

# **Feminist Relational Contract Theory: A New Model for Family Property Agreements**

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*In this article, a new model named Feminist Relational Contract Theory (FRCT) is explained, justified and applied to the context of family property agreements and specifically nuptial agreements. Most nuptial agreements are created amidst a complex web of power relationships and the dynamic of these relationships often evolves over time. However, the courts in England and Wales have not yet found a way to recognise this without adopting a paternalistic approach. This article proposes an alternative that could, in practice, recognise issues of power between parties entering family property agreements, exploring a recent Australian case on nuptial agreements which adopts a more contextual understanding of contract law.*

## **INTRODUCTION**

‘Feminist contract theory’, David Campbell says, is ‘something of an oxymoron’ because in his view, it sacrifices respect for autonomy for other political goals.<sup>1</sup> However, in this article I argue that an explicitly feminist version of contract theory is not only possible but is crucial in practice. A new model named Feminist Relational Contract Theory (FRCT) brings to the fore the untapped potential of contract law to properly engage with gendered issues of power without losing sight of the agency of the parties, whilst giving new meaning to core ideas of ‘freedom of contract’ and ‘autonomy’.

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<sup>1</sup>D. Campbell, ‘Afterword: Feminism, Liberalism and Utopianism in the Analysis of Contracting’ in *Feminist Perspectives on Contract Law*, ed. L. Mulcahy and S. Wheeler (2005) 161, at 165.

Focusing upon the law on nuptial agreements, this article will show that in practice courts frequently make assumptions as to how individuals make decisions and enter contracts.<sup>2</sup> Such assumptions are made out of respect for the autonomy of the individual,<sup>3</sup> but can mean not acknowledging the inevitable inequalities and hierarchies of family life that permeate the relationship and the decision-making process. This article will begin by outlining the legal status of nuptial agreements in England and Wales. This is a controversial context because nuptial agreements are not binding under legislation, but pressure for reform in the media and in Parliament has increased in recent years, most notably from Baroness Deech. If her proposed Divorce (Financial Provision) Bill 2017-2019 were introduced, this would limit the discretion afforded to judges<sup>4</sup> and would allow the possibility for housing, childcare and other financial needs to be contracted out of.<sup>5</sup> Even without reform, courts already take a restrictive approach when deciding when an imbalance of power between the parties will affect the weight of a nuptial agreement on relationship breakdown, which Lady Hale referred to extra-judicially as ‘the worst of all worlds’.<sup>6</sup> It will be argued that neo-liberal contractual principles can lead to important context being left out of the court’s overall assessment which can lead to unfairness and a failure to recognise how parties’ intentions change over time. This is problematic because

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<sup>2</sup> In England and Wales nuptial agreements have not historically been characterised as contracts, but the Law Commission (*Matrimonial Property, Needs and Agreements* (2014) Report no. 343) has stated that nuptial agreements must be contractually valid. Whilst it is unclear whether nuptial agreements are contracts and the Supreme Court in *Radmacher v Granatino* [2010] UKSC 42, at 63 treated this question as a ‘red herring’, Lady Hale later said extra-judicially that the majority viewed nuptial agreements as having contractual status: B. Hale, ‘Equality and Autonomy in Family Law’ (2011) 33 *J. of Social Welfare and Family Law* 3.

<sup>3</sup> *Id.*

<sup>4</sup> The legislative context of nuptial agreements encouragingly provides an opportunity for the courts to adopt an alternative approach. The discretion of the court to determine financial provision on divorce (conferred by section 23 of the Matrimonial Causes Act 1973) cannot be ousted by a nuptial agreement, and so the fluidity of the law in this area provides greater scope for the court to evaluate such agreements differently.

<sup>5</sup> This differs from the Law Commission’s stance, as reported in: Law Commission, *op. cit.*, n.2. The Law Commission attached a Nuptial Agreements Bill to its report on this matter providing for binding nuptial agreements with safeguards, including safeguards protecting parties’ needs.

<sup>6</sup> B. Hale, Keynote speech, Resolution’s 30<sup>th</sup> Annual conference, Bristol, 20 April 2018, at <<https://www.supremecourt.uk/docs/speech-180420.pdf>>.

it obscures patterns of power that almost always exist between the parties by assuming that individuals would only agree to terms that were personally beneficial for them.<sup>7</sup>

