social commentators and the media and became the scapegoats for rising juvenile crime and delinquent children. Secondly, the costs of benefits an increasing burden on the state. In 1971, 213,000 lone parents received supplementary benefits by 1987 the figure had risen to 649,000.<sup>166</sup> Only 30% of single mothers received financial support from the fathers of their children.<sup>167</sup> Indeed, by 1986, 93% of never-married mothers claimed state benefits as their source of income.<sup>168</sup> Yet on reflection and discussed above, ‘splintered’ feminism provides an understanding of the changing attitudes of women towards intimate relationships and the family. Thus, some women chose their autonomy through their choice: career, marriage, divorce or to be single parents. The choices were political and part of the context of feminism. Yet according to Martin Pugh, politicians and the media used feminism as a scapegoat for social shifts and moral decline and the breakdown of the family.<sup>169</sup>

Absent fathers also generated concerns amongst politicians. There were accusations of ‘deadbeat dads’ and feckless fathers.<sup>170</sup> The loss of the authority of the father and arguably children losing a father figure also linked with the increase of juvenile delinquency, the health and education of children.<sup>171</sup> Dominant right wing politicians voiced their anxiety with the trend towards ‘the separation of marriage and parenthood’<sup>172</sup> and the failure of the father to meet their financial and social

---

<sup>166</sup>Bradshaw, J., & Millar, J., *Lone Parent Families in the UK* (London: HMSO: 1991) p64.

<sup>167</sup>Bradshaw, J., & Millar, J., *Children Come First The Government’s Proposals on the maintenance of children* (London: HMSO, 1990) Cm. 1263 p78.

<sup>168</sup>Morgan, P., op. cit. p6.

<sup>169</sup>Pugh, M., op.cit. p335.

<sup>170</sup>Morgan, P., op.cit. p154; Smart, C., ‘The ‘New’ Parenthood: Fathers And Mothers After Divorce’ in *the new family?* op.cit. p100.

<sup>171</sup>Brophy, J., *Explorations in law, family and sexuality*, op. cit. p112-3. In addition, ideas of juvenile delinquency were also not a new phenomenon. In 1806, there was great fear in London of youth crime. Courts ordered unruly and disruptive children, ‘Artful Dodgers’ to be directed to the emerging philanthropic societies; Morgan, P., op.cit.. p154.

<sup>172</sup> Lewis, J., op.cit. p130.

responsibilities.<sup>173</sup> Thus ideas that the 1989 Act would reduce conflicts between separating parents regarding the care of their children and financial maintenance did not subside. As Susan Boyd suggests ‘using new terminology such as “joint custody” of “parental responsibility” has not succeeded in changing behaviour making parents share responsibility.’<sup>174</sup>

#### Divorcing Responsibly: *The Family Law Act 1996*

The Government did take steps to deal with the problems of divorce and separation (of cohabiting couples) and financial responsibility. The first was through the introduction of the *Child Support Act 1991* and the establishment of the Child Support Agency in 1993. However, there were immediate problems that added to the increasingly difficulties in attempting to simplify and disentangle this complex area of family law. The aim to reduce conflict between separating parents further by moving the collection and distribution of financial maintenance from the courts to the CSA failed. Administration problems delayed payments.<sup>175</sup> Furthermore, higher payments and the fact that the CSA failed to take into account a mother’s financial position raised angry reactions from fathers and fathers’ rights groups.<sup>176</sup> The CSA was an intrusion by the state that as Jane Lewis argues, separated fathers had never faced before.<sup>177</sup> At the same time, linking maintenance and the deduction of money for parents on state benefits with responsibility added to the likelihood of conflict between parents.<sup>178</sup> Thus, there remained concern amongst politicians of a ‘crisis’ in

---

<sup>173</sup>Fox Harding, L., *Family, State & Social Policy* (Basingstoke Hampshire: Macmillan Press Ltd., 1996); Lewis, J., op cit p130. As Lewis argues Charles Murray 1985 was one of the strongest voices on the fear of the lone mother and the consequences of anti-social behaviour as well as the burden on the state for financial support

<sup>174</sup>Boyd, S.B., ‘Legal Regulation of Families in Changing Societies’ in Sarat, A., *The Blackwell Companion to Law and Society* (Blackwell Publishing, 2004) p266.

<sup>175</sup>The time it took for the agency to get money from an absent parent rose from 150 days in 2003; 202 days in 2004 and 238 days in 2005. The delays can only add to the tensions and misery of the parents waiting for payments. Hencke, D., ‘Seven out of 10 absent parents pay maintenance for children’ *The Guardian*, 10/04/2006, p8.

<sup>176</sup>Diduck, A., & Kanagas, F., op.cit. pp485-7; Lewis, J., op.cit. pp142-3; Jagger, G., & Wright, G., Eds. *changing family values* (London: Routledge, 1999) pp30-1.

<sup>177</sup>Lewis, J., op.cit. pp140-1.

<sup>178</sup>Taking into account parents with care issues and receiving Income Support and reducing the amount of maintenance in relation to the amount of responsibility. Stanley, K., & Williams, F., ‘Relationships between parents’ in Stanley, L., Ed. *Daddy Dearest? Active Fatherhood and Public Policy* (London: I.P.P.R., 2005) p47.

family life and a need to strengthen the family and a need to strengthen the family through reforms to the divorce laws that would support marriage.<sup>179</sup>

In 1990, the Law Commissioners in their *Report of the Grounds for Divorce*<sup>180</sup> stated it was not the grounds for divorce but the legal process establishing the point of breakdown that they believed was the problem. 'Breakdown' they suggested should be defined as after a one-year period from the petition. The Commissioners proposed that the time be used constructively to consider reconciliation, counselling and mediation. Their second Paper, *Looking to the Future: Mediation and the Ground for Divorce*<sup>181</sup> reinforced the mediation and counselling proposals advising that divorce should be a process of transition over a set period. It was, as Stephen Cretney argues, the first time Government were involved in legislative policy on divorce, since the costs of the services would come from public expenditure.<sup>182</sup>

Nevertheless, as Carol Smart argues, the proposals were a move away from the liberal views of 'governance'<sup>183</sup> in ideas of encouragement and guidance that emerged from the late nineteen sixties. This reflects the thinking of Michele Foucault and his philosophy of the use of power.<sup>184</sup> There was she argued a shift back to 'government' dominant in the nineteen fifties and early sixties and a re-emergence of ideas of 'control and punish.'<sup>185</sup> Undoubtedly, this reflected right wing politics and the increasing state intervention of the family. The introduction of the Family Law Bill in 1995 presented, as Carol Smart argues, opportunities for such debates of governance and government at the centre of political debate. On one side, there were the right wing theories of a dictatorial view of marriage and family life. For example, Baroness Young stated that changing attitudes towards marriage 'reflects the growing self-disease which is debasing our society.'<sup>186</sup> However, from a more liberal view, Church commentators argued that while marriage should be a lifelong commitment,

---

<sup>179</sup>Day Scalter, S., & Piper, C., 'The Family Law 1996 in Context' in Day Scalter, S., & Piper, C., Eds. *Undercurrents of Divorce* (Dartmouth: Ashgate, 1999) p6.

<sup>180</sup>Law Comm. No. 192 (1990)

<sup>181</sup>Cm.2799 1995.

<sup>182</sup>Cretney, S., op.cit. p387.

<sup>183</sup>Smart, C., 'Divorce in England 1950-2000: A Moral Tale?' in Sandford, N., Katz, Eekelaar, J., Maclean, M., Eds. *Cross Currents* (Oxford: Oxford University Press, 2000) p375.

<sup>184</sup>Reference to Foucault and governance in Chapter 2.

<sup>185</sup>Smart, C., *Cross Currents*, op cit. p375.

<sup>186</sup>HC Deb 29<sup>th</sup> February 1996 c1638.

marriages did break-up. There was a need to be conciliatory and reflective.<sup>187</sup> As Lord Bishop of Oxford stated, ‘anyone who knows anything about relationships knows how difficult it is to attribute blame fairly. If we are to have a divorce Bill, let it be one that is humane and effective.’<sup>188</sup> Thus, the remit of the 1995 Bill was to support marriage by removing fault in divorce<sup>189</sup> and reducing conflict between parties through reflection, mediation and counselling. In some respects, the ideas of mediation and counselling in the Family Law Bill 1995 reflected the conciliatory roles of the magistrates and probation officers in the magistrates and police courts of the late nineteenth century.

Ideas of mediation and counselling were some of the primary aims of the Bill. As Helen Reece argues, the Act set out to persuade couples to divorce responsibly and have time to reflect on their decisions.<sup>190</sup> Indeed, the ideas reflected the informal advice of the magistrates’ courts in the nineteenth century and promote marriage and the nuclear family. However, the outcomes were disappointing. Attendance was poor and research showed that the meetings tended to involve just one of the separated parties.<sup>191</sup> The lawmakers did not take into account individuals’ freedom of choice, their feelings or animosity. As Davies suggests the law cannot repair individual broken relationships indeed the processes of the law can indeed make it worse<sup>192</sup> There were minor changes to the laws regulating the care of children post-separation,<sup>193</sup> yet as Jonathan Herring argues, there was no fundamental change to advance the interests of the child.<sup>194</sup>

However, the outcomes of the *Children Act*, the *Child Support Act*, the *FLA* and the establishment of the *CSA* set a conundrum. They addressed a ‘crisis’ in the

---

<sup>187</sup>Smart, C., *Cross Currents*, op. cit. pp376-7.

<sup>188</sup>HC Deb 30<sup>th</sup> November 1995 c734-6.

<sup>189</sup>Removing fault was also one of the aims of the 1969 Act, however this was based on a number of factors that needed to be satisfied by the courts.

<sup>190</sup>Reece, H., *Divorcing Responsibly* (Oxford: Hart Publishers, 2003).

<sup>191</sup>Herring, J., op.cit. p114.

<sup>192</sup>Davis, G., ‘Informing policy in light of research findings’ *Family Law* 2001, 31 at 822 & James, A., ‘The Family Law Act 1996’ in Carling, A., Duncan, S., Edwards, R., *Analysing Families* (London: Routledge, 2002) p61 and both discussed in Herring, J., 3<sup>rd</sup> Ed. *Family Law* (Harlow, Essex: Pearson Education Ltd. 2007) p117.

<sup>193</sup>Under s 11, the courts were required to consider the wishes of children. However, this was only taken into account a divorce was in question through unresolved arrangements for the children. If the courts decided, the child would suffer significant financial or other needs, under s 10, an order could be granted prohibiting a divorce. *Family Law Act 1996*.

<sup>194</sup>Herring, J., op.cit. p116.

*breakdown* of the family by *reconstructing* a ‘family’ post-separation. Despite the impact of wider changes that challenged familial relationships and the increasing diversity of family structures the Acts reinforced the idea of the traditional family. The law remained rooted in the historical ideas of the family and buttressed the *ideology* of the nuclear family. An idea that has been argued as an intangible philosophy yet has had a real impact on political and legal narrative on family life.

Section 2 has explored the direction of the laws of divorce and regulation of the care of children post-separation following the Children Act 1989 up until the Family Law Act 1996. The increasing numbers of single parents, either through divorce or by choice and the growing numbers of children involved continued to be a grave political concern. In the wider social and economic context, families and parenting practices were also coming to the forefront of political debate. Section 3 moves on to consider the policy changes in the broader context relating to supporting parents and separating parents and the impact on residency and contact law up until the *Children and Adoption Act 2006*.

### **New Labour and the Politics of the Family**

New Labour came into government in 1997 and captured right wing political thought on the family. The family became the mantra New Labour. The ‘moral deficit’ and the importance of the stability of the family in the wider context of social cohesion emerged as central to New Labour policies. In an early speech, Prime Minister Tony Blair declared:

We cannot say we want a strong and secure society when we ignore its very foundations: family life. This is not preaching to individuals about their private lives. It is addressing a huge social problem. Attitudes have changed [and] Every area of this government’s policy will be scrutinized to see how it affects family life. Every policy examined, every initiative tested, every avenue explored to see how we can strengthen our families.<sup>195</sup>

---

<sup>195</sup>*The Guardian* 1.10.97

With the increase of dual-earner families, the New Labour Government introduced policy changes supporting working parents to allow them to meet responsibilities for their children particularly since when mothers are increasingly involved in the formal economy. New Labour, strengthened by directives from the European Union has set out to support families. The UK's decision to accept the European Union's Social Charter<sup>196</sup> has obliged the implementation of European Directives on *Fairness at Work*,<sup>197</sup> maternity and paternity leave, emergency leave and working time. There is now a blurring of the divisions of labour.

Parallel to this, the continued rising numbers of divorce cases, separations, and the consequences of changing family structures added to the need for stability for children. In 1998, the Government published the first formal family policy discussion Paper, *Supporting Families*.<sup>198</sup> The Paper aimed to find ways to support *all* families experiencing family change. As the document stated, 'The truth is that families are, and always will be, mainly shaped by private choice well beyond the influence of government. That is how it should be. But that is no excuse for government not to do what it can.'<sup>199</sup> Nevertheless, there is a contradiction in the Paper. While seemingly accepting other choices of family structures, the Paper makes it clear that marriage is the preferred setting and the most effective family way to ensure moral, social unity and the well-being of children.<sup>200</sup> At a practical level, various government schemes have been set up to support parents and indeed others caring for children such as grandparents. This includes the National Family and Parenting Institutes, Home Office Support Unit, Sure Start Scheme, financial Working Family Tax Credits and New Deal for Lone Parents<sup>201</sup> have all been part of the schemes to help the family. However, supporting parents has also involved getting mothers, including single mothers, back into work. Underpinning the moral stance and stability of the family

---

<sup>196</sup>The Charter implemented directives on maternity and paternity leave, emergency leave and working time.

<sup>197</sup>The aim of this Paper was to support a balance between work and family life, promote equality between women and men to meet their responsibilities at work and at home and 'family friendly' policies by employers.

<sup>198</sup> Home Office, *Supporting Families* (London: HMSO, 1998).

<sup>199</sup> Home Office, *ibid*, p187, at para 16.

<sup>200</sup>Barlow, A., Duncan, S., & James, G., 'New Labour, the rationality mistake and family policy in Britain' in Carling, A., Duncan, S., & Edwards, R., Eds. *Analysing Families Morality & rationality in policy and practice* (London: Routledge, Taylor & Francis Group, 2002) p116.

<sup>201</sup>Linking welfare with paid work for all lone parents on income support.



New Labour advocates is clearly mothers' paid work.<sup>202</sup> This runs parallel to an active policy to encourage fathers' involvement in caring and sharing in the home and reflects the gender shifts in the patterns of employment. There is now a blurring of the traditional gendered roles of parents and the private and public spheres.

### Family Policies and the Politics of Parenting

There has been a significant drive by the Government for fathers to be more involved with their children as active 'hands on' fathers and shared carer.<sup>203</sup> New Labour political, economic and legal discourses advocate a new fatherhood. Fathers are now central to family life political agendas and legal change. The Government have brought fathers and fatherhood onto the political agenda and back into the home. As Brid Featherstone and Liz Trinder point out, New Labour policies are encouraging towards fathers.<sup>204</sup> Agencies such as Fathers Direct a government-funded group have been set up. However, in each policy proposal, there is explicit reference to the role of fathers in relation to their children and particularly their sons. This undoubtedly reflects ideas of the need for the authority of the father as a figure of social control. Scourfield and Drakefords' arguments expose the way that Government agenda also negotiates the role of women in their social policy changes. The feminisation of the workforce has disrupted the traditional gendered role of parents to meet the changed labour market.<sup>205</sup> Yet the political remit for mothers is the reverse. The Government's policies are as much about encouraging mothers to work as drawing fathers into the home.<sup>206</sup> This is not to deny that some mothers choose to enter the formal economic market or a need to recognise that pregnancy and childbirth limit the

---

<sup>202</sup>Barlow, A., Duncan, S., & James, G., op. cit. p114.