The second and third parts of this article will explore how a different approach can be taken. The second part will explain and explore FRCT. This was formulated previously but is set out comprehensively here for the first time as a new model proposed for adjudicating and understanding family property agreements.<sup>8</sup> It builds upon relational autonomy and relational contract theory, combining these approaches and overcoming their weaknesses with a feminist perspective. This explicates how contract can be ‘retrieved’ by FRCT because unlike orthodox contract, FRCT does not suppress the relational context affecting the balance of power between contracting parties. Using relational approaches, FRCT can recognise long term changes over the course of the marriage that frequently leave one spouse more economically vulnerable than the other.<sup>9</sup> This is especially important given Diduck and Kaganas’ criticism of family law as presently failing to ‘recognise the constraints affecting family choices, assuming them to be equally and freely made’.<sup>10</sup> Neither does it acknowledge ‘the value to society and to the family of the care work that (mostly) women do’<sup>11</sup> and, it does not pay attention to the economic hardship experienced by many women on relationship breakdown.<sup>12</sup> By contrast, FRCT applies an explicitly feminist approach that addresses these concerns by focusing on the lived realities of the parties, leading to an alternative assessment of contracts such as nuptial agreements.<sup>13</sup>

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<sup>7</sup> L-A. Buckley, ‘Autonomy and Prenuptial Agreements in Ireland: A Relational Analysis’ (2010) 38 *Legal Studies* 164, 166.

<sup>8</sup> S. Thompson, *Prenuptial Agreements and the Presumption of Free Choice* (2015).

<sup>9</sup> R. Leckey, ‘Relational Contract and other models of marriage’ (2002) 40 *Osgoode Hall Law J.* 1, 5.

<sup>10</sup> A. Diduck and F. Kaganas, ‘Family Law’ in *Great Debates in Gender and Law*, ed. R. Auchmuty (2018) 95, 101.

<sup>11</sup> *Id.*

<sup>12</sup> H. Fisher and H. Low, ‘Recovery from Divorce: Comparing High and Low-Income Couples’ (2016) 30 *International J. of Law, Policy and the Family* 338.

<sup>13</sup> This reflects the grounded nature of much feminist legal scholarship, which dispenses the usual top down analysis: see, e.g. J. Conaghan, ‘Reassessing the Feminist Theoretical Project in Law’ (2000) 27 *J. of Law and Society* 351.

The third and final part of this article explores the practical consequences of FRCT through a detailed examination of the High Court of Australia judgment *Thorne v Kennedy*.<sup>14</sup> This decision has cited and applied my earlier work on prenuptial agreements and it is currently the best example of a relational approach to nuptial agreements in practice. It will be argued that although the legal status of prenups is unlike England and Wales in that such agreements are binding under legislation in Australia, *Thorne v Kennedy* has important relevance to English jurisprudence because it adopts a more expansive and contextual approach.

This article will show how FRCT is useful not only as a means of critiquing contract, but also as a way of providing solutions that can empower contracting parties in the everyday context, especially those who would otherwise be on the short end of power imbalances.

## **PART 1: THE ORTHODOX APPROACH TO NUPTIAL AGREEMENTS**

### *1. The Current Law*

‘Nuptial agreement’ is an umbrella term referring to three types of agreement made by couples in the context of marriage: prenuptial agreements (made before marriage), postnuptial agreements (made during marriage) and separation agreements (made on dissolution of the marriage). The purpose of all three types of nuptial agreement is primarily to regulate the economic consequences of divorce, and sometimes death. In England and Wales, the legal status of nuptial agreements has a complex history that is distinct from other jurisdictions.<sup>15</sup> One of the important factors affecting enforcement historically has been the status of the relationship when the agreement was entered into. Agreements made at the beginning of relationship were previously perceived as pre-empting divorce and thus undermining marriage, yet agreements made once the parties had already separated were not influenced by this policy

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<sup>14</sup> [2017] HCA 49.

<sup>15</sup> Thompson, *op. cit.*, n.8, pp.38-70.

concern.<sup>16</sup> This is one of the reasons why separation agreements have had decisive weight since 1980,<sup>17</sup> whilst prenuptial agreements were only enforced in exceptional circumstances<sup>18</sup> until the Supreme Court accorded them decisive weight in 2010.<sup>19</sup> The Privy Council had established the status of postnuptial agreements two years previously.<sup>20</sup>

The rationale for giving effect to nuptial agreements was outlined by *Edgar v Edgar*,<sup>21</sup> the case that clarified the status of separation agreements. Upholding the agreement, Oliver LJ reasoned as follows:

Men and women of full age, education and understanding, acting with competent advice available to them, must be assumed to know and appreciate what they are doing and their actual respective bargaining strengths will in fact depend in every case upon a subjective evaluation of their motives for doing it.<sup>22</sup>

There are two important points in this quotation. First is the view that the court does not want to interfere with individuals' decisions just because they agreed to terms they understood but later regretted.<sup>23</sup> Therefore, nuptial agreements have decisive weight out of respect for individual autonomy.<sup>24</sup> The caselaw has consistently said to conclude otherwise would be unduly paternalistic.<sup>25</sup> It is considered patronising to hold that someone's decision is not good

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<sup>16</sup> M. Parker, 'The Draft Nuptial Agreements Bill and the Abolition of the Common Law Rule: 'Swept away' or Swept under the Carpet?' (2015) 27 *Child and Family Law Q.* 63.

<sup>17</sup> *Edgar v Edgar* [1980] 1 W.L.R. 1410.

<sup>18</sup> *Crossley v Crossley* [2007] EWCA Civ 1491.

<sup>19</sup> *Radmacher*, op. cit., n.2.

<sup>20</sup> *Macleod v Macleod* [2008] UKPC 64.

<sup>21</sup> *Edgar*, op. cit., n.17.

<sup>22</sup> *Id.*, pp.1420-1421.

<sup>23</sup> Oliver LJ's reasoning on separation agreements is now relevant to postnuptial and prenuptial agreements too (see *Radmacher*, op. cit., n.2.).

<sup>24</sup> *Id.*, p.78.

<sup>25</sup> *Radmacher v Granatino* [2009] EWCA Civ 649, at 83.

enough, and to deny them the agency and responsibility of being held to a legally enforceable agreement.

However, the latter half of Oliver LJ's above statement is also significant; the court should undertake a *subjective* evaluation of one's motives for signing a nuptial agreement. This allows a wide range of relevant aspects of the relationship to be taken into account, particularly at the point of separation when the context of the entire marriage is relevant. Ideally then, bargaining inequalities, power imbalances and disadvantages incurred during the marriage through care or other non-financial contributions could be considered when determining the motives for entering into the agreement, which could then provide scope to ask why someone later regretted that agreement. However, in the caselaw individual autonomy is frequently positioned in opposition to a subjective assessment of power imbalances in the relationship, because when this assessment requires an agreement to be changed or set aside, the autonomy of at least one of the parties is necessarily overruled.

Consequently, it is now very difficult to persuade the court that a nuptial agreement should not have any weight on divorce. The court still has the final say over the effect an agreement will have because it cannot oust its own discretion, as this has been conferred by Parliament. Only legislation can make nuptial agreements binding.<sup>26</sup> So if there has been material disclosure and understanding of the terms by both parties, the agreement will be upheld unless 'in the circumstances prevailing it would not be fair to hold the parties to their agreement'.<sup>27</sup> This would apply, for example, in cases where one of the parties is left 'in a predicament of real need, while the other enjoys a sufficiency or more'.<sup>28</sup>

For many, this is not good enough, as there is still a possibility that the nuptial agreement can be set aside. Baroness Deech has received considerable support for her Divorce

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<sup>26</sup>*Radmacher*, op. cit., n.2, p.144.

<sup>27</sup>*Id.*, p.78.

<sup>28</sup>*Id.*, p.81.

(Financial Provision) Bill, which seeks to make nuptial agreements binding under legislation with very few exceptions - an approach more extreme than in jurisdictions where such agreements are enforced.<sup>29</sup>

The current law<sup>30</sup> is arguably better than Baroness Deech's proposed reform of nuptial agreements, but it could be improved. The binary choice imposed by judges between either respecting party autonomy *or* recognising inequalities between the parties is polarising. To be clear, it is not that power disparity is invisible to the court – it is that engaging with such power disparity is not viewed as being practically possible without undermining the autonomy assumed to have been exercised when the agreement was signed. And so if a spouse experiences power disparity that is not 'exceptional' and she isn't in 'real' need, the agreement will normally stand. FRCT provides a new perspective that moves beyond this binary choice. But before exploring this, it is important to consider the neo-liberal ideology that has led to this binary choice and how this reinforces power inequalities along gender lines.

## 2. *The Neo-Liberal Myth of Autonomy*

The Supreme Court's 2010 decision in *Radmacher v Granatino*, that prenuptial agreements (like postnuptial and separation agreements) should have decisive weight, has been described as ushering in a 'new respect for autonomy'.<sup>31</sup> But the mantra that 'autonomy is good for you' requires circumspection in that it has repeatedly been used to legitimise the relegation of family disputes to the private sphere by justifying the rollback of the State in the name of giving choice and control to individuals. The zenith of this change has been the virtual obliteration of legal aid in private family law cases since 2012,<sup>32</sup> a reform which Jess Mant argues is rooted in neo-

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<sup>29</sup>S. Thompson and R. Sandberg, 'Common defects of the Divorce Bill and Arbitration and Mediation Services (Equality) Bill 2016-17' (2017) 47 *Family Law* 425.

<sup>30</sup> As stated by the Supreme Court in *Radmacher*, op. cit., n.2.

<sup>31</sup> *V v V* [2011] EWHC 3230 (Fam) at 36.