<sup>203</sup>A number of academic debates have focused on the inclusion of fathers into family policy including: Barlow, A., & Duncan, S., 'New Labour's communitarianism, supporting families and the 'rationality mistake' Part II 2007 *Journal of Social Welfare and Family Law.*, 22, 2, pp129-143; Featherstone, B., 'Taking Fathers Seriously' 2003 *British Journal of Social Work*, 33:pp239-254; Kilkey, M., 'New Labour and Reconciling Work and Family Life: Making It Fathers' Business', 2006 *Social Policy & Society.*, 5, 2, pp167-175; Lewis, C., 'A man's place in the home: Fathers and families in the UK', (Joseph Rowntree Foundation, 2000). <http://www.jrf.org.uk/knowledge/findings/foundations/440>; O'Brien, Working Paper Series No.18 "Shared Caring bringing fathers into the frame" (Manchester: Equal Opportunities Commission. Resolving the tensions in parenting policy, Joseph Rowntree Foundation, 2005) <http://www.jrf.org.uk/knowledge/social-policy/333>; Scourfield, J., & Drakeford, M., 'New Labour and the 'problem of men' *Critical Social Policy*, 2002 22 p 619.

<sup>204</sup>Featherstone, B., & Trinder, L., *ibid*, pp534-536; Kilkey, M., op.cit. p167.

<sup>205</sup>McDowell, L., *Capital Culture* (Oxford: Blackwell Publishers Ltd, 1997) p11.

<sup>206</sup>Kilkey, M., op.cit. p167.

impact on the working lives of women.<sup>207</sup> However, mothers too face change. For some they bear a double burden. There is little evidence that there has been in an increase in fathers' input in unpaid domestic duties and the care of children.<sup>208</sup> Thus, mothers increased involvement in the public sphere of employment is corresponded with continued high input in the private sphere in the home. Thus, the realities of implementing the policy changes to support parents in work/life balance are complex and contradictory and have a long history of embedded gendered roles.

There has been as Jonathan Scourfield and Mark Drakeford argue a 'creeping compulsion', a covert approach to New Labour's family policies and their use of power. Indeed, there is a sense of two opposing directions. There is optimism in New Labour's policies for men in the home and pessimism for women outside the home. For men who choose to help in the home there are policies, such as paternity leave, to support in their responsibility for their families. In contrast, where the policies are pessimistic they verge on draconian. The implementation of New Deal for lone parents that links job seeking with the payment of Income Support is a clear illustration.<sup>209</sup>

However, perhaps as the writers point out, there is a simple philosophy underpinning the -policy makers' thinking and that is their intuitive understanding of the 'malleability of women and the intractability of men.' The 'creeping compulsion' Scourfield and Drakeford suggest illustrates the strategies of the state to maintain economic and social stability and expose the power relationships between the state and individuals, particularly women in society.<sup>210</sup> Therefore, the ideas of functionalism remain in the relationship between the state and the family and implemented through social policy.

Functionalism has, as argued surfaced in other periods in history too. Certainly, drawing women into formal employment during both world wars and pushing them back home afterwards was policy practice and reinforced through legislation.

---

<sup>207</sup>Scourfield, J., & Drakeford, M., op.cit. p623.

<sup>208</sup>Stanley, K., & Gamble, C., 'Introduction: fathers and policy' in Stanley, K., Ed., *Daddy Dearest? Active Fatherhood & Public Policy* (London: Institute for Public Policy Research, 2005) p5.

<sup>209</sup>Originally, the idea was voluntary participation but by 2002 shifted to statutory and lone parents on Income Support were required to go to work related interviews and repeat this at the six-month stage.

<sup>210</sup>Scourfield, J., & Drakeford, M., op.cit. p636.

However, in the contemporary period the relationship of the state with the family is more intense. The power relationships between individuals and the state are covert, in this context with the principles of fairness, sharing and childcare underpinning economic stability. Yet the practices of parenting formally linked to mothers and motherhood are contradictory to men's traditionally constructed role as the breadwinner. There are major cultural barriers to overcome at home and in the workplace. Inherently linked to men's employment is a sense of worth. The idea of men as no longer the principal breadwinners is difficult for fathers, mothers and their children.<sup>211</sup> It is within this broader picture that the policies of shared parenting post-separation are also located.

### Post-separated Parenting the Politics and Legal Reforms

As noted in Chapter 1, figures show the number of children involved in parental separation is increasing and the majority of children of the children are under the age of ten. Figures also show that more than 80%, of children live with their mother with approximately 2million non-resident fathers in the UK.<sup>212</sup> Nevertheless, as the statistics in Chapter 1 show increasing numbers of separated fathers are contesting residency and contact orders and demanding their right to equality of equal parenting. The high media profile demonstrations by the fathers' rights group Fathers4Justice clearly demonstrates the strength of emotions in this field of family conflict. Indeed, their actions and the continued acrimony between separated parents have brought their demands to the centre of political, legal and media debates.<sup>213</sup> As Carol Smart argues, there has been a 're-ignition of a major gender struggle in the area of family life and family law.'<sup>214</sup>

---

<sup>211</sup>Lewis, C., *A man's place in the home: Fathers and families in the UK*, (York: Joseph Rowntree Foundation, 2000) p1.

<sup>212</sup>Hunt, J., & Roberts, C., *Child Contact with Non-Resident Parents* (Oxford: University of Oxford, 2004) at 1; Smart, C., May, V., Wade, A. & Furniss, C., *Residence and Contact Disputes in Court*-Volume 1 (Research Series 6/03) (London: Department for Constitutional Affairs, 2003); Smart, C. 'The Ethic of Justice Strikes Back: Changing Narratives of Fatherhood' in Diduck, A., & O'Donovan, K., Eds. *Feminist Perspectives on Family Law* (Abingdon, Oxon: Routledge & Cavendish Taylor & Francis Book a Glasshouse Book, 2006) p126.

<sup>213</sup>Since same-sex couples have the same rights and responsibilities as heterosexual couples separation and indeed legal separation and the issues of the legal regulation of the child involved should follow the same legal principles.

<sup>214</sup>Smart, C., *Residence and Contact Disputes in Court*, op.cit. p123.

As already noted, the wider narratives of parenting have historically reinforced the laws regulating the care of children post-separation. The contemporary period is no different. Thus, mirroring the wider narratives of parenting and government policy to encourage and support fathers in a more active role in parenting have also been reflected if not reinforced in parenting practices post-separation. Yet alongside this, there has been a renewed emphasis on the need to care for the child. Following the tragic death of Victoria Climbié, the Government published the Green Paper *Every Child Matters*. The Paper set out five targets for children:

- Being healthy
- Staying Safe
- Enjoying and Achieving
- Making a positive contribution
- Experience economic well being.

The document reinforced the Government's commitment to the principle and best interests of the child particularly the vulnerable child. UK government policy has since stated that a child has 'the right to the best possible start in life and parents have a clear responsibility to protect and provide for their children so that children can make the most of their lives.'<sup>215</sup> This includes a need to address the risk to children involved in acrimonious disputes, broken and re-constructed families.

Certainly, New Labour initiated a number of significant consultation papers to deal with the issues.<sup>216</sup> Following the initial report *Making Contact Work*<sup>217</sup> on the problems and practicalities of making contact work, the Government published the first consultation documents *Parental Separation: Children's Needs and Parents' Responsibilities*.<sup>218</sup> In this, the Government set out to promote the wellbeing of the family undergoing breakdown. The Paper proposed a system to determine that both

---

<sup>215</sup>*Children's Rights and Parental Responsibilities* (London: Department of Social Security, 2000) p1.

<sup>216</sup>HM Treasury *Every Child Matters* Cm 5860 (London: HMSO 2003); *Parental Separation: Children's Needs and Parents' Responsibilities 2004* *Parental Separation: Child and Adoption Act 2006* *Children's Needs and Parents' Responsibilities: Next Steps 2005*.

<sup>217</sup>The Advisory Board on Family Law Children Act Sub Committee, *Making Contact Work: A Report To The Lord Chancellor on the Facilitation of Arrangements for Contact Between Children and Their Non-Resident Parent And The Enforcement Of Compulsory Orders For Contact*.

<sup>218</sup>Secretary of State for Constitutional Affairs, The Secretary of State for Education and Skills and the Secretary of State for Trade and Industry, *Parental Separation: Children's Needs and Parents' Responsibilities*, Cm 6273 (London: TSO, 2004).

parents maintained a meaningful relationship with their parents post-separation and resolution through a network of legal and practical advice.<sup>219</sup> The document recommended changes to the judiciary system and a shift of emphasis from Children and Families Court Advisory Support Service (CAFCASS) towards active problem solving to ensure prompter action on resolving dispute cases. In addition, the document suggested pilot schemes to provide support that is more effective to parents<sup>220</sup> and indeed further proposed a draft Bill to give powers to the courts to enforce contact orders.<sup>221</sup>

*Parental Separation: Children's Needs and Parents' Responsibilities: Next Steps*<sup>222</sup> followed in 2005 with an agenda for action. Since the current legal position stated that both parents are equal and they both have a meaningful relationship with their child post-separation provided it was safe to do so there would be no amendments to the *Children Act 1989*.<sup>223</sup> However, there was a need to strengthen mediation and the Paper recommended increased public funding to promote and run parenting schemes.<sup>224</sup> Proposals also reinforced the earlier suggestions of changing the ways in-court conciliation service CAFCASS operated to overcome the delays in dealing with court reports and reduce conflict between parents.<sup>225</sup> Furthermore, the Paper suggested that dealing with cases where domestic violence and child abuse were involved would need detailed monitoring an evaluation. Where there was no contact with the non-resident parent, it was proposed legislation would be introduced to

---

<sup>219</sup>The pilot mediation schemes run in family courts in London, Brighton and Sunderland proved unsuccessful. There were just 23 couples over a period of 9 months taking part in the scheme well below the figure of 1000 couples expected. Members of the Opposition argued that the scheme was 'simply a sham to get the government out of a political hole. Ministers wanted to neutralise the protests from fathers' groups T. May shadow secretary of state for the family, Dyer, C., 'Divorce Mediation Scheme Flops' *The Guardian* 27/06/2005.

<sup>220</sup>The idea of strengthening mediation services to save marriages and support children involved had been put forward in the Family Law 1996 however in 1999 the Lord Chancellor in the Labour Government without any indication to the appropriate bodies that any changes to Family Law would be deferred. Cretney, S., op.cit. p390; *Parental Separation: Children's Needs and Parents' Responsibilities*, op.cit. Chapter 3, p68.

<sup>221</sup>*Parental Separation: Children's Needs and Parents' Responsibilities Responses* Cm 6452, London: HMSO, 2004) p100.

<sup>222</sup>Secretary of State for Constitutional Affairs, The Secretary of State for Education and Skills and the Secretary of State for Trade and Industry *Parental Separation: Children's Needs and Parents' Responsibilities: Next Steps* Cm 6452 (London: TSO, 2005).

<sup>223</sup>*Parental Separation: Children's Needs and Parents' Responsibilities: Next Steps* op.cit. p10

<sup>224</sup>*Parental Separation: Children's Needs and Parents' Responsibilities Summary of Responses* op cit p7.

<sup>225</sup>*Parental Separation: Children's Needs and Parents' Responsibilities The Proposals* Cm 6273, London: HMS Chapter 3 at 73.

enforce contact. Failure to maintain contact would result in referrals to parenting classes, condition orders, community based orders or financial compensation should plans paid for be lost.<sup>226</sup> The proposals formed the basis for the Children & Adoption Bill 2005.

### *The Children and Adoption Act 2006*

The debates around the Children and Adoption Bill 2005 brought the realities of dealing with the increasing contested cases between separated parents into the political debate. As Baroness Morris of Bolton pointed out ‘Across my desk each day goes the heartache of Britain. We are dealing not only with matters of law but with people's feelings and lives.’<sup>227</sup> She added,

We are all familiar with the uncomfortable statistics on the problems posed for children without proper parental structure and without a role for their father. The current arrangements risk the downgrading of the family and above all of fatherhood. We allow that at peril to future generations.<sup>228</sup>

However, while Baroness Barker agreed, she pointed out ‘It is not our job to seek solutions or remedies for those problems. We simply cannot do that. It is our job to provide a framework in which adults and courts are enabled to do what is right for children.’<sup>229</sup>

As Lord Adonis argued ‘we do not believe it right to restrict the ability of the courts to make an unfettered judgment about the best interests of the child on the facts of each case. In that respect, we agree wholeheartedly with Fathers Direct, a leading fathers group.’ Indeed, the Group had responded to the earlier consultation document stating: ‘The problem is not the law. It is that the implementation of the current law is not bringing about the intended outcome, namely, the best interests of the child. The problem of how we support families in separation is far more complex and diverse

---

<sup>226</sup>*Parental Separation: Children's Needs and Parents' Responsibilities: Next op.cit.* p98.

<sup>227</sup>HL Deb 29 Jun 2005 c 254.

<sup>228</sup>HL Deb 29 Jun 2005 c 257.

<sup>229</sup>HL Deb 29 Jun 2005 c282.

than can be solved by one dramatic gesture.’<sup>230</sup> It would appear that Edward Jenks arguments of the ‘ungodly jumble’ of this area of family law would continue to remain a key element.

*The Children and Adoption Act 2006*<sup>231</sup> now provides a legal framework for dealing with the legal regulation of the care of children post-separation that includes unmarried fathers.<sup>232</sup> Government policy is clear that children should have ‘the stability of a loving relationship with both parents, even if they separate.’<sup>233</sup> Contact with both parents is in the best interests of the welfare of the child, where it is safe to do so.

There is no presumption of either parent to residency and contact, the decision is the parents. It is only if the case comes to court for settlement the decision is made in the best interests of the child. In addition, shared parenting does not mean equal parenting; it means a meaningful relationship with both parents. Indeed, there was a clear rejection of the demands from Fathers’ Rights Groups of a 50-50 claim in residency and contact. ‘Children are not a commodity to be apportioned equally after separation’.<sup>234</sup>

The courts now have more flexibility in arrangements of contact, and the power to enforce contacts arrangements when necessary.<sup>235</sup> Separated parties who defy court orders and refuse their former partners contact with their child could face curfews.<sup>236</sup> Beyond imposing such a condition, the courts have limited powers to punish parents and no parent imprisoned for defying the court. In theory this could be possible, however in reality this would probably mean the temporary loss of the primary carer of the child and have a detrimental effect on the child involved. This is a contentious

---

<sup>230</sup>HL Deb 29 Jun 2005 c251.

<sup>231</sup>*Children and Adoption Act 2006*.

<sup>232</sup>Wallbank, J., ‘Clause 106 if the Adoption and Children Bill: legislation for the ‘good’ father?’ 2002 *Legal Studies* 22 p276. Unmarried fathers can joint parental responsibility when they jointly register the child’s birth along with the mother.

<sup>233</sup>Lord Chancellors Department *The Government’s Response to the Children Act Sub-Committee Report Making Contact Work* (London: Family Policy Division 2002) p2.