<sup>32</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012.

liberal ideology in that individuals are supposed to have responsibility for their own circumstances, whatever the structural barriers they experience.<sup>33</sup> As Felicity Kaganas puts it, ‘having made her/his bed, the disputant must lie in it’.<sup>34</sup> The neo-liberal context in which relationship disputes are being pushed means other concerns are being neglected, such as how the relationship evolved over time.

Importantly, this ‘hands off’ approach draws a veil over power imbalances prevalent in the family context. As Munro notes, blind respect for autonomy favours the party with greater bargaining power, often at the expense of the interests of the non-moneyed spouse because it fails to adequately recognise the often gendered power struggles in the relationship.<sup>35</sup> The family is a stabilising force for structural inequality, with research showing that even when women are breadwinners, they continue to carry out most of the domestic labour.<sup>36</sup> Traditional family roles such as childcare, decision making, and control of finances continue to be gendered. Although there has been a greater shift towards equality in dual career families, this may be more to do with alternative paid help with housework.<sup>37</sup> This gendered context to inequality in the family is not considered to be relevant to the effect nuptial agreements have, as the autonomy being respected by the courts is a gender-neutral notion of autonomy.

This gender-neutral approach contradicts the assertion made by Lady Hale in her dissenting judgment in *Radmacher*, that prenuptial agreements are tainted by power imbalance and are gendered in their effect.<sup>38</sup> Instead, the post-*Radmacher* approach now respects a neutral and individualised form of autonomy.<sup>39</sup> It is important to be cautious and critical of this approach. Assumptions of individual autonomy are linked to assumptions of formal equality

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<sup>33</sup>J. Mant, ‘Neoliberalism, Family Law and the Cost of Access to Justice’ (2017) 39 *J. Social Welfare and Family Law* 246.

<sup>34</sup>F. Kaganas, ‘Justifying the LASPO Act: Authenticity, Necessity, Suitability, Responsibility and Autonomy’ (2017) 39 *J. Social Welfare and Family Law* 168.

<sup>35</sup>V. Munro, *Law and Politics at the Perimeter* (2007) 49.

<sup>36</sup>J. Scott and E. Cleary, *Gender Roles: British social attitudes 30* (2013) Nat Cen.

<sup>37</sup>*Id.*

<sup>38</sup>*Radmacher*, op. cit., n.2, p.134.

<sup>39</sup>*V v V*, op. cit., n.31, p.36.



and as Alison Diduck claims, these assumptions have led to the prioritisation of unregulated choice in the family sphere through nuptial (and other family law) agreements and this is linked with policy and fiscal austerity.<sup>40</sup> Furthermore, when issues of power affecting nuptial agreements are relegated to the private sphere and out of the court's reach, inequalities caused by the relationship of power between parties entering such agreements are likely to be reproduced and reinforced, particularly on gender lines.<sup>41</sup> Parties are assumed to have exercised autonomy when they have not. Yet this assumption often means the gendered dimension to agreements made in the family law context is rendered invisible.

An emphasis upon individual autonomy means that a binary approach is taken that underplays agency. If agreements are routinely set aside the 'new respect' for autonomy is sacrificed. On the other hand, giving effect to contracts without close examination of the context in which they were created risks the suppression of one spouse's autonomy. As caselaw has shown, power inequalities need to be exceptional to have any force. And crucially, gender does not appear to play a role in much of the court's reasoning.

In the absence of a nuptial agreement, the judge has power to recognise the value of unpaid work in the home, such as reproductive or domestic labour, by making appropriate financial provision for the spouse who has undertaken this work.<sup>42</sup> For obvious reasons, this is typically the lesser income producing spouse. Furthermore, empirical research demonstrates that nuptial agreements operate to contract out of any entitlements generated by inevitably gendered non-financial contributions within marriage.<sup>43</sup> However, judges do not engage with this gendered power dimension when doing so would be seen as undermining individual autonomy, which is not only at the heart of freedom to contract (or deciding *whether* to

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<sup>40</sup> A Diduck, 'Autonomy and Family Justice' (2016) 28 *Child and Family Law Q.* 133, at 134.

<sup>41</sup> See N. Lacey, 'Feminist Legal Theory Beyond Neutrality' (1995) 48 *Current Legal Problems* 18.

<sup>42</sup> *White v White* [2000] UKHL 54.

<sup>43</sup> Thompson, *op. cit.*, n.8, p.6.

contract) but also flows from freedom *of* contract, whereby parties are free to dictate terms without legal intervention.<sup>44</sup>

Importantly, however, the solution to properly account for gendered power inequalities should not be to deny women the agency to contract, because in Charles Fried's words: 'If we decline to take seriously the assumption of an obligation...we do not take [her] seriously as a person. We infantilize [her]'.<sup>45</sup> Gillian Hadfield expresses this as leading to a 'feminist puzzle' or 'dilemma of choice'<sup>46</sup> and asks whether it is possible 'to protect women from the oppressive consequences of harmful, constrained choices...without divesting women of agency?'<sup>47</sup>

The question is whether there is an alternative to the binary choice of having to choose between either respecting neo-liberal understandings of autonomy or engaging with the power struggles of the parties. In the next section, this question will be explored in connection with a new theoretical framework, FRCT. It will be argued that FRCT could be used to illuminate the issues with power and autonomy in nuptial agreements to better understand how individuals make decisions when determining the financial consequences of relationship breakdown.

## **PART 2: BUILDING A NEW APPROACH – FEMINIST RELATIONAL CONTRACT THEORY (FRCT)**

So far, this article has argued that the current individualised approach to nuptial agreements is inadequate. A neo-liberal version of autonomy overshadows other considerations in an effort to move away from paternalism and encourage more private ordering, particularly in the wider family law context of legal aid cuts. This version of autonomy leaves little space for power imbalances to be taken into account, particularly on gender lines. If the consent of one of the

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<sup>44</sup> S. Smith, *Contract Theory* (2004) 59.

<sup>45</sup> C. Fried, *Contract as Promise* (1981) 20. N.B. 'him' is substituted for 'her' in the crotchets.

<sup>46</sup> G. Hadfield, 'The Dilemma of Choice: A Feminist Perspective on The Limits of Freedom of Contract' (1996) *Osgoode Hall Law J.* 337.

<sup>47</sup> G. Hadfield, 'Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law' (1998) 146 *University of Pennsylvania Law Rev.* 1235, at 1237.

parties is tainted by improper pressure then the parties are not bound, because the choice was not voluntary. Yet an *unwise* choice is still an autonomous choice.

The problem with this is not the concept of autonomy; it is the way the exercise of autonomy is measured in law. A nuptial agreement is taken as evidence of parties' autonomy provided the parties are appropriately informed and neither party has unlawfully been pressured into signing it. However, this assumption of autonomy serves to side-line contextual factors such as how and why the agreement was made and changes in the power dynamic that occur during the relationship. Assuming autonomy also means the question of *why* an individual would knowingly sign a bad agreement or stay party to it is not asked. But as Sheila McClean notes, the context in which choices are made must be appreciated because otherwise autonomy is reduced to a question of informed consent.<sup>48</sup> Distinguishing between autonomy and consent is vital, she says, because 'while consent is heralded as the legal equivalent of autonomy, in fact it is close only to that part of autonomy that relates to status – to the question of competence'.<sup>49</sup> Therefore, if autonomy and consent are assimilated, we are left with a binary view of autonomy whereby individuals either agree or do not.

This analysis suggests a way out of Hadfield's 'dilemma of choice' by conceptually separating autonomy from consent. Hadfield notes Elizabeth Anderson's theory,<sup>50</sup> that moving away from a binary view of choice requires justifying why an exercise of choice is significant *beyond* simply pointing to the bare fact that a contract has been made. If autonomy means more than consenting to something in the discrete moment a contract is signed, then assessing whether someone has been autonomous must require one to look beyond the circumstances prevailing at the time the agreement was made. This is especially important for prenups because these agreements are signed before the marriage, when research shows individuals are

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<sup>48</sup> S. McLean, *Autonomy, Consent and the Law* (2010) 215.

<sup>49</sup> *Id.*

<sup>50</sup> Hadfield, *op. cit.*, n.47, p.1237.

unrealistic about the probability of divorce,<sup>51</sup> are overly sanguine,<sup>52</sup> and often want to assert their own financial independence<sup>53</sup> despite financial dependency that usually accumulates during marriage. In short, parties to a prenup often have an unrealistic view of the present and also do not know how circumstances will change.<sup>54</sup> When circumstances *do* change this is frequently to the economic detriment of the spouse undertaking the domestic and reproductive labour in the relationship. What we need then, according to Hadfield is ‘a foothold to a contract logic that does not see the decision to refrain from implementing a person’s earlier choice as a failure to represent her autonomy’.<sup>55</sup> If individual’s circumstances and choices change over time, then this can be considered when understanding how autonomy is exercised over the course of a relationship. Searching for Hadfield’s foothold to contract logic leads to the first consideration when building FRCT: the theory of relational autonomy.

### *1. Relational Autonomy*

The theory of relational autonomy has developed as a useful lens through which orthodox approaches to autonomy can be criticised for ignoring the importance of relationships and their power ramifications. In contract law, for instance, autonomy is a central norm, which encapsulates ideas of freedom, voluntariness and self-interest. This version of autonomy focuses on the individual, who is expected to seek the best deal for him- or herself. In contrast to these ideas of neo-liberal autonomy, *relational* autonomy subverts the expectation to behave in one’s own self-interest and instead stresses the need to examine the constellation of

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<sup>51</sup> L. Baker and R. Emery, ‘Why Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage’ (1993) 17 *Law and Human Behaviour* 439.