<sup>234</sup>*Parental Separation: Children’s needs and Parents’ Responsibilities* Cm 6273 (London: HMSO, 2004) Ch. 3 42.

<sup>235</sup>*The Children and Adoption Act 2006*

<sup>236</sup>Dyer, C., ‘Curfew planned for mothers who block fathers’ visits.’ *The Guardian* 1/12/2004.

area where there may be domestic violence or contact is unwelcome by either the child or resident parent. In such cases, the judiciary have the powers to enforce a legal obligation to the non-resident parent and indeed the child to sustain that relationship.<sup>237</sup>

The legal framework that is now in place to regulate the welfare of the child is far removed from the historical patriarchal laws of infant custody or indeed the infant custody during inter-war period. Separated mothers had then only just gained statutory equality to *apply* for custody of their children following separation. As demonstrated by the case of *Annot Robinson*<sup>238</sup> while there was the ability to apply, the stigma of shame of separation and financial limitations could deny the opportunity. While the few numbers of reported cases during the inter-war period reflected the general trend of maternal presumption or a negotiated settlement of custody of the children. Shared parenting was not a consideration. In disputed cases the welfare principal gave the courts had the power to reinforce patriarchal authority as demonstrated in the case of *re Thain (an infant) In re M. M. Thain Thain v Taylor*.<sup>239</sup> This was certainly a concern of Kitty Trevelyan as revealed in her letters. It was, of course more intense for Kitty. In Germany at that time, infant custody laws only granted mothers legal custody of their children until the age of four. In marriage or divorce, fathers had absolute rights to legal custody of their children. From the correspondence, Geo was plainly preparing to apply for custody of their elder daughter Elsa.

Both case studies exposed the realities for some separated mothers dealing with the contradictions, complexities and difficulties in their gendered role and provided an insight to the feminist arguments of the conflicts for women between striking social changes and legal reforms, the ‘new freedoms,’ and women’s entrenched role within the private sphere. However, as Bertrand Russell argued, there were contradictions for men, paternal authority in the family was less important than in ancient societies, and the economic depression brought mass unemployment and the loss of men’s role as the breadwinner, as discussed and evidenced in the case of Sam Robinson. Undoubtedly,

---

<sup>237</sup>*The Children and Adoption Act 2006.*

<sup>238</sup>Together with empirical evidence of the Co-operative Women’s Guild discussed in Chapter 2 & 3.

<sup>239</sup>[1925 T 1299] [Court of Appeal] [1926] Ch.676 discussed in Chapter 3.



as the study has shown, there have always been contested cases and difficulties for separated parents. Yet the contradictions and complexities for separated mothers and fathers grounded in gender politics in the inter-war period resonate and are highly visible in the contemporary period. This concluding section considers the dynamics that underpin the key issues.

### **Section 3**

#### **The Reconstructed Post-Separated Family: Critical Questions for Fathers and Mothers**

New Labour has captured the Conservative values of the family in maintaining economic and social stability. As indicated above, New Labour family policies challenge parents in 'intact' families however, for separated families the problems are deeper. The law encourages co-parenting post-separation and a reconstruction of an idealised model of the nuclear family<sup>240</sup> within a fractured family. This can be difficult when separation for parents also involves ongoing relationships between them in the best interests of their children.<sup>241</sup> At a time when strong emotive reactions of anger, fear and a sense of loss are powerful, shared parenting develops into a site of tension and raises contradictions and critical questions based on gender issues and the embedded cultural practices of parenting.

#### **Gender Dilemmas for Post-Separated Fathers and Mothers**

In the re-conceptualisation of the family post-separation, a new father figure has emerged theorised within the principle of the welfare of the child.<sup>242</sup> Fathers are now actively encouraged to have a crucial role in their children's upbringing. The shift from parental rights to parental responsibilities has theorised the relationship between the father and the child within the concept of the welfare of the child. Richard Collier points out that this signifies a complexity of changes that are interrelated and correlate

---

<sup>240</sup>As discussed in Chapter 1.

<sup>241</sup>Maclean, M., 'Introduction: Conflicted Contact between Parents and Children after Separation' in Maclean, M., Ed. *Parenting after Partnering* (Oxford: Hart Publishing, 2007) p1.

<sup>242</sup>Smart. C & Neale, B., *Family Fragments?* op.cit. p34.

with the changing interpretations of childhood.<sup>243</sup> As discussed above, the child is now the vulnerable child in need of protection. The capture of the ‘psy’ sciences, as in the 1925 Act, has again been utilised to endorse narratives of parenting post-separation through the concept of the welfare of the child.<sup>244</sup> As Chris Jenks argues, ‘our historical perspectives on normality in childhood reflect the changes in the organization of our social structure.’<sup>245</sup> The welfare of the child has become a powerful argument in law and is now utilised under the concept of care rather than a father’s absolute right to possession.

Statistics show increasing numbers of fathers are demanding their rights to shared parenting. Fathers and fathers’ rights groups have captured the principle of the welfare of the child to advocate for their right to equality of parenting post-separation. High profile media tactics of the Fathers4Justice Group<sup>246</sup> have brought their claims of justice to the forefront of the media, public and political scene. Fathers allege injustice and the ‘injustice’ would appear obvious in the statistics. Nonetheless, for some separated fathers shared parenting raises complex contradictions and uncertainty. As Carol Smart argues, the reconstituted father post-separation can be without the mutual material and emotional support that is (usually) intrinsic within marriage or a partnership and the basis to parenting. The daily care of children has traditionally been associated with mothers; post-separated fathers may need to acquire the practical skills of caring for their children. Fathers must also negotiate new relationships with their children and former partner or negotiate relationships with a new partner and, if any, their children.<sup>247</sup>

Nevertheless, as Carol Smart argues, the ‘care talk’ of mother’s care as a duty, as against father’s care gives no space for mother’s voices in the public arena of

---

<sup>243</sup> Collier, R., op. cit. p69. See also the discussion on the historical changing ideas of childhood in Chapter 1.

<sup>244</sup> Dewar, J., op.cit. p479.

<sup>245</sup> Jenks, C., *Childhood* (London: Routledge, 1996) p80.

<sup>246</sup> The F4J Group also took their campaign into the centre of Parliament throwing condoms filled with purple flour at the Prime Minister during debates 19<sup>th</sup> May 2004, proceedings in the House were stopped and the Chamber evacuated. However, in 2005 there was a split in the Fathers For Justice Group and the split-away group known as the Real Fathers for Justice. In January 2006 reported allegations of a plot by extremist members of the Group to kidnap the Prime Minister’s five year old son appeared in the media. The Group disbanded but has since in March 2006 has been re-launched as Re-Born Fathers 4 Justice. ‘Re-Born Fathers 4 Justice’ On the Men’s Hour: [http://men.typepad.com/f4j/2006/03/reborn\\_fathers\\_html](http://men.typepad.com/f4j/2006/03/reborn_fathers_html).

<sup>247</sup> Smart, C., & Neale, B. *Family Fragments* ? op. cit. p33.

residency and contact law.<sup>248</sup> The inclusion of the fathers as a stabilising influence diminishes the caring role of mothers.<sup>249</sup> Has the pendulum towards fathers swung too far and shifted the role of mothers? The state, Smart argues through the law is using the ethics of care (and justice) to construct a new narrative of fatherhood. In the unabated gender debates, she contends a ‘subtle interplay’ between the ideas of ‘rights talk’ and ‘care talk’ that is allowing a father’s role to ascend. Therefore, men’s power over women continues and the law regulates in the care of children post-separation. Smart comments, this shift could renew the father’s power over mothers,<sup>250</sup> and a renewal of ‘patriarchal ideology.’<sup>251</sup>

There is another argument. Richard Collier points out that research has shown that the law is not discriminating against fathers. He asks if the issues were ‘a matter of false consciousness on the part of these men [and] Men who are in reality truly empowered, if only they realise it.’<sup>252</sup> This could be a ‘debilitative power’ on the part of the fathers<sup>253</sup> and far from being seen as the victims, men are empowered. In their demands for equality are modern separated fathers claiming to be ‘victims’ not in fact reinforcing their evidently powerful position? In promoting the idea of the separated father as the ‘victim’,<sup>254</sup> separated fathers have put the ‘new contact culture’ at the core of family law. Thus, the subtext of power relations between separating parents has come into the public arena. Men have a ‘voice’ to make their demands heard. They are generally economically better off than mothers are and can afford lawyers to support their case. As such, class distinctions also re-emerge directed by financial circumstances. The narratives that reinforce shared parenting undoubtedly support this via court support officers, thus supporting Collier’s argument. Nevertheless, changing socio-legal policies towards and attitudes of separated fathers have consequences for separated mothers.

---

<sup>248</sup> Smart, C., *Feminist Perspectives on Family Law*, op.cit. pp126-7.

<sup>249</sup> Fineman, M., *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (New York: Routledge, 1995); Smart, C., *Feminist Perspectives on Family Law* op.cit. p128.

<sup>250</sup> Smart, C., & Sevenhuijsen, S., Eds. *Power and the Politics of Child Custody*, (London: Routledge, 1989) p8; Smart, C., *Feminist Perspectives on Family Law*, op.cit. p126.

<sup>251</sup> Brophy, J., ‘Parental Rights and Children’s Welfare: Some Problems of Feminist Strategy in the 1920s’ 1982 *International Journal of the Sociology of Law* 10 2 pp149-78.

<sup>252</sup> Collier, R., op.cit. p65.

<sup>253</sup> Day Slater, *Divorce: A Psycho- Social Study* (Aldershot: Ashgate, 1999); Collier, R., *ibid* p64 fn. 65.

<sup>254</sup> In their campaigns and discussed in Collier, R., op.cit. pp 62-5.

Mothers too may face complex difficulties. In the shift to shared parenting, the mother and motherhood have been de-gendered. Martha Fineman argues the tradition of motherhood and the cultural elements of the daily care of parenting associated with mothers have, in the move to equality, ‘neutered’ motherhood into parenthood.<sup>255</sup> Consequently, the mother’s role is blurred. A mother needs to re-establish her role and relationship with her children her position in the workforce. In the majority of cases, the mother is the primary carer and the child lives with the mother. The law requires that mothers ensure that relationships with fathers continue. Therefore, mothers must negotiate with fathers to deal with the practicalities of maintaining contact.<sup>256</sup> The increased numbers of cases of dispute between separated parents indicate that mothers are not always willing to undertake that responsibility.

The question of why a mother may refuse to allow the father contact with their children raises a number of responses. Carol Smart and Bren Neale suggest the reasons may be more complicated than being the awkward, selfish and bitter mother.<sup>257</sup> Indeed, research indicates that the concepts of blame and innocence have re-emerged. Evidence shows that it was unreasonable to allow the partner who instigated the break-up of the relationship to seek shared parenting of the children.<sup>258</sup> This of course resonates with the fault principle of the divorce laws prior to the 1969 Act. Furthermore, similar to the comments made of the ‘special procedures’ in the early nineteen seventies, there is no space for anger and hurt to be expressed. If a mother does not have a residency order or the contact order fails, what recompense does she have? Illness, domestic violence or the father’s refusal to return the children after a contact visit, could all present reasons for mothers not having contact with their children. Indeed similar factors could affect fathers and a loss of contact. Marian Jayawardne from *Mothers Apart from Their Children* (Match) argues that mothers

---

<sup>255</sup>Fineman, M.A., op.cit. pp70-1.

<sup>256</sup>Smart, C., *The new family?*, op. cit. pp112-3.

<sup>257</sup>Smart, C., & Neale, B., *Family Fragments?*, op. cit. p4; Collier, R., op.cit. p58. Australian academics that through the contact enforcement rules there has been the emergence of the ‘no contact mother’ the bad parent, see Rhoades, H., “The ‘No Contact Mother’: Reconstructions of Motherhood in the Era of the ‘New Father’ 2002 *International Journal of Law, Policy and the Family* 16 at 71. Judges and civil servants were studying research from Australia on ways to reduce the stress and psychological damage to children in cases of dispute. The family law system in Australia that has undergone changes in the last 5 years has shown that the tensions in dispute cases are ‘serious public health issues’. Dyer, C. “Family judges learn from Australian approach to battles over children.” *The Guardian*, 31/07/2006, p12.

<sup>258</sup>Smart, C., & May, V., ‘Why Can’t They Agree? The Underlying Complexity of Contact and Residence Disputes’ 2004 *Journal of Social Welfare and Family Law* 26 4 p347.

who do not hold a residency order or indeed have no contact with their children have no 'voice' and their situation is hidden.<sup>259</sup> Undoubtedly, the persistent division of labour makes it financially harder for the majority of mothers to take their case to court.

### The Contradictions of Individualisation

While Chapter 1 considered the broader issues of individualisation and ideas of the autonomy of the self, this concluding part of Section 3 individualisation offers an understanding of the theoretical background to the concerns and debates around the increases in the numbers of contested cases between separated parents for their rights to equal parenting.

There is increasing fragility in contemporary intimate relationships as individuals seek autonomy there is also a desire for security. Carol Smart and Bren Neale contend, there is a desperate feel to this 'new' form of love.<sup>260</sup> Beck and Beck-Gernsheim suggest, 'As traditions become diluted, that tractions of a close relationship grow.' They suggest that when adult relationships fracture after separation 'the child becomes the last remaining irrevocable, unique primary love object.'<sup>261</sup> The child becomes the stability. They further argue that it is the realisation of separation and the ownership of the child that makes fathers conscious of their loss in their role as husbands and fathers. This opens a subtext of power relations and in this context, seen in the increasing numbers of contested cases in residency and contact law.

However, as Alison Diduck points out, it is women that have actively sought autonomy. While individualisation may allow women and men, the freedom of choice, in women's expectations of autonomy and equality there is a disparity. Autonomy is tempered with the dependency on circumstances that are outside an individual's control. That control in the context of the care of children post separation is governance through legal rules. Although individualisation permeates modern society, there is still a competing influence in legal discourses. This is of course

---

<sup>259</sup>Jayawardene, J., 'The mothers who fight 4 justice' *BBC News*<http://newsvote.bbc.co.uk>

<sup>260</sup>Smart, C., & Neale, B., *Family Fragments?* op. cit. pp14-5.

<sup>261</sup>Beck, U., & Beck-Gernsheim, E., *The Normal Chaos of Love* (Cambridge: Polity Press in Association with Blackwell Publishers Ltd., 1995) pp32 & 37.

clearly apparent in the reconstruction of the post-separated family where the state through the law encourages shared parenting post-separation. Individualisation feeds into the situation. Individualisation and seeking autonomy is confusing, complex and in contradiction to the legal rules that support the continuation of the fractured relationship that undoubtedly will lead to gender struggles. Thus, despite legal reforms and a move towards gender neutrality contested cases of the regulation of the care of children post-separation continue to be underpinned by the dynamics of gender power relationships and separated mothers in a vulnerable and disempowering position.