<sup>52</sup> B. Bix, ‘Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage’ (1998) 40 *William and Mary Law Rev.* 145.

<sup>53</sup> S. Thompson, ‘In Defence of the ‘Gold-Digger’’ (2016) 6 *Oñati Socio-Legal Series* 1225.

<sup>54</sup> Thompson, *op. cit.*, n.8, p.93.

<sup>55</sup> Hadfield, *op. cit.*, n.47, p.1258.

relationships surrounding decision making processes. This contrast is useful because it highlights the shortcomings of neo-liberal autonomy.

If the reality of how individuals make decisions is to be appreciated, then it is important to challenge the idea that in contracts, autonomy simply means a rational and voluntary choice. Particularly in the complex realm of intimate family law agreements, it would be fair to ask whether individuals ever make completely voluntary, rational choices. But this is often what the law presumes has happened. Lucy-Ann Buckley contends that this is because ‘neoliberalism reinterprets conduct based on relational values (such as love and altruism) in the language of rationality and self-interest’.<sup>56</sup> In the late 1990s the concept of relational autonomy emerged in opposition to these traditional contractual perspectives on autonomy. Catriona Mackenzie and Natalie Stoljar have described relational autonomy as

an umbrella term, designating a range of related perspectives ... premised on a shared conviction, the conviction that persons are socially embedded and that agents’ identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender and ethnicity.<sup>57</sup>

Put simply, relational autonomy does not ignore the context in which decisions are made; rather, it is informed by this on-going context.

In *Relational Autonomy in Family Law*, Jonathan Herring juxtaposed his own perspective of relational autonomy with neo-liberal perspectives on autonomy. While neo-liberal notions of autonomy are built on assumptions that decision makers are independent, self-interested and rational actors, relational autonomy asserts that ‘[t]o be autonomous is not

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<sup>56</sup> L-A. Buckley, ‘Relational Theory and Choice of Rhetoric in the Supreme Court of Canada’ (2015) 29 *Canadian J. of Family Law* 251, 258.

<sup>57</sup> C. Mackenzie and N. Stoljar, ‘Autonomy Refigured’ in *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self*, ed. C. Mackenzie and N. Stoljar (2000) 4.

to be isolated and free of responsibility, but to be in a network of relationships, with their dependent responsibilities'.<sup>58</sup> Our autonomy when making these decisions is inherently impacted by relationships with others and the relationships with those we are entering into agreements with. This has led Herring to use relational autonomy to automatically argue against giving effect to agreements where there is an imbalance of power between the parties. However, as my earlier research has demonstrated, there is almost always an imbalance of power between the parties<sup>59</sup> because one of the parties tends to be disproportionately responsible for caring obligations. The conclusion reached by Herring's application of relational autonomy falls back with the paternalistic result that couples are prevented from determining the financial consequences of divorce for themselves.

It is important to not presume a lack of agency when there is evidence of oppression or systematic subordination. Diana Meyers notes that even if 'it seems undeniable that an autonomy-friendly environment is necessary for autonomy, this is not the case'.<sup>60</sup> She argues that individuals experiencing multiple forms of oppression and structural inequality can still be partially autonomous and it should not be assumed they are unable to be autonomous because of structural constraints. Similarly, Buckley says that from a feminist perspective, it is important to employ relational theory in a way that does not inhibit individual agency,<sup>61</sup> and so on this view, autonomy has not been denied to individuals who have made 'bad' decisions. However, as empirical research has shown,<sup>62</sup> relational autonomy does not advance matters a great deal in practice. Pre-existing contractual norms remain central to the overall assessment of the agreement. For instance, figuring out what autonomy means from a relational perspective is inevitably affected by societal assumptions about the family. While in theory relational

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<sup>58</sup> J. Herring, *Relational Autonomy and Family Law* (2014) 68.

<sup>59</sup> Thompson, *op. cit.*, n.8, p.109.

<sup>60</sup> D. Meyers, 'Intersectional Identity and the Authentic Self? Opposites Attract!' in *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self*, ed. C. Mackenzie and N. Stoljar (2000) 151.

<sup>61</sup> Buckley, *op. cit.*, n.56.

<sup>62</sup> *Id.*

autonomy both challenges and undermines assumptions made by neo-liberal autonomy, in practice the term is almost impossible to apply without the court falling back on neo-liberal norms, because relational autonomy can be interpreted in a range of different ways. It appears then that the main difference between neo-liberal autonomy and relational autonomy is simply that the latter compels one to ask *why* the decision was made.<sup>63</sup>

## 2. Relational Contract Theory (RCT)

A key element of RCT is the significance it places on context, by looking first to the relationship between the parties before looking at the transaction. This is different from orthodox approaches to contract, where the focus on the agreement distracts from inequalities that can arise in intimate relationships. This is not to say that the orthodox approach ignores context – it is criticised because context is not prioritised.<sup>64</sup>

RCT as developed by Ian Macneil examines the contract as a whole.<sup>65</sup> As Sally Wheeler explains, Macneil's model builds on the principles of contract law relied on in practice but extends it 'to embrace a much broader and richer social or perhaps philosophical relational contract that more accurately explained how exchange took place' in the agreement being assessed.<sup>66</sup> Macneil's theory challenges the neo-liberal underpinnings of contract, and its individualised model of autonomy. Given that neo-liberal norms of contract are increasingly influencing judicial approaches in family law,<sup>67</sup> relational contract theory is a useful way of recognising the relational elements of nuptial agreements. Put simply, relational autonomy criticises contract and attempts to repurpose autonomy, and RCT attempts to repurpose contract, providing a different view of autonomy and patterns of power in the process.

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<sup>63</sup> See Edgar, *op. cit.*, n.17, p.1420.

<sup>64</sup> H. Beale, 'Relational Values in English Contract Law' in *Changing Concepts of Contract: Essays in Honour of Ian Macneil*, ed. D. Campbell et al. (2013) 116.

<sup>65</sup> I. Macneil, *Contract: Exchange Transactions and Relations* (1978).

<sup>66</sup> S. Wheeler, 'Visions of Contract' (2017) 44 *J. of Law and Society* 74, 82.

<sup>67</sup> Mant, *op. cit.*, n.33.

Probing further using RCT helps us understand how and why the agreement was made. RCT overcomes a difficulty theorised by Macneil which he calls ‘presentation’.<sup>68</sup> This refers to long term contracts that deal with the future as if it were the present. A prenup is an example of presentation; it binds a future situation that may or may not happen in future – divorce. But it is made in the circumstances of the parties’ relationship at *present* – before they are married and at a time when divorce seems to be a distant and unlikely prospect. Using RCT can help highlight the fact that nuptial agreements can be complex because of the many unforeseeable ways in which the marital relationship may develop. Therefore, nuptial agreements are not understood by the promises the parties make to one another in the agreement they sign but as Robert Leckey explains, the content of the relationship ‘simply develops from the parties’ interactions during its life’.<sup>69</sup>

For some, RCT may seem an inappropriate approach for nuptial agreements, given that Macneil developed this theory in a commercial context, based on commercial norms.<sup>70</sup> When contractual relationships are built on these norms, responses to future incidents are more foreseeable. However, in the intimate context of nuptial agreements, each relationship is different and there is no clear normative framework to rely on.<sup>71</sup> In spite of these different contexts RCT has potential for family property agreements.<sup>72</sup> While factors like economic dependency are not *explicitly* used as bargaining tools, the parties can be aware of the power imbalance such factors can cause. This leads to what John Wightman refers to as ‘tacit understandings’ between the parties, which could inhibit the negotiation of some issues. Recognising these tacit understandings can provide a more complete picture of how and why

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<sup>68</sup> I. Macneil, ‘Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law’ (1978) 72 *Northwestern University Law Rev.* 854.

<sup>69</sup> Leckey, *op. cit.*, n.9, p.8.

<sup>70</sup> J. Wightman, ‘Intimate Relationships, Relational Contract Theory and the Reach of Contract’ (2000) 8 *Feminist Legal Studies* 93.

<sup>71</sup> J. Dewar, ‘The Normal Chaos of Family Law’ (1998) 61 *Modern Law Rev.* 467; although see M. Henaghan, ‘The Normal Order of Family Law’ (2008) 28 *Oxford J. of Legal Studies* 165.

<sup>72</sup> Thompson, *op. cit.*, n.7, p.154; Wightman, *op. cit.*, n.70.



decisions are made in the context of nuptial agreements. It is also a more realistic reflection of the parties' relationship as a 'shared project'<sup>73</sup> rather than an individual enterprise.