### Feminist Perspectives in the Modern Era

Outside the socio-legal debates, of which this study has aspired to add to, in general, issues of separated mothers and the laws regulating the care of the child post-separation are lost amidst wider concerns of feminist debates. The issues continue to raise difficulties for feminists in that their search for autonomy and freedom that necessitates a move away from the constrictions of the family. Thus, to argue for their role in the family would be contradictory. Indeed, similar to the inter-war period, it would appear that feminism has all but disappeared; there was no need for feminist campaigners and women's demands for legal equality.<sup>262</sup> Indeed as discussed above, there was a period when women were argued to be the 'darlings of the law'. Nonetheless, the reality and the agenda of the law as Chapter 3 showed continued to determine women's subjective social, economic position and legal position. The re-emergence of the second wave of feminism in the nineteen sixties raised the issues of women's continued inequality. The legal reforms in the nineteen seventies and the socio-economic changes over the last thirty years would seem to have given women legal, economic and social equality, and feminism again appeared to fade from the public domain. Nonetheless, women's groups remain and generally concentrate their campaigns on issues of domestic violence against women and children. Indeed, in evidence to Parliamentary Select Committees around residency and contact, women's groups focused on the safety of contact where women and children have been victims of domestic violence. However, as Helen Reece points

---

<sup>262</sup>Eleanor Rathbone remained an active feminist campaigner for family allowances to be given to mothers and other feminist politics turned to action in peace movements.

out, in evidence to the Committee on *Making Contact Work* the Rights of Women Group<sup>263</sup> raised only one aspect of women's lives outside the issues of domestic violence. This is not to deny that this group have not concerned themselves with the issues of domestic violence and unsafe contact<sup>264</sup> or indeed that the concern is not one of high importance.

The increasing numbers of contested cases would indicate that separated fathers are back in an authoritative position through economic and psychological pressures supported by the law and social policy. Yet, has the father's authoritative position ever gone away? In addition, if fathers are demanding their rights where does this place the legal rights of women? It would appear that there is an absence on the part of organised women's groups to raise the issue of their continued subjective position in the post-separated family or at least to any degree of importance. As history has shown, mothers may now make the choice or have no real choice in separation yet they remain in a disempowering position socially and economically.

This concluding section of Chapter 4 has outlined the rapid social changes to the structure of the family and the blurring of the concept of parenting since the nineteen nineties. It has considered family policy changes that have reflected the shifts that the law has reinforced in the regulation of the care of children post-separation. There is now a new orthodoxy of parenting post-separation. Since the early nineteenth century, there has been move away from the absolute rights of the father to a trend towards maternal presumption that has come full circle and a half-turn round again, both parents now have an equal and continual responsibility for the welfare of the child. However, as the increased numbers of contested cases show, conflict between separated parents remains unabated and the subject of political, legal and public debates. The concluding section considered the dilemmas for fathers and mothers undoubtedly underpinned by gender politics and the contradictions of historically embedded practices of parenting. In this, the theory of individualisation offered an understanding of the arguments that raised critical questions on gender power relations within the context of families and the shifting concepts of parenthood,

---

<sup>263</sup><http://rightsofwomen.org.uk/about.html>. This is a voluntary organisation committed to informing, educating and empowering women concerning their legal rights.

<sup>264</sup>Reece, H., 'UK women's groups' child contact campaign: 'so long as it is safe' 2006 *Child and Family Law Quarterly* 18 p538.

motherhood and fatherhood around the care of the child. Yet while separated father's have a political voice in the debates it would seem that separated mothers now have no political voice of any strength.

Chapter 5 forms a conclusion, and draws together the primary themes within the sociological theories of the law that have emerged from this study of the historical development of infant custody law and the resonance of the inter-war period on contemporary gender issues in residency and contact law.



## Chapter 5

### Conclusion

You don't have to gaze into a crystal ball when you can read an open book<sup>1</sup>

This thesis has engaged with the historical issues of infant custody laws that have a particular resonance in the contemporary era. It has conducted an analysis of the historical development of this area of family law, and the significance of the social and legal reforms of the nineteen twenties that this study has argued underpin the contemporary debates around the care of children post-separation. This concluding chapter summarises the insights and offers an synopsis of the direction this area of family law may take in the future.

#### Historical Insights and the Regulation of the Post-Separated Family

The history of the development of the laws of marriage, divorce and infant custody has largely been a history of women's legal inequality within marriage and the family. In Chapter 2 the early history of the laws demonstrated the ways the church, the state through the law have played in the regulation of a patriarchal model of the family and the subjective role of wives and mothers. This clearly links with the sociological theories of the historical approaches, discussed in Chapter 1, and the idea of the patriarchal nuclear family suggested by Lawrence Stone and Leonore Davidoff and adding substance to their arguments that historians are able to identify continuities in the structure of the family throughout history.<sup>2</sup>

The historical analysis clearly showed that by the nineteenth century, the ideology of domesticity and ideas of clear divisions of the public and private spheres were powerful political narratives and reinforced the authority of the husband and father. Case studies during this period, further demonstrated the power of patriarchal authority within the family and the subordinated position of wives and mothers. The strongest confirmation was implicit in the case of *De Manneville v De Manneville*,

---

<sup>1</sup>HL Deb December 1 1998 c 432.

<sup>2</sup>Stone, L., *The Family, Sex and Marriage in England 1500-1800* (Harmondsworth, Pelican, 1977); Davidoff, L., *et al The Family Story* (Harlow: Addison Wesley Longman Ltd., 1999).

where Lord Ellenborough pointed out, ‘the law is clear that the custody of the child, of whatever age, belongs to the father’.<sup>3</sup> In some cases there was recorded some sympathy for separated mothers<sup>4</sup> nevertheless, the courts upheld the absolute rights of the father to custody and further demonstrated how far the courts were prepared to execute the rule and the authority of patriarchal power and the idea of the traditional nuclear family.

Nevertheless, women were not passive in their roles. An examination of late eighteenth century, early nineteenth century literature and intellectual debate provided evidence that men and women were raising questions on the legal injustices and women’s subjective social position and indeed the origins of feminist political thought. The literary skills of Caroline Norton were crucial in challenging the authority of the father. Yet, Caroline was no feminist and did not to seek legal equalities with men but to change the law and address the injustices of the law towards married women. Indeed, through her determination, and the political voice of Serjeant Talfourd, the passage of the *Custody of Infants Act 1839* gave married mothers their first legal rights to apply for custody and access to their children following separation. A success, but as the analysis showed the reforms were limited.

The study tracked the growing feminist movement actively campaigning and challenging the law and the state for the legal rights of all women and the slow progress of legal change. It appeared that there were positive shifts towards the legal rights of separated mothers. The principle of the welfare of the child strengthened the narratives of motherhood and the status of mothers to claim custody of their children post-separation and challenged the rights of the father. Yet the reforms reflected the wider shifts towards the protection of the child and the concept of childhood. Thus, the reforms were not completely about the legal rights of women or indeed the separated mother but the child and the power of the courts through the welfare principle to retain the authority and rights of the father as demonstrated through case studies, *Re Besant* and *re Agar-Ellis*.<sup>5</sup>

---

<sup>3</sup>[1804] 5 East 221.

<sup>4</sup>*Ball v Ball* [1827] 2 Sim 35; *Ex parte McClelland* [1827] 1 Dowl. P.C. & *R V Greenhill* [1836] 4 A & E (OS) 624.

<sup>5</sup>[1879] 11 Ch D 508; [1878] 10 Ch D 49.

Historical analysis reveals that this argument continued throughout the nineteenth century. Changes to the laws to bring married and separated mothers legal equality were limited and biased towards the traditional idea of the morally ‘good mother.’ The same restrictions however, did not apply to husbands and fathers. Separated wives and mothers had to accept the sexual double standards and prove their fitness to mother. The concept of the ‘good mother’ remained a factor in the courts’ decisions to deny mothers’ custody of their children as the case of *re Besant*.<sup>6</sup> Nevertheless, a ‘good mother’ did not automatically mean the mother gained custody of her children as in *Re Agar-Ellis*.<sup>7</sup> As suggested in Chapter 1, engaging with a critical feminist perspective to the law exposed that despite the changes, improved the status of women but covertly reinforced the subordination of women and retained the patriarchal authority in the family.

Nonetheless, as noted, major shifts in the legal system and legislative reforms at the end of the nineteenth and beginning of the twentieth centuries, opened opportunities for mothers to apply for separation, custody of their children and maintenance. In comparison to the long history of the non-existence of married mothers’ legal rights, it would seem there had been a ‘revolution’ of the laws of laws of infant custody, yet there were counter claims of a gender bias towards mothers. Nevertheless, as Eleanor Rathbone argued, legal equality was but a ‘fleshless bone’<sup>8</sup>. Thus, following the arguments of Danaya Wright<sup>9</sup> far from empowering separated mothers, the impact of the legal reforms had the opposite effect. As pointed out, the division of the public and private spheres sustained women’s inequalities, disempowering separated mothers socially and economically, maintaining the oppression of women.

Again, the argument that women were passive in their oppression fails to stand. Feminist campaigners fiercely challenged the law and the state for legal reforms and gender equality however, rebuilding society following the First World War, reinforced ideas of the functionalist role of the family. The significance of the

---

<sup>6</sup>[1879] 11 Ch D 508.

<sup>7</sup>[1878] 10 Ch D 49 (CA)

<sup>8</sup>Rathbone, E., Foreword to Reiss, E., (Barrister) *Rights and Duties of Englishwomen A Study of Law and Public Opinion* (Manchester: Sherrat Hughes, 1934) pviii-ix.

<sup>9</sup>Wright, D., ‘The crisis of Child Custody: A History of the Birth of Family Law in England’ 2002 *Columbia Journal of Gender and Law* 11 p75.

historical analysis of the laws of marriage, divorce and infant custody laws in Chapter 2 is therefore crucial; it analysed the reforms yet also uncovered the contradictions of the law's claims to equality and indeed bias towards separated wives and mothers. Through close examination, the claims of the 'revolutionary' changes to the laws of infant custody served as a reminder that the inequalities and injustices had not entirely been overcome. An understanding of this argument is critical to comprehend the collisions and contradictions that emerged in the inter-war period.

### Collisions and Contradictions of the 'New Age'

The effects of the War were undoubtedly a catalyst for social and legal change. The study showed this was a key period in women's history for formal legal equality that challenged class and gender barriers and was a watershed towards for legal change particularly for women. Nevertheless, against the long historical background of the oppression of married women and mothers in the family, the collision of social changes and legal reforms towards legal equality inevitably caused contradictions and difficulties for women and men.<sup>10</sup>

Chapter 3 explored the literature and political commentaries of the time that highlighted the collisions of the economic, social and formal legal changes and contradictory impact for mothers and fathers. The impact on separated parents was more acute as the evidence from the Co-operative Women's Guild and the case studies. The experiences of Annot and Sam Robinson, Kitty Trevelyan and Georg (Geo) Götsch personalised the collisions and the close examination offered an insight to the personal experiences and the difficulties of men and women contending with the challenges and contradictions of their traditional gendered roles coping with the many strands of single parenthood.

In an understanding of the collisions and contradictions, the case studies link with the ideas of individualisation. As discussed in Chapter 1 and the arguments of Anthony Giddens and Ulrich Beck and Elisabeth Beck-Gernsheim the ideas of individualisation

---

<sup>10</sup>Strachey, R., *Our Freedom and its Results by five women* (London: Leonard & Virginia Woolf at the Hogarth Press, 1936) p91.

have proved a useful tool in the contemporary era to understand the blurring of the roles of parents, particularly post-separation and the search for autonomy of the individual. In retrospect, this can be applied to the mothers in both cases and exposes the contradictions and difficulties, in the search for employment to meet their family financial commitments in their dual roles of parenting post-separation. Yet the framework also reveals Annot and Kitty as women of the 'new age' in their determination for autonomy and equality. The quote from the letter from CPT to Geo summarises the issue, [She] 'comes from a world where women are fast becoming the equal of men and ought to lead lives and have occupations and responsibilities of their own.'<sup>11</sup> Thus, the analysis showed that while there were challenges the embedded cultural practises remained.

Feminist perspectives add to the discussions through the writings of feminists such as Ray Strachey<sup>12</sup> and Winifred Holtby.<sup>13</sup> As Strachey argued, there was a 'sudden development of the personal, legal political and social liberties of half the population of Great Britain within the space of eighty years.'<sup>14</sup> Therefore, feminist thought raises the gender issues and the impact on mothers particularly between their embedded traditional gendered roles and the social and legal changes that challenged these roles. While Winifred Holtby argued, 'Throughout long centuries they have been told that a woman's first and only duty is domestic. It is not possible in one or two generations to counteract that tradition.'<sup>15</sup> This is clearly evidenced in the case studies. Feminism had given the women the ideas of challenging the status quo of their socially and legally constructed roles as wives and mothers. Indeed, in both cases, Annot and Kitty had pursued their goals with determination and a measure of success. Yet in separation, they faced gender contradictions dealing with the obvious double financial burdens of breadwinner and primary carer adding to the contradictions and their difficulties rooted in gender politics. The evidence showed that the stigma of shame and the disempowerment financially and socially persisted. Therefore, the arguments while claiming equality and indeed bias towards separated mothers, legal reforms also

---

<sup>11</sup>Letter from C.P.Trevelyan to Geo Kitty's estranged husband following legal correspondence in 1937.

<sup>12</sup>Strachey, R., op.cit.

<sup>13</sup>Holtby, W., *Women and a Changing Civilisation* (London: John Lane The Bodley Head Ltd., 1934).

<sup>14</sup>Strachey, R., op.cit. p5.

<sup>15</sup>Holtby, W., op.cit. p103.

contain an agenda that maintained the subordinate role of women and the contradictions of the law persist. In addition, the case study of Annot and Sam Robinson also offered an insight into the changes and contradictions for men. There is much to be drawn from the insights of the contradictory experiences exposed in the case studies and the social changes and legal reforms of the nineteen twenties should be given more acknowledgement with the shifts and legal reforms of the contemporary period.

### Contemporary Era

This thesis has argued that the challenges to gender and sexuality of the inter-war period informed the contemporary contradictions and difficulties for men and women. This is now apparently clear in shifts in parenting practices and contested cases of residency and contact law. The two periods are synonymous with change. Yet the pioneering origins and revolutionary changes during the inter-war period are often lost amongst a broad sweep of legal and social history but represent a doorway to the contemporary era. The shifts in attitudes and social changes of that era that are now so much part of our culture we accept them without consideration of their contribution to society in the contemporary era. The insights this thesis offers do provide understanding of the contemporary debates through their reality.

Obviously as Chapters 1 and 4 demonstrated there have been further changes to the socio-economic trends and the impact reflected in shifts in women's employment that have challenged the power dynamics in familial and gender relationships contesting ideas of parenthood and family structures. The thesis illustrated the increasing trends in divorce rates and cohabitation. Attitudes to same-sex-parenting along with technological advances in in-vitro fertilization have added to the confusion and contradictions of ideas of gendered parenting. The law, as has social policies, have reflected these changes. The laws of residency and contact are now located within what is now a gender-neutral framework yet as the increased numbers of contested cases between parents show the tensions have not been resolved and are underpinned by gender politics.

Taking an historical approach to the development of infant custody laws has identified the gradual shifts in the status of motherhood, fatherhood and the understanding of the concept of the child. This has shown that that there has been a full circle and half a turn again in the laws regarding the regulation of the child post-separation. It is in the shifts against the embedded traditional practices and long history of the patriarchal authority of the law that the roots of the tensions are located. In the inter-war period, the collision was clearly apparent through the *formal* introduction of legal reforms for gender equality that further challenged parenting and the political dynamics of gender politics. As Erna Reiss stated in 1934, ‘The position as we find it to-day cannot be understood unless we place it in its historical setting, and although the past cannot tell us what we ought to be nor yet what will be, since each age brings forth us many lessons which we ignore at our peril.’<sup>16</sup>

By drawing on major sociological theories, the outcomes and the contradictions for separated parents in the contemporary period can be understood as having their roots in the historical development of infant custody law and the changes formally reinforced in the inter-war period. The impact and the contradictory outcomes in the inter-war period resonate in the contemporary period and the ‘relatability’ of case studies gave an insight of the reality of the contradictions.

In looking at the theories individualisation and the autonomy of the self, evident in the general analysis of the inter-war period and detailed in the case studies of separated parents<sup>17</sup> now opens a subtext of gender power relations as individuals seek autonomy. At the same time, gender issues, individualisation and the autonomy of the self, evident in the general analysis of the inter-war period and detailed in the case studies of separated parents<sup>18</sup> now opens a subtext of gender power relations as individuals seek autonomy. This is highly visible in the increasing numbers of contested cases in residency and contact law. The clashes between individualisation

---

<sup>16</sup> Reiss, E., Barrister *Rights and Duties of Englishwomen a study in law and public opinion* (Manchester Sherrat & Hughes, 1934).

<sup>17</sup>As Kitty’s father C.P.Trevelyan suggested, ‘[She] comes from a world where women are fast becoming equal of men and ought to lead lives and occupations and responsibilities of their own.’ Letter from C.P.Trevelyan to Geo, Kitty’s estranged husband in 1937 and discussed in Chapter 3.

<sup>18</sup>As Kitty’s father C.P.Trevelyan suggested, ‘[She] comes from a world where women are fast becoming equal of men and ought to lead lives and occupations and responsibilities of their own.’ Letter from C.P.Trevelyan to Geo, Kitty’s estranged husband in 1937 and discussed in Chapter 3.

and the legal rules undoubtedly lead to difficulties that have emerged in the increased numbers of contested cases. Thus, the contradictions, complexities and difficulties for separated parents remain unabated and now in the public domain.

Undoubtedly, feminist perspectives challenged the law and the legally and socially constructed subordination of women. As the contemporary debates above show, for some mothers in contemporary times the same difficulties continue. Mothers continue to hold a double burden of care and employment and face problems where there is shared parenting post-separation. Both Anott and Kitty faced the problems of, as single parents, balancing childcare and employment in the best interests of their children. The state in the contemporary era through the law and social policy continues to advocate and maintain a reconstructed nuclear family and generally the continuities of mothers' inequalities remain.

The situation for fathers would appear to be different from the inter-war period. Fathers are actively encouraged to share in the care of their children. For Sam and Geo quite simply the situation did not arise. Nevertheless, in Sam's case the contradictions and the loss of the father's role as breadwinner indicated the contradictions for men. Indeed, there was visionary warning from Mrs C Gasquoine Hartley in that 'The father needs to preserve his rights and duties within the home'<sup>19</sup> and the claims of Bertrand Russell.<sup>20</sup> For Geo global events overtook any plans to take further action although he did renew contact with his family after the Second World War. In the contemporary era, the absent father links with threats to the stability of the family, a balanced upbringing for children and cohesion of wider society. Similar to Sam Robinson the loss of identity within the family has an adverse effect. Male unemployment in the last three decades has added to the problems. Yet it would seem that here there is a difference in that the emphasis in the inter-war period of the loss of the father appears to reflect the masculine role and paternal authority as against the father's caring role in the family. The law and family policy now actively encourage fathers as shared carers in the family and reinforced in the reconstructed

---

<sup>19</sup>Gasquoine Hartley, Mrs C., *Women, Children, Love and Marriage* (London: Heath Granton Ltd., 1925 ) p56.

<sup>20</sup>Russell, B., *Marriage and Morals* (New York, USA: Liveright PaperBound Editions 1979 Copyright C R 1957 by B. Russell 1929 by Horace Liveright Inc. Manufactured in the USA) p84.



family post-separation. Yet as the discussions in Chapter 4 indicated, the difficulties for men accepting this shift are a consideration that remains.

The approaches of the public and private add to these arguments through the ideas of the divisions of labour and the control of mothers by the state and fathers. The case studies represented a challenge to divisions and the outcomes were of course seen in the contradictions for Kitty and Annot. While it has been argued that parenting and trends in employment are now blurred, there are still indications that the divisions remain especially in the care of the child. This runs parallel to ideas of public and private control of parenting post-separation and the shifts in the ideas that the rights and responsibilities of parenting post-separation are now clearly evident.

Functionalism has also played a significant role in state policy and the legal regulation of women following the First World War and indeed has throughout the historical analysis of the regulation of the family in the subordination of mothers and . It is argued this remains a feature in the rebuilding of the reconstructed family after separation. Yet shared parenting raises critical questions on gender issues. In this the state through the law has utilised the concept of the principle of the welfare of the child to *covertly* reinforce the rights of the father and *visibly* reinforce father's rights and involvement. Fathers have rights and responsibilities vocalised in the language of care, however, the rights of mothers and their responsibilities have shifted. The family and the reconstructed family are part of a wider political agenda that is dependent on the state's need to ensure the wider economic and social stability. The legal reconstruction of a form of 'nuclear family' post-separation linked to functionalism is in contradiction to the ideas of individualisation and will raise difficulties.

Thus, the study has shown that in the contemporary debates in residency and contact law have their roots in the historical development of the laws of marriage, divorce and infant custody. In the inter-war period impact of the massive changes and formal legal legislation for gender legal equality raised contradictions for men and women that resonate in the contemporary era in residency and contact laws and contributes to the vulnerable and disempowering position of separated mothers. However, it is a concern that unlike Caroline Norton, Annot Robinson and feminist campaigners in the past, the voices of mothers in the contemporary era would seem to be lost and

suppressed through the political voice of the fathers buttressed by the state and the law. Feminist political thought would seem to have abandoned their vulnerabilities and oppression. Thus, the timeless considerations of issues of the gender struggles in contested cases of the care of children persist should remain in the social and legal debates.

## The Future

A number of recent debates may have an impact on any future reforms regarding the family, family law and gender issues in parenting. As the numbers of marriages drop and cohabitation increases, marriage is no longer the norm. However, if unmarried couples separate, the existing laws cannot adequately protect them from any injustices. Lord Justice Munby, chairman of the Law Commission, argued that the law must face up to reality and bring the laws up to date and make provisions to address this issue. At the same time, the judge suggested there should also be a review on the division of the finances of a married couple divorcing to ensure a balance between the couple.<sup>21</sup> Outlining their policies in preparation for a General Election in 2010 the Conservative Party propose to reward marriage through the tax system and provide support for fathers particularly at the birth of their first child to strengthen marriages. This follows similar arguments from the Conservative Centre for Social Justice and primarily of Ian Duncan Smith who has continually argued that marriage is the best surroundings to bring up children the long held mantra of the Conservative Party.

New Labour are taking a different perspective publishing a Green Paper on how to support all families to maintain ‘strong and stable relationships.’<sup>22</sup> In January 2010, the Government published a Green Paper in the Series *Every Child Matters*, proposing to increase training and financial support for kinship care in families. In this New Labour, recognise other members of the family who care for children including grandparents and stepparents. The Paper has also resurrected the ideas of mediation for divorcing married couples and separating cohabiting couples in dispute with the arrangements for the care and welfare of the child. Indeed, the proposal is that mediation will be compulsory.<sup>23</sup> Supporting this standpoint the chief executive of the Family and Parenting Institute, Dr Katherine Rake has argued that over the next decade the shape of the family will change dramatically. With increasing divorce rates, less numbers of marriages and the growth of same-sex partnerships, the idea of

---

<sup>21</sup>Gibb, F., ‘Law needs changing to protect unmarried and divorcing couples, reform judge says’ *The Times* 07/12/2009 at 23.

<sup>22</sup>Balls, E., in ‘Stable Relationships, not just marriage, ‘key to happy families’ Wintour, P., & Curtis, P., *The Guardian* 30/11/2009 at 6.

<sup>23</sup>*Every Child Matters Kinship Care in Families* 20/01/2010, CM 7787.

the nuclear family will no longer exist. Consequently, from New Labour there is recognition of the shifts in marriage and cohabitation, the diversity of the family and the need for care of the child. Therefore, there are conflicting policies emerging on marriage, separation and parenting that would be likely to have an impact on post-separated parenting and the roles of fathers and mothers within fractured families. Of course, implementation will be dependent on which political party is elected to government.

Interestingly there are new debates emerging on parenting practices. The concept of the child and childhood have come to the centre of parenting practices and reinforced by the law where there is dispute in residency and contact law. Nevertheless, there are arguments that an over-focus on children is detrimental to the child's well-being and development and they become more demanding, dissatisfied and anxious. Rather than struggling to be perfect parents, mothers and fathers should focus on maintaining a good marriage with each other.<sup>24</sup> Therefore, there would appear to be a debate to move away from the child-centred ideas of the family. Other discussions on parenting practices are surfacing. A recent academic study reveals that teenage parenthood need not be a disaster and can indeed improve their lives, empowering them to take responsibility. Olivia Fane argues that teenage mums also offer a lesson in parenting. They allow their children to be themselves without any pressure from parents.<sup>25</sup> This is a different approach not only to parenting practices, but also to a turnaround from the disparaging comments on single teenage mothers in the nineteen eighties. These emerging debates demonstrate the shifting narratives, evident in the historical analysis, informing changes to the laws regarding the legal regulation of the care of children post-separation. Whether these contemporary debates have an impact of parenting narratives within the law of residency and contact remains in the future but is, as this thesis should remain as a timeless consideration.

---

<sup>24</sup>David Code's study *To Raise Happy Kids, Put Your Marriage First* discussed in Hill A, 'Pushy Parents "don't make children happy"' *The Observer* 7/02/2010 at News 7. '

<sup>25</sup>Fane, O., 'The middle classes can learn a lot from teenage mothers' *The Observer* 13/02/2010 at Comment & Debate 35.

## Bibliography

- Abrams, L., Gordon, E., Simonton, D., Yeo, E.J. Eds. *Gender in Scottish History Since 1700* (Edinburgh: Edinburgh University Press, 2006).
- Acland, A., *Caroline Norton* (London: Constable and Company Ltd., 1948).
- Aries, P., *Centuries of Childhood* (London: Cape, 1962).
- Anderson, B.S., & Zinsser, J.P. *A History of Their Own* (London: Penguin Books, 1988).
- Anderson, M., *Family Structure in the 19<sup>th</sup> Century Lancashire* (London: Cambridge University Press, 1971).
- Anderson, M., *Approaches to the History of the Western Family 1500-1914* (London, Cambridge University Press, 1980).
- Aristodemou, M., *Law and Literature Journeys from her to eternity* (Oxford: Oxford University Press, 2000).
- Arnot, L., & Harte, E., 'Shared Parenting-The Clear Message From *Re G*' 2005 *Family Law* September pp718-21.
- Ayers D., *English Literature of the 1920s* (Edinburgh: Edinburgh University Press, 1999).
- Bailey-Harris, R., Barron, J., and Pearce, J., 'Settlement culture and the use of the "No Order" Principle under the Children Act 1989' 1999, 11 *Child and Family Law Quarterly* pp53-62.
- Bailey, M., *A Comparative Study of Child Access* (PhD Thesis Oxford University Pembroke College, 1997).
- Bainham, A., 'The privatisation of the public interest in children' 1990, 53, *Modern Law Review* pp206-21.
- Bainham, A., 'Non-Intervention and Judicial Paternalism' in Birks, P., Ed. *Frontiers of Liability* (Oxford: Oxford University Press, 1994).
- Bainham, A., Day Sclater, S. & Richards, R., Eds. *What is a Parent?* (Oxford: Hart Publishing, 1999).
- Bala, Nicholas, & Bromwich, Rebecca Jaremko, 'Context and Inclusively in Canada's Evolving Definition of the Family' 2002 *International Journal of Law, Policy and the Family* pp145-80.
- Bala, N., 'Report From Canada's Gender War Zone: Reforming the Child related Provisions of the Divorce Act' 1999 16 *Canadian Journal of Family Law* pp163-227.

Barlow, A., Duncan, S., & James, G., 'New Labour, the rationality mistake and family policy in Britain' in Carling, A., Duncan, S., & Edwards, R., Eds. *Analysing Families Morality and Rationality in Policy and Practice* (London: Routledge, 2002).

Barlow, A., Duncan, S., James, G., & Park, A., *Cohabitation, Marriage and the Law Social Change and Legal Reform in the 21<sup>st</sup> Century* (Oxford: Hart Publishing, 2005).

Barton, C., 'White Paper weddings-The Beginnings, muddles and the ends of wedlock' 2002 32 *Family Law* pp 431-38.

Barnett, H., *Introduction to Feminist Jurisprudence* (London: Cavendish Publishing, 1998).

Barrett, M., & McIntosh, M., *The Anti-Social Family* (London: Verso, 1991).

Bassey, M., 'Pedagogic research on the relative merits of the search for generalization and study of single events' 1981 *Oxford Review of Education* 7 1 pp73-94.

Beck, U., & Beck-Gersheim, E., *The Normal Chaos of Love* (Cambridge: Polity Press in Association with Blackwell Publishers Ltd., 1995).

Beddoe, D., *Back to Home and Duty, Women Between the Wars 1918-1939* (London: Pandora, 1989).

Behlmer, G.K. *Friends of the Family* (Stanford, California: Stanford University Press, 1998).

Bell, J., 4<sup>th</sup> Ed. *Doing Your Research Project* (Maidenhead: Oxford University Press, 2004).

Bernardes, J. *Family Studies* (London: Routledge, 1997).

Berry, P., & Bishop, A., Eds. *Testament of a Generation The Journalism of Vera Britten and Winifred Holby* (London: Virago Press Ltd., 1985).

Bevan, H.K. *The Law Relating to Children* (London: Butterworths, 1973).

Blackstone, Sir W., *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765).

Booth, C., *Life and Labour of the People of London* (London: Macmillan, 1902).

Bowlby, J., *Maternal Care and Mental Health* (Geneva: WHO, 1951).

Bowlby, J., *Attachment* (Harmondsworth: Penguin, 1969).

Boyd, S.B., 'Is There An Ideology Of Motherhood In (Post) Modern Child Custody Law?' 1996 *Social and Legal Studies* 4 pp495-521.

Boyd, S.B., *Child Custody, Law and Women's Work* (Ontario: Oxford University Press, 2003).

Boyd, S.B., 'Legal Regulation of Families in Changing Societies' in Sarat, A., *The Blackwell Companion to Law and Society* (Blackwell Publishing, 2004).

Bradley, H., *Men's Work Women's Work* (Cambridge: Polity Press, 1989).

Bradney, A., 'Law as a Parasitic Discipline' *Journal of Law and Society* 25 1 pp71-84.

Bradshaw, J., & Millar, J., *Lone Parent Families in the UK* (London: HMSO: 1991).

Bradshaw, J., & Millar, J., *Children Come First The Government's Proposals on the maintenance of children* Cm. 1263 (London: HMSO, 1990).

Branson, N., & Heinemann, M., *Britain in the Nineteen Thirties* (St Albans, Herts: Granada Publishing Ltd, 1971).

Bridge, S., 'Assisted Reproduction and the Legal Definition of Parentage' in Bainham, A., Day Sclater, S., & Richards, M. Eds in *What is a Parent?* (Oxford: Hart Publishing, 1999).

Brittain, V., *A Testament of Youth* first published in 1933 by Victor Gollancz (London: Virago, 1978).

Britten, V., *Honourable Estate A Novel of Transition* first published in great Britain by Victor Gollancz, 1936 (London: Virago Press, 2000).

Brontë, A., *The Tenant of Wildfell Hall* (First published 1848 this publication London: Penguin Group, 1994).

Brophy, J., & Smart, C., 'From Disregard to Disrepute: The Position of Women in Family Law' 1981 *Feminist Review* 9 pp3-16.

Brophy, J., 'Parental Rights and Children's Welfare: Some Problems of Feminist Strategy in the 1920s' 1982 *International Journal of the Sociology of Law* 10 pp149-68.

Brophy, J., 'Law, State and the Family: The Politics of Child Custody Law' PhD.Thesis DX 185403(Sheffield University, 1985a).

Brophy, J., 'Child Care and the growth of power: the status of mothers in child custody disputes' in Brophy, J., & Smart, C., Eds *Women in Law Explorations in Law* (London: Routledge 1985b).

Brown, M., *Stop this Starvation of Mother and Child* (London: National Union Unemployed Workers Movement, no exact date but around 1933).

Brown, R. L., 'Rise and Fall of the Fleet Marriages' in Outhwaite, R. B. Ed. *Marriage and Society: Studies in the Social History of Marriage* (New York: St Martins Press, 1981).

Bryant, J. M. & Hall, J. A., 'Towards Integration and Unity in the Human Sciences: The Project of Historical Sociology' in Hall, J. A. & Bryant, J. M. Eds. *Historical Methods in the Social Sciences* Vol. 1 (London: Sage Publications, 2005) at XX1-XXV11.

Buchanan, A., Hunt, J., Bretherton, H., and Bream, V., *Families in Conflict: Perspectives of Children and Parents on the Family Court Welfare Service* (Bristol: Policy, 2001).

Burghes, L., with Brown, M. *Single lone mothers: Problems, prospects and policies* (London: Social Policy Research 84, Family Policy Studies Centre, October 1995).

Butler-Sloss, Lord Justice *Report into the Inquiry into Child Sexual Abuse in Cleveland* Cm.412 (London: HMSO, 1987).

Castle Barbara 'No Kitchen Cabinet' as discussed in Rowbotham, S., *A Century of Women* (London Penguin Books, 1997).

Charles, N., *Gender and Social Change*, (Hemel Hempstead, Hertfordshire: Harvester Wheatsheaf, 1993).

Chedzoy, A., *A Scandalous Woman*, (London: Allison & Busby, 1992).

Chinn, C., *They Worked All Their Lives Women of the Urban Poor in England 1830-1939* (Manchester: Manchester University Press, 1988).

Chodorow N., 'Family Structure and Feminine Personality' in Rosaldo, M., & Lamphere, M., Eds. *Woman, Culture and Society* (Stanford: Stanford University Press, 1974).

Christ, Carol, T., "'The Hero as Man of Letters': Masculinity and Victorian Nonfiction Prose" in Morgan T., Ed. *Victorian Sages and Cultural Discourse Renegotiating Gender and Power* (New Brunswick: Rutgers University Press, 1990).

Clark, H., & Carnegie, E. *She Was Aye Working* (Oxford: White Cockade Publishing, 2003).

Cobbe, Frances Power, 'Criminals, Idiots, Women and Criminals' *Fraser's Magazine* 1868 reprinted in Hamilton, S., *Criminals, Idiots, Women & Minors* (Ontario, Broadview Press, 1996).

Collier, R., *Masculinity, Law and the Family*, (London: Routledge, 1995).

Collier, R., "'Feminising' the Workplace? Law, the 'Good Parent' and the 'problem of Men' " in Morris, A., & O'Donnell Eds. *Feminist Perspectives if Employment Law* (London: Cavendish, 1998).



Collier, R., 'A Hard Time to Be a Father? Reassessing the Relationship between Law, Policy and Family (Practices)' 2001 *Journal of Law and Society* 28 4 pp520-45.

Collier, R., and Sheldon, S. Eds. *Fathers' Rights Activism and Law Reform in Comparative Perspectives* (Hart Publishing, Oxford, 2006).

Collier, R., & Sheldon, S., *Fragmenting Fatherhood* (Oxford: Hart Publishing, 2008).

De Courcy, A., *Diana Mosley* (London: Vintage, 2004).

Crawford, S., *Childhood in Anglo-Saxon England* (Stroud: no publisher given, 2000).

Cretney, S.M. 'What Will Women Want Next?' 1996 *Law Quarterly Review* 111 pp110-37.

Cretney, S. "Sir John Swithers MP: the solicitor in private practice and public life in England between the wars" 2007 *Cambridge Law Journal* 66 pp200-27.

Cretney, S.M. & Masson, J.M. *Principles of Family Law* 5<sup>th</sup> Ed. (London: Sweet & Maxwell, 1990).

Cretney, S., *Law, Law Reform and the Family* (Oxford: Clarendon Press, 1998).

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

Cretney, S., & Probert, R., *Family Law* (London: Sweet & Maxwell, Thomson Reuters (Legal) Ltd., 2009).

Crompton, R., & Harris, F., 'Gender Relations and Employment: The Impact of Occupation' 1998 *Work, Employment & Society* 12 2 pp297-315.

Crow, D., *The Edwardian Woman* (London: Cox & Wyman Ltd., 1978).

Davidoff, L., & Hall, C., Revised 3<sup>rd</sup> Ed. *Family Fortunes* (London: Routledge, 2002).

Day Sclater, S., *Families* (London: Hodder & Stoughton, 2000).

De Mause, L., Ed. *History of Childhood* (London, Souvenir Press (Education & Academic) Ltd., 1974).

Delmar, R., 'What is feminism?' in Mitchell, J., & Oakley, A., Eds. *What is Feminism?* (Oxford: Blackwell, 1986).

Dench, G., & Ogg, J., *Grandparenting in Britain* (London: Institute of Community Studies, 2002).

Dennis, D., Henriques, F., Slaughter, C., *Coal is Our Life: An Analysis of a Yorkshire Mining Community* (London: Tavistock, 1969).

Dennis, N., *The Invention of Permanent Poverty* (London: IEA Health and Welfare Unit, 1997).

- Dewar, J., *Law and the Family* (London: Butterworths, 1989).
- Dewar, J., 'The Normal Chaos of Family Law', 1998 Vol. 61 4 *The Modern Law Review* at 467-85.
- Dewar, J., 'Family Law And Its Discontents' 2000 *International Journal of Law, Policy and the Family* 14 pp59-85.
- Dex, S., *The Sexual Divisions of Work: Conceptual revolutions in the social sciences* (Hemel Hempstead: Harvester Wheatsheaf, 1985).
- Diduck, A., *Law's Families* (UK: Lexis Nexis, 2003).
- Diduck, A., & Kaganas, F., 2<sup>nd</sup> Ed. *Family Law, Gender and the State* (Oxford: Hart Publishing, 2006).
- Diduck, A., & O'Donovan, K., Eds. *Feminist Perspectives on Family Law* (Abingdon: Routledge Cavendish Taylor & Francis Books, 2006).
- Dolin, K., *A Critical Introduction to Law and Literature* (Cambridge University Press, 2007).
- Donzelot, J., & Hurley, R., (tr) *The Policing of Families* (London: Hutchinson, 1980).
- Doucet, A., *Do Men Mother?* (Toronto: University of Toronto, 2006).
- Drakopoulou, M., 'Feminism And The Siren Call Of Law' 2007 *Law Critique* 18 pp331-60.
- Duffy, B., 'The Analysis of Documentary Evidence' in Bell, J., 4<sup>th</sup> Ed. *Doing Your Research Project* (Maidenhead: Oxford University Press, 2004).
- Dyhouse, C., *Feminism and the Family in England 1880-1939* (Oxford: Basil Blackwell Ltd, 1989).
- Eekelaar, J., & Maclean, M., *Children and Divorce: Economic Factors* (Oxford: Centre for Socio-Legal Studies, 1982)
- Eekelaar, J., 2<sup>nd</sup> *Family Law and Social Policy* (London: Weidenfeld, 1984).
- Eekelaar, J., & Maclean, M., *Maintenance After Divorce* (Oxford: Clarendon Press, 1986).
- Eekelaar, J., *Regulating Divorce* (Oxford: Clarendon Press, 1991).
- Eekelaar, J., 'Parental Responsibility: State of nature or nature of the state' 1991 *Journal of Social Welfare and Family Law* 6 pp37-50.
- Eekelaar, J., *Family Law and Personal Life* (Oxford: Oxford University Press, 2007).
- Elmy, Mrs Wolstenholme *The Infants Bill* (A Paper Read by Mr Elmy at the Annual Congress of the Social Science Association, held at Birmingham, 1884, and Published By Permission of the Council. Manchester: A. Ireland and Co., Printers, 1884).

Elston, E., Fuller, J., & Murch, M., 'Judicial Hearings of Undefended Divorce Proceeding' 1975 *Modern Law Review* 38 pp609-40.

Engles, F., *The Origin of the Family, Private Property and the State* (London: Penguin Books, 1986 First published in 1884).

Featherstone, B., 'Taking Fathers Seriously' 2003 *British Journal of Social Work* 33 pp239-54.

*Every Child Matters Kinship Care in Families* CM 7787. (London: HMSO, 2010).

Featherstone, B., and Trinder, L., 'New Labour, families and fathers' 2001 *Critical Social Policy* 21 4 pp534-36.

Fellows, A., 'Changes in the law of Husband and Wife' 1906 *The Law Quarterly Review* No. LXXXV January pp64-72.

Fielding, W.J., *Strange Customs of Courtship and Marriage* (London: Souvenir Press, 1961).

Finch, J., & Summerfield, P., 'Social Reconstruction and the Emergence of Companionship Marriage, 1945-1959 in Clark, D., Ed *Marriage, Domestic Life and Social Change* (London: Routledge, 1991).

Finch, J., *The State and the Family*, lecture to inaugurate the Institute's annual theme for 1996-7, 30 October 1996, Edinburgh: International Social Sciences Institute.

Finch, J., & Mason, J., *Negotiating Family Responsibilities* (London: Tavistock/Routledge, 1993).

Finch, J., & Mason, J., *Passing On: Kinship and Inheritance in England* (London: Routledge, 2000).

Fineman, M.A., 'The Neutered Mother' 1992 *University of Miami Law Review* 46 pp653-69.

Fineman, M.A., *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (New York: Routledge, 1995).

Fineman, M.A., *The Autonomy Myth* (New York: The New Press, 2004).

Fleming, S., 'Introductory Essay' in Rathbone, E., *The Disinherited Family* First Published 1924 this Edition (Bristol: Falling Wall; Press, 1986).

Foreman, A., *Georgiana Duchess of Devonshire* (London: HarperCollins Publishers, 1999).

Forster, M., *Diary of an Ordinary Woman* (London: Vintage, 2004).

Fortin, J., Case Commentary 'Re D (Care: Natural Parent Presumption): Is Blood Really Thicker Than Water?' 1999 *Child and Family Law Quarterly* 11 4 pp435-47.

- Foucault, M., *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* Colin Gordon Ed. (Brighton: Harvester Press: 1980).
- Foucault, M., Space, Knowledge and Power in Rabinow, P., Ed *The Foucault Reader, An Introduction to Foucault's Thoughts* (London: Penguin Books: 1981).
- Foucault, M., *The History of Sexuality: Vol.2, The uses of Pleasure* (Harmondsworth: Penguin, 198.).
- Foucault, M., 'The subject of Power and Knowledge' in Rabinow P. & Rose, N., Eds *The Essential Foucault*, London: The New Press, 1994).
- Fox Harding, L., *Family, State & Social Policy* (Basingstoke, Hampshire: Macmillan Press Ltd, 1996).
- French, M., *The Women's Room* (First published in Great Britain André Deutsch, 1978 London: Abacus Book, 1990).
- Freidan, B., *The Feminist Mystique* (London: Victor Gollancz, 1963).
- Gaffin, J., & Thoms, D., *Caring and Sharing* (Manchester: Co-operative Union, 1983).
- Galanter, M. 'Law Abounding: Legislation around the North Atlantic' 1992 *Modern Law Review* 55 pp1-24.
- General Household Survey 1994*, (London: HMSO, 1996).
- Gibson, C., *Dissolving Wedlock*, (London: Routledge, 1994).
- Gibson, C., 'Changing Family Patterns in England and Wales over The Last Fifty Years' in Sandford, N. Katz, Eekelaar, J., & Maclean, M. Eds *Cross Currents* (Oxford: Oxford University Press, 2000).
- Giddens, A., 2<sup>nd</sup> Ed. *Sociology* (London: Macmillan Press Ltd., 1986).
- Giddens, A., *The Transformation of Intimacy* (Cambridge: Polity Press, 1992).
- Giddens, A., & Pierson, C., *Conversations with Anthony Giddens: Making Sense of Modernity* (Cambridge: Polity Press, 1998).
- Gillis, J.R., *For Better or for Worse: British Marriages 1600 to the Present* (Oxford: Oxford University Press, 1985).
- Gillis., J. R., 'Resort to Common Law Marriage in England and Wales 1700-1850' *Law an Human Relations* (Past and Present Society, 1980).
- Gittens, D., *Fair Sex* (London: Hutchinson Publishing Group, 1982).
- Gittens, D., 2<sup>nd</sup> Ed *The Family In Question* (Basingstoke, Hampshire: Macmillan, 1993).

- Gordon, C., Ed *Powe /Knowledge: Selected Interviews and Other Writings 1972-1977* (Brighton: Harvester Press, 1980).
- Gordon, E., & Nair, G., *Public Lives Women, family and Society in Victorian Britain* (New Haven & London: Yale University Press, 2003).
- Graveson, R., 'The Background of the Century' in Graveson, R.H., & Crane, F.R., Eds. *A Century of Family Law 1857-1957* (London: Sweet & Maxwell Ltd, 1957).
- Green, J., *All Dressed Up: The Sixties and the Counter-Culture* (London: 1998).
- Gwyn, G., *Folklore* 1928.
- Hakim, C., *Occupational Segregation*, Research Paper no. 9, (London: Department of Employment, 1979).
- Hale, Baroness 'Unmarried couples in family law' 2004 *Family Law* 35 pp419-.
- Hamilton, S., Ed. *Criminals, Idiots, Women and Minors* (Canada: Broadview Press, 1996).
- Hart, H. L., *Woman Suffrage; a national danger* (London: Murby, 1909).
- Hartley, Mrs. C., *Gasquoine Women, Children Love and Marriage* (London: Heath Granton Ltd., 1924).
- Haskey, J., 'Demographic aspects of cohabitation in Great Britain' 2001 *International Journal of Law, Policy and Family* 15 1 pp22-50.
- Halsey, A.H. Ed. *British Social Trends since 1900* (London: Macmillan, 1988).
- Hastings, Sir Patrick *Famous and Infamous Cases* (London: W. Heinemann, 1950).
- Hattersley, R., *The Edwardians* (Great Britain: Little, Brown, 2004).
- Hayek, F.A., *John Stuart Mill and Harriet Taylor: Their Friendship and Subsequent Marriage* (London: Routledge and Kegan Paul, 1951).
- Hendrick, H., 'Constructions of British Childhood: An Interpretive Survey, 1800 to the Present' in James, A., & Prout, A., 2<sup>nd</sup> Ed. *Constructing and Reconstructing Childhood* (London: Falmer Press, 1997).
- Henricson, C., 'Resolving the Tensions in Parenting policy' from Henricson, C., *Government and parenting: Is there a case for a policy review and a parents' code?* (York: Joseph Rowntree Foundation, 2003)
- <http://www.jrf.org.uk/knowledge/findings/social>.
- Herring, J., 3<sup>rd</sup> Ed. *Family Law* (Harlow, Essex: Pearson Educational Ltd, 2007).
- Hester, M., et al 'Domestic Violence and Access Arrangements in England and Denmark' 1992 *Journal of Social Welfare & Family Law* 14 1 pp57-70.

Hester M., & Radford, L., *Domestic Violence and Access Arrangements in England and Denmark* (Bristol: Policy, 1996).

Hill, Bridgit, *Women, Work and Sexual Politics in Eighteenth Century England*, (London: UCL Press Ltd., 1994).

Hill, M.R., *Archival Strategies and Techniques* (London: Sage Publishers Ltd., 1993).

Hobsbawn, E., *Age of Extremes The Short Twentieth Century*, (London: Michael Joseph, 1994).

Hoggett, B.M. 4<sup>th</sup> Ed. *Parents & Children* (London: Sweet & Maxwell, 1993).

HM Treasury and Department of Trade and Industry, *Balancing work and family life: enhancing choice and support for parents* (London: HMSO, 2003).

Hollis. P., *Jennie Lee A Life* (Oxford: Oxford University Press, 1997).

Holmes Sumner A., “ ‘Fallen Mothers’ Maternal adultery and Child Custody in England, 1886-1925” in *Maternal Instincts: Visions of Motherhood and Sexuality*, (New York: St Martins, 1997).

Holtby, W., *Women and A Changing Civilisation* (London: John Lane The Bodley Head Ltd., 1934).

Holtby, W., ‘Black Words for Women Only’ Clarion 24<sup>th</sup> March 1934 in Berry, P. & Bishop, A., & Berry, P., Eds. *Testament of a Generation The Journalism of Vera Britten and Winifred Hotlby* (London: Virago Press Ltd., 1985).

Home Office, *Supporting Families: A Consultation Document* (London: The Stationery Office, 1998).

Homans, M., *Royal Representations Queen Victoria and British Culture 1837-1876* (London: The University of Chicago Press, 1998).

Horn. P., *Women in the 1920s* (Stroud, Gloucestershire: Alan Sutton Publishing Ltd., 1995).

Horstman, A., *Victorian Divorce* (London, Croom Helm, 1985).

Hunt, A., & Wickham, G., *Foucault and Law Towards a Sociology of Law as Governance* (London: Pluto Press, 1994).

Hunt, J., Macleod, A., Thomas, C., *The Last Resort Child Protection, the Courts and the 1989 Children Act* (London: HMSO, 1999).

Hunt, J., & Roberts, C., *Child contact with non-resident parents* (Oxford: Oxford University Press, 2004).

Hutt, A., *The Post-War History of the British Working Class* (London: Victor Gollancez, 1937).

- Jackson, S., & Jones, J., Eds. *Contemporary Feminist Theories* (Edinburgh: Edinburgh University Press, 1998).
- Jagger, G., & Wright, G., Eds. *changing family values* (London: Routledge, 1999).
- Jamieson, L., 'Intimacy Transformed? A Critical Look at the "Pure" Relationship' 1999 *Sociology* 33 pp477-94.
- Jenks, C., *Childhood* (London: Routledge, 1996).
- Jenks, E., *Husband and Wife In The Law* (London: J. M. Dent, 1909).
- Jenks, E., 'Recent Changes on Family Law' 1928 *The Law Quarterly Review* 44 pp314-23.
- Jenkins, R., *Dilke A Victorian Tragedy*, London: Macmillan General Books, 1996).
- Johnson, D., 'Planning Small-Scale Research' in Bell, J., Bush, T., & Fox, A. *et al* in *Conducting Small-Scale Investigations in Educational Management* (London: Harper & Row, 1984).
- Jolly, S. 'Family Law' in Thomas, P.A., Ed. *Socio-Legal Studies* (Aldershot, Hants, 1997).
- Jordon, J., *Josephine Butler* (London: John Murray, 2001).
- Kent, Kinsley, S., *Gender & Power in Britain 1640-1990* (London: Routledge, 1999).
- Kilkey, M., 'New Labour and Reconciling Work and Family Life: Making It Fathers' Business', 2006 *Social Policy & Society* 5 2 pp167-75.
- King, M., & Piper, C., *The Welfare of the Child The Principle and The Law* (Aldershot: Ashgate Arena, 1999).
- Klein, J., 'Irregular Marriages: Unorthodox Working-Class Domestic Life in Liverpool, Birmingham and Manchester 1900-1939' 2005 *Journal of Family History*, 30 2 pp210-29.
- Kuhn, A., *Family Secrets: Acts of Memory and Imagination* (London: Verso, 1995).
- Lamb, M.E., & Laumann B., 'Fathers of Children with Special Needs' in *The Role of the Father in Child Development* (Canada: John Wiley & Sons Inc: 1997).
- Lamb, M.E., 3<sup>rd</sup> Ed *The Role of the Father in Child Development* (Canada: John Wiley & Sons, Inc., 1997).
- Lasch, C., "The Suppression of Clandestine Marriage in England: the Marriage Act of 1753" 1974. *Salmagundi* 26 pp91-109.
- Laslette, P., with assistance Wall, R., *Household and Family in Past Time*, (London, Cambridge University Press, 1972).

- The Law Commission, Law Com NO. 97 *A Better Way Out* a discussion paper prepared by the Family Law Sub-Committee of the Law Society, and *Fourteenth Annual Report 1978-1979* (The Law Society, 1979).
- The Law Commission No. 172 *Family Law Review of Child Law and Guardianship and Custody* H.C. 594 (London: HMSO, 1988).
- The Law Commission Com. (No. 170) *Facing The Future A Discussion Paper On the Ground for Divorce*. HC 479 (London: HMSO, 1988.)
- LeFanu, S., *Rose Macauley* (London: Virago Press, 2003).
- LeRossa, R., *The Moderization of Fatherhood* (Chicago: University of Chicago Press, 1997).
- Lewis, C., & O'Brien, M., Eds. *Reassessing Fatherhood* (London: Sage Publications, 1987).
- Lewis, C., *A man's place in the home: Fathers and Families in the UK* (York: Joseph Rowntree Foundation, 2000) at <http://www.jrf.org.uk/knowledge/findings/440>.
- Lewis, J., *Women in England 1879-1950* (Hemel Hempstead; Harvester Wheatsheaf, 1984).
- Lewis, J., *Women in Britain since 1945* (Blackwell Oxford, 1992).
- Lewis, J., 'The Decline of the Male Breadwinner Model: Implications for Work and Care' 2001 Summer *Social Politics* pp152-69.
- Lewis, J., 'The problems of fathers: policy and behaviour in Britain' in Hobson, B., Ed. *Making Men into Fathers* (Cambridge: Cambridge University Press, 2002).
- Lowe, N., & Douglas, G., *Bromley's Family Law* (London: Butterworths, 1998).
- Lush, M., 'Changes In The Laws Affecting The Rights, Status, And Liabilities Of Married Women' in Odgers, Blake, W., *A Century of Family Law on the Changes in the Law of England During the Nineteenth Century* (London: Macmillan & Co., Ltd, 1902).
- McCall Smith A., "Is Anything Left of Parental Rights?" in Sutherland, E., & McCall Smith, A., Eds. *Family Rights: Family Law and Medical Ethics* (Edinburgh: Edinburgh University Press, 1990).
- McDowell, L., *Capital Culture*, (Oxford: Blackwell Publishers Ltd, 1997).
- McGlynn, C., *Families and The European Union*, (Cambridge: Cambridge University Press, 2006).
- McGregor, O.R., Blom-Cooper, L., & Gibson, C., *Separated Spouses*, (London: Gerald Duckworth & Co. Ltd., 1970).



Maclean, M., & Eekelaar, J., *The Parental Obligation* (Oxford: Hart Publishing, 1997).

Maclean, M., 'The Making of the Child Support Act of 1991: Policy Making at the Intersection of Law and Social Policy' 1994 *Journal of Law and Society* 21 pp505-19.

Maclean, M., 'Introduction: Conflicted Contact between Parents and Children after Separation' in *Parenting After Partnering* (Portland, Or: Hart Publishing, 2007).

Maclean, M. *Foundations Together and Apart* (York: Joseph Rowntree Foundation, 2004).

Maidment, S., 'A Study in Child Custody' 1977 *Family Law* 6 pp195-200.

Maidment, S. *Child Custody and Divorce*, (London: Croom Helm, 1984).

Martin Anna, *Working Women and Divorce* (New York, Garland Publishing Inc., 1980 Reprint of 2 works originally published in 1911, the 1<sup>st</sup> by D.Nutt, London; the 2<sup>nd</sup> by The National Union of Women's Suffrage Societies, Westminster).

Marwick, A., 4<sup>th</sup> Ed. *British Society Since 1945* (London: Penguin Books Ltd., 2003).

Mason, M.A., *From Father's Property to Children's Rights: The History of Child Custody Law in the United States* (New York: Columbia University press, 1994).

Masters, B., *The Swinging Sixties* London: Constable & Co. Ltd., 1985).

May, V., Smart, C., 'The Parenting Contest: Problems of Ongoing Conflict over Children' in *Parenting After Partnering* (Oxford: Hart Publishing, 2007).

Maynard, M., & Purvis, J., *Researching Women's Lives from a Feminist Perspective* (London: Taylor & Francis Ltd., 1994).

Mead, M., *Male and Female* (Harmondsworth: Penguin, 1962 first published 1949).

Mearns, A., *The Bitter Cry of Outcast London* (Leicester: Leicester University Press The Victorian Library Series, 1970).

Mill, J., Stuart, *On Liberty and The Subjection of Women*, Published in 1869 (This edition published Ware, Hertfordshire: Wordsworth Edition, 1996).

Mitchell, G., Ed., *Hard Way Up* (London: Faber & Faber, 1968).

Morgan, P. 'Family Crisis Affects Us All' in Donnellan Ed. *Marriage and Divorce: Issues for the Nineties* (Independence Educational Publishers, 1996).

Morgan, P., *Farewell to the Family* (London: IEA Health and Welfare Unit, 1995).

Mullins, C. *Marriage, Failures and the Children* (London: Epworth Press, 1954).

Mulvey Dr. M. & Professor Mitzuta, T., Eds. *The Disempowered Women and the Law* (London: Routledge/Thoemmes Press, 1993).

- Mulvey Dr. M. & Professor Mitzuta, T., Eds. *The Wives: The Rights of Married Women* (London: Routledge/Thoemmes Press, 1994).
- Munby, J., 'Access to and Reporting of family proceedings' 2005 *Family Law* 35 pp945-54.
- Murray, C., *Losing Ground: American Social Policy 1950-1980* (New York: Basic Books, 1984).
- Naffine, N., *Law and the Sexes* (Sydney: Allen & Unwin, 1990).
- Neale, Bren, "Executive Summary in B Neale Ed. *Young Children's Citizenship* (York: Joseph Rowntree Foundation, 2004).
- Nethercot, A.H., *The First Five Lives of Annie Besant* (Chicago: The University of Chicago Press, 1960).
- New Lanark Conservation Trust, *The Story of Robert Owen* (Lanark: New Lanark Conservation Trust, date unknown).
- Newman, A., 'An Evaluation of Bastardy Recording in an East Kent Parish' in Laslett, P., Ed. *Bastardy and its Comparative History* (London: Edward Arnold, 1980).
- Norton, C., *English Laws for Women in the Nineteenth Century* (London: Printed for Private Circulation, 1854).
- Norton, C. 'The 'Non-Existence' of Women Letter to the Queen on Lord Cranworth's Marriage and Divorce Bill 1855' in Roberts, Dr. M. Mulvey & Professor Mitzuta, T., Eds. *The Wives: The Rights of Married Women* (London: Routledge/Thoemmes Press, 1994).
- Norton, Caroline 'The Separation Of Mother And Child By The Law Of 'Custody of Infants' Considered' in Mulvey Roberts, Dr., M., & Mizuta, Professor T., Eds. *The Mothers Controversies of Motherhood* (London: Routledge/Thoemmes Press, 1994).
- Oakley, A. *The Sociology of Housework* (London: Martin Robertson, 1974).
- Oakley, Ann 'Wisewoman and medicine man: changes in the management of childbirth' in Mitchell, J., & Oakley, A. Eds. *The Rights and Wrongs of Women* (Harmondsworth: Penguin 1979).
- Oakley, Ann, 'Women and Health Policy' in Lewis, J., Ed. *Women's Welfare Rights* (London: Croom Helm, 1983).
- O'Brien, Working Paper Series No.18 '*Shared Caring bringing fathers into the frame*' (Manchester: Equal Opportunities Commission 2005).
- O'Donovan, K., *Family Law Matters* (London: Pluto Press, 1993).

Okin Moller, S., *Women in Western Political Thought* (Oxford: Princeton University Press, 1979).

Oliphant, M., 'The Condition of Women' *Blackwood's Edinburgh Magazine* February 1858 reprinted in Hamilton S., Ed. *Criminals, Idiots, Women & Minors* (Ontario, Canada: Broadview Press Ltd., 1996).

Osborne, F., *The Bolter* (Great Britain: Virago Press, 2009).

Odgers, W. Blake *A Century of Family Law 12 Lectures on the Change of the Laws of England During the 19<sup>th</sup> Century* (London: MacMillan & Co., Ltd, 1902)

Orwell, G., *The Road To Wigan Pier* First Published by Victor Gollancz 1937 (London: Penguin Books 2001).

Outhwaite, R.B. *Clandestine Marriage in England 1500-1850* (London: The Hambleton Press, 1995).

Parker, S., 'The Marriage Act: 1753: A Case Study in Family Law-Making' 1987 *International Journal of Law & the Family* 1 pp133-54.

Parker, S., *Informal Marriage, Cohabitation and the Law 1750-1989* (Basingstoke: Macmillan, 1990).

Parker, S., 'Rights and utility in Anglo-Australia family law' 1992 *Modern Law Review* 55 pp311-30.

Parry, M., Ed. *Studies in Law The Children Act 1989: Conflict and Compromise* (Hull: Hull University Law School Studies in Law, 1992).

Parsons, T., 'The Isolated Conjugal Family' in Anderson, M., *Sociology of the Family* (Harmondsworth Middlesex: Penguin Books, 1971).

Payne, J.M., 'From Fleet Street to Gretna Green: The Reform of "Clandestine Marriage" under Lord Chancellor Harwicke's Marriage Act of 1753' a Paper presented to the Southwest Social Science Association Conference, Dallas, Texas March 24, 1995, <http://www.geocities.com/Athens/Aegean/7023/ clandestine.html>.

Pember Reeves, M., *Round About A Pound A Week* First published G.Bell & Sons Ltd, 1913 (London: Virago, 1979).

Perkins, Miss Jane Gray *The Life of Mrs Norton* (London: John Murray, Albemarle Street, 1909).

Perkin, J., *Women and Marriage in Nineteenth-Century England* (London: Routledge, 1989).

Phillips, M., *The Sex- Change Society* (London: The Social Market Foundation, 1999).

Platt, J., 'Evidence and Proof in Documentary Research: Some Specific Problems of Documentary Research' 1981 *Sociological Review* 29 1 pp31-52.

Pleck, J., & Masciadrelli, B., '*Parental involvement: levels, sources and consequences*' in Lamb, M. Ed 4<sup>th</sup> Ed *The Role of the father in child development* Canada: John Wiley and Sons, 2004).

Plummer, K., *Documents of Life* (London: George Allen & Unwin Publishers Ltd., 1983).

Pollock, Sir, F., and Maitland, F. W., 2<sup>nd</sup> Ed. *The History of English Law* (Cambridge: Cambridge University Press, 1968).

Pollock, L. A., *Forgotten Children: Parent-child Relations from 1500-1900* (Cambridge: Cambridge University Press, 1988 orig. 1983).

T. Poynter, 2<sup>nd</sup> Ed. *A Concise View of the Doctrine and Practice of the Ecclesiastical Courts* (by Thomas Poynter, 1824).

Pugh, M., *Women's Suffrage in Britain 1867-1928* (London: The Chamelon Press, 1980).

Pugh, M., *Votes for Women in Britain 1867-1928* (London: The Historical Association, 1994).

Pugh, M., 2<sup>nd</sup> Ed. *Women and the Women's Movement in Britain* (Hampshire: Macmillan Press Ltd., 2000).

*Pugh, Martin, 'We Danced All Night'* (London: The Bodley Head, 2008).

*Punch, or the London Charivari* March 1 1922.

Purvis, J., 'Doing Feminist Women's History: Researching the Lives of Women in the Suffragette Movement in Edwardian England' in Maynard, M., & Purvis, J., *Researching Women's Lives from a Feminist Perspective* (London: Taylor & Francis Ltd., 1994).

Outhwaite, R.B. *Clandestine Marriage in England 1500-1850* (Hableton: 1995).

Rathbone, E., *The Disinherited Family* (First Published 1924 this edition Bristol: Falling Wall; Press, 1986).

Rathbone, E.F., Forward to Reiss, E., (Barrister) *Rights and Duties of Englishwomen, A Study in Law and Public Opinion*, (Manchester: Sherratt Hughes, 1934).

Reid, N., *The Origins and Development of the Independent Labour Party in Manchester and Salford 1880-1914* PhD Thesis University of Hull 1981.

Reid, N., *Annot Erskine Robinson Suffragist and Socialist (1874-1925)* draft manuscript in the possession of Annot's granddaughter Celia Caldicott. A shorten

version of this draft has been published: Reid, Dr. N. & Reid, T.D.W. in Bellamy, J.M. & Saville, J., *Dictionary of Labour Biography* Vol VIII (Basingstoke, Hampshire: Macmillan Press Ltd., 1987) at 215-9.

Reilly, C., *Scars upon my heart' Women's Poetry & Verse of The First World War* (London: Virago Press Ltd., 1981).

Reiss, E., (Barrister) *Rights and Duties of Englishwomen A Study of Law and Public Opinion* (Manchester: Sherratt Hughes, 1934).

Rice Spring, M., *Working Class Wives* (Harmondsworth, Middlesex, Penguin Books Ltd., 1939).

Riddall, J.G. *Jurisprudence* (London: Butterworths, 1991).

Roberts, R., *The Classic Slum* (London: Penguin Group, 1990).

Rowbotham, S., 3<sup>rd</sup> Ed. *Hidden From History*, London: Pluto Press, 1977).

Rowbotham, S., *A Century of Women* (London Penguin Books, 1997).

Russell, B., *Marriage & Morals* (New York: Liveright Paperbound Edition 1970 copyright 1957 by Bertrand Russell Copyright 1929 by Horace Liveright Inc. Manufactured in the USA).

Rutter M., 2<sup>nd</sup> Ed. *Maternal deprivation Reassessed* (Harmondsworth, Middlesex: Penguin Books Ltd., 1981).

Samuel R., Ed. *People's History and Socialist Theory* (London: Routledge & Kegan Paul, 1981).

Sandford, N. Katz, Eekelaar, J., & Maclean, M Eds. *Cross Currents* (Oxford: Oxford University Press, 2000).

Sandbrook, D., *Never Had It So Good* (London: Abacus, 2006).

Scourfield, J., & Drakeford, M., 'New Labour and the 'problem of men' 2002 *Critical Social Policy* 22 pp596-618.

Schama, S., *A History of Britain 3, 1776-2000 The Fate of the Empire* (London: BBC Worldwide Ltd, 2002).

Sclater, S., Day, *Families* (Abingdon, Oxon: Hodder & Stoughton, 2000).

Scott, J., & Tilly, L., 'Women's Work and the Family in Nineteenth Century Europe' 1975 *Comparative Studies in Society and History* 17 pp36-64.

Secombe, W., A., *Millenium of Family Change* (London, Verso, 1992).

Secretary of State for Constitutional Affairs, The Secretary of State for Education and Skills and the Secretary of State for Trade and Industry, *Parental Separation: Children's Needs and Parents' Responsibilities* Cm 6273, (London: TSO., 2004).

Sevenhuijsen, S., 'A third way? Moralities, ethics and families' in Carling, A., Duncan, S., & Edwards, R., Eds. *Analysing Families*, London: Routledge, 2002).

Skills and the Secretary of State for Trade and Industry *Parental Separation: Children's Needs and Parents' Responsibilities: Next Steps Cm 6452*, (London: TSO, 2005).

Shahar, S., *Childhood in the Middle Ages* (London, 1990).

Shanley Lyndon, M *Feminism, Marriage, and the Law in Victorian England*, (Princeton New Jersey: Princeton University Press, 1989).

Shorter, E., *The Making of the Modern Family* (London: Collins, 1976).

Showstack Sassoon, A., Ed. *Women and the State* (London: Hutchinson, 1987).

Showalter, E., Expanded & Revised Edition *A Literature of Their Own* (London: Virago, 1999).

Silva, E., & Smart, C., Eds. 'The 'New' Practices And Politics Of Family Life' in Silva, E., & Smart, C., Eds. *the new family?* (London: Sage Publications, 1999).

Slattery, M., *Key Ideas in Sociology*, (Walton-on-Thames: Nelson, 1991).

Smart, C., *The Ties That Bind: Law, Marriage and the Reproduction of Patriarchal Relation* (London: Routledge & Keegan Paul, 1984).

Smart, C., & Brophy, J., Eds. *Women in Law Exploitations in law family and sexuality* (London: Routledge, 1985).

Smart, C., *Feminism and the Power of Law*, London: Routledge, 1989).

Smart, C., & Sevenhuijsen, S., Eds *Power and the Politics of Child Custody* (London: Routledge, 1989).

Smart, C., 'The Legal and Moral Ordering of Child Custody' 1991 *Journal of Law and Society* 18 4 pp485-500.

Smart, C., *Law, Crime and Sexuality* (London: Sage Publication Ltd., 1995).

Smart, C., "The 'New' Parenthood: Fathers And Mothers After Divorce" in Silva, E., & Smart, C., *the new family?* (London: Sage Publications, 1999).

Smart, C., & Neale, B., *Family Fragments*, (Cambridge: Polity Press in Association with Blackwell Publishers, 1999).

Smart, C., 'Divorce in England 1950-2000: A Moral Tale?' in Sandford, N., Katz, Eekelaar, J., Maclean, M., Eds. *Cross Currents* (Oxford: Oxford University Press, 2000).

Smart, C., Neale, B., & Wade, A., *The Changing Experience of Childhood-Families and Divorce* (Cambridge: Polity Press, 2001).

- Smart, C., May, V., Wade, A. & Furniss, C., *Residence and Contact Disputes in Court*-Volume 1 (Research Series 6/03) (London: Department for Constitutional Affairs, 2003).
- Smart, C., & May, V., 'Why Can't They Agree? The Underlying Complexity of Contact and Residence Disputes' 2004 *Journal of Social Welfare and Family Law* 26 4 pp347-60.
- Smart, C., 'The Ethic of Justice Strikes Back: Changing Narratives of Fatherhood' in Diduck, A., & O'Donovan, K., Eds *Feminist Perspectives on Family Law* (Abingdon, Oxon: Routledge & Cavendish Taylor & Francis Book a Glasshouse Book, 2006).
- Smart, C., *Personal Life*, (Cambridge: Polity Press, 2007).
- Stanley, K., & Gamble, C., Eds. *Daddy Dearest? Active Fatherhood and Public Policy* (London: Institute for Public Policy Research, 2005).
- Stanley, L., *The Auto/Biographical* (Manchester: Manchester University Press, 1992).
- Steedman, C., *Landscape for a Good Woman* (London: Virago 1986).
- Steedman, C., *Past Tenses: Essays on Writing, Autobiography and History* (London: Rivers Oram Press, 1992).
- Steedman, C., *Dust* (Manchester: Manchester University Press, 2001).
- Stevenson, Pearce *A Plain Letter To The Lord Chancellor On The Infant Custody Bill Dated 15 December 1838*(London: Ridgway, 1839).
- Stone, L., *The Family, Sex and Marriage in England 1500-1800*, (Harmondsworth: Pelican, 1977).
- Stone, L., *The Road to Divorce: England, 1530-1987* (Oxford: Oxford University press, 1990).
- Stone, L. *Uncertain Unions* (Oxford: Oxford University Press, 1992).
- Stone, L., & Stone, J.C. Fawtier, *An Open Elite? England 1540-1880* (Oxford: Clarendon Press, 1984).
- Stone, O., *Family Law* (London: Macmillan, 1977).
- Strachey, R., *The Cause* (London: G. Bell and Sons Ltd., 1928).
- Taylor, A., *Annie Besant A Biography* (Oxford: Oxford University Press, 1992).
- Thery, I., *Le Démariage* (Paris Editions: Odile Jacob, 1993).
- Thompson, E.P. *Whigs and Hunters: The Origins of the Black Act* (London: Penguin Books Ltd., 1975).
- E.P. Thompson, *The Making of the English Working Class* First published by Victor Gollancz 1963 (London: Penguin Group, 1991).

- Thorpe, A., *Britain in the 1930s* (Oxford: Blackwell, 1992).
- Tilly, L.A., & Scott, J.W. *Women, Work and the Family* (New York: Holt, Rinehart & Winston, 1978).
- Tosh, J., *A Man's Place* (New Haven: Yale University Press, 1999).
- Tosh, J., Revised 3<sup>rd</sup> Ed *The Pursuit of History* (London: Longman, Pearson Education, 2002).
- Trevelyan, G.O. *The Early History of Charles James Fox* (London, 1881).
- Trinder, L., 'Dangerous Dads and Malicious Mothers: The Relevance of Gender to Contact Disputes' MacLean, M., Ed. *Parenting after Partnering* (Oxford, Hart Publishing, 2007).
- Trinder, L., Connolly, J., Kellett, J. & Notley, C. *A Profile of Applicants and Respondents in Contact Cases in Essex* (London: DCA Research Series 1/05)
- Truby King, E., *Feeding and Care of Baby* (London: Macmillan, 1925 original 1913)
- Tyrrell, A., 'Samuel Smiles and the Woman Question in Early Victorian Britain' 2000 *The Journal of British Studies* 39 2 pp185-216.
- Ugnow, J., Introduction Elizabeth Gaskell *Cranford* (First published in Charles Dickens magazine *Household Words* in 1853 London: Bloomsbury Publishing Plc., 2007).
- Utting D., *Family and parenthood: Supporting families, preventing breakdown* (London: Joseph Rowntree Foundation, 1995).
- Wallbank, J., 'An Unlikely Match? Foucault and the Lone Mother' 1998 *Law and Critique* IX 1 pp59-88.
- Wallbank, J., 'Clause 106 if the Adoption and Children Bill: legislation for the 'good' father?' 2002 *Legal Studies* 22 pp276-96.
- Walpole, H., *Memoirs of the Reign of King George the Second* (London: 1847).
- Ward, I., *The Case of Helen Huntingdon* plenary lecture at the Conference on Equity in Law and Literature at the University of Verona May 2007 and published 2007 Vol 49 *Project Muse Criticism* 2 pp151-82.
- Weeks, J., *Sex, Politics and Society* (London: Longmans, 1981).
- Weeks, J., Donovan, C., & Heaphy, B., 'Everday Experiments: Narratives of Non-Heterosexual relationships' in Silva, E.B., & Smart, C., *The new family?* (London: Sage Publications Ltd, 1999).
- Westermarck, E., *The Future of Marriage in Western Civilisation* (London: Macmillan and Company Ltd., 1936).



- Wilkinson, E., *Clash: A Novel* (London: Harrap, 1929).
- Wilmot, M., & Young, P., *Family and Kinship in East End London* (London: Routledge & Kegan Paul, 1957).
- Winton, Karina, 'The Spoilt Darling of the Law': Women and Canadian Child Custody Law in the Postwar Period (1945-1960) 2003 *Canadian Journal Family Law* 19 pp193-.
- Wohl, A.S., Ed *The Victorian Family* London (Croom Helm, 1978).
- Wollstonecraft, M. *The Vindication of the Rights of Women* (The text is edited from the 2<sup>nd</sup> revised edition published in London: Joseph Johnson, 1792 London: J.M.Dent, 1995 First Published in Everyman in 1929).
- Women's Co-operative Guild '*Working Women and Divorce. An Account of Evidence Given on Behalf Of The Women's Co-operative Guild Before The Royal Commission On Divorce*' (London: David Nutt, 1911).
- Woolf, V., *Night and Day* (First published by The Hogarth Press Ltd., 1919, London: Grafton Books, 1978).
- Woolf, V., *A Room of One's Own* (First published by the Hogarth Press, 1929 London: Penguin Group, 1993).
- Wright, Danaya, C., 'The Crisis Of Child Custody: A History Of The Birth Of Family Law In England' 2002. *Columbia Journal of Gender and Law* 11 pp175-270.
- Wright, Danaya, C., "'Well-Behaved Women Don't Make History": Rethinking English Family, Law and History.' 2004 *Wisconsin Women's Law Journal* 19 pp211-318.
- Wroath, J., *Until They Are Seven* (Winchester: Waterside Press, 1998).
- Young, M., & Wilmot, P., *The Symmetrical Family* (Harmondsworth: Penguin, 1973).
- Zainaldin, J.S. 'The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851' 1979 *Northwestern University Law Review* 73 pp1038-89.

### **Other Sources**

- Balls, E., in 'Stable Relationships, not just marriage, 'key to happy families' Wintour, P., & Curtis, P., *The Guardian* 30/11/2009 at 6.
- Coward, R., 'Busybody's Charter' *The Guardian* June 9 1998.

Driscoll, M., 'After the split, the marrying of minds' *The Sunday Times, News Review*, 17/02/2002, at 6.

Dyer, C., 'Curfew planned for mothers who block fathers' visits.' *The Guardian* 1/12/2004.

Fane, O., 'The middle classes can learn a lot from teenage mothers' *The Observer* 13/02/2010 at Comment & Debate 35.

Gibb, F., 'Law needs changing to protect unmarried and divorcing couples, reform judge says' *The Times* 07/12/2009 at 23.

Hill A, 'Pushy Parents "don't make children happy"' *The Observer* 7/02/2010 at News 7. '

Jayawardene, J., 'The mothers who fight 4 justice' BBC News <http://newsvote.bbc.co.uk>

Kruml E. <http://www.loyno.edu/histody/journal/Kruml.html>.

Prime Minister's Speech *The Guardian* 1/10/1997 at 8.

Smith, Iain Duncan 'Ian Duncan Smith: men are being erased from family life' *The Sunday Times* 25/5/2008.

Willets, G., in 'Marriage is becoming preserve of middle-classes, Tories claim'

Wintour, P., & Watt, N., *The Guardian* 23/12/2009 at 1-2.

Xinran, Anonymous quote *The Guardian* G2, 11/07/2003 at 7.