RCT can therefore be a valuable way of understanding intimate relationships like marriage, as Leckey uses it to mean 'a relationship between two individuals in which they seek not only economic, but also non-economic and emotional support'.<sup>74</sup> This shows the richness of Macneil's work, which accounts for the 'non-promissory' aspects of marriage - in other words - the fact that many obligations and transactions of marriage cannot be delineated at the beginning of the relationship.<sup>75</sup> Instead, the content of the relationship develops from the parties' interactions during the marriage.<sup>76</sup> On this basis, Lloyd Cohen developed a model of marriage as relational contract that could appreciate a range of investments specific to the relationship, such as sacrificing one's career or forgoing other opportunities.<sup>77</sup> As nuptial agreements are informed by this marital context, Leckey and Cohen's approaches help bring to the fore the fact that obligations in the marital relationship arise over time from a combination of parties' interaction, tacit agreement and statute. These are not accurately reflected by the terms of a nuptial agreement when it is considered outside of its relational context.<sup>78</sup>

### 3. FRCT

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<sup>73</sup>Leckey, op. cit., n.9, p.9.

<sup>74</sup>Id.

<sup>75</sup> I. Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (1980) 28; I Macneil, *The Relational Theory of Contract: Selected Works of Ian Macneil* (2001).

<sup>76</sup> Leckey, op. cit., n.9, p.8.

<sup>77</sup> L. Cohen, 'Marriage, Divorce and Quasi Rents; or, "I Gave Him the Best Years of My Life"' (1987) 16 *The J. of Legal Studies* 267.

<sup>78</sup> For a detailed application of RCT to prenuptial agreements in the Netherlands, see A. Flos, 'Prenuptial and Tenancy Agreements as Relational Contracts' in *Embedding the Principles of Life Time Contracts: A Research Agenda for Contract Law*, ed. L. Ratti (2018) 163.

FRCT was first posited in my earlier work<sup>79</sup> but is developed here for the first time. The feminist aspect of this theory – the ‘F’ of FRCT – is crucial. This is because RCT does not explicitly address gendered power dimensions in agreements which are especially likely to be prevalent in the family sphere. This is not to say RCT is not capable of addressing the consequences of gendered power in intimate relationships. Indeed, by looking to the gains and losses flowing from the relationship,<sup>80</sup> RCT can recognise

that changes after divorce all too often lead to poor economic conditions for women...Even when parties begin as equals, then, the choices made and specialization of labour assumed may “lock” some people into positions, raising concerns of power, exploitation, and dependence.<sup>81</sup>

Here, Leckey underscores the force of RCT’s potential in that it has scope for assessing how changing circumstances during the course of the relationship affect parties on gender lines. His application of RCT in relation to marriage shows that when nuptial agreements are in place, parties’ ‘investments’ in their career and earning power survive. But parties who ‘invest’ in domestic and reproductive labour during the relationship do not recover the cost of their investment unless the agreement provides accordingly. RCT recognises that such an explicit recognition is unlikely because it is not possible to know what investments the parties will make at the beginning of the relationship.

Importantly, however, RCT is not explicitly feminist, and it has been treated with caution by feminist scholars. As Máiréad Enright observes, relationality is ‘not innocent of power: informal solidarity and unwritten custom are compatible with capitalist hierarchy’.<sup>82</sup>

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<sup>79</sup> Thompson op. cit., n.8, p.154; R. Sandberg and S. Thompson, ‘Relational Autonomy and Religious Tribunals’ (2017) 6 *Oxford J. of Law and Religion* 137.

<sup>80</sup> Leckey, op. cit., n.9, p.14.

<sup>81</sup> Id., p.18.

<sup>82</sup> M. Enright, ‘Contract Law’ in *Great Debates in Gender and Law*, ed. R. Auchmuty (2018) 1, 11..

The norms on which relationships are built, and which RCT pays attention to, have the potential to favour some individuals and exploit others.<sup>83</sup> Moreover, an approach based on RCT alone cannot question or critique the norms and structures that exist and the gendered power disparities that result. Although RCT has now been developed outside its original commercial context, this context continues to constrain it, and it continues to be shaped by the priorities, assumptions and values of the pervasive neo-liberal culture. As Campbell, a leading advocate of RCT, notes, the liberal values implicit in RCT are incompatible with the prioritisation of feminist equality.<sup>84</sup> FRCT is designed to overcome this incompatibility by discarding the liberal values implicit in RCT and applying an explicitly feminist approach which develops RCT to pay attention not only to the tacit understandings affecting intimate relationships, but to also critique and subvert them.

This development of RCT is clearly needed if we pay attention to Scoular's warning for scholars using it to address feminist concerns:

Macneil's focus would seem to provide a hospitable framework for feminists attempting to disrupt dominant norms of contract. While certainly offering a parallel description of contract law's inability to be context-specific, it should be noted that it also applies in a very different context ... [W]e must be vigilant and not rush in to uncritically adopt into a long term intimate context norms which apply to long term commercial transactions. This is a pit into which significant and oft-quoted feminist work has already fallen.<sup>85</sup>

Falling into this pit would be ironic given that the commercial norms on which RCT are ostensibly based are normally the focus of feminist critique for being apolitical and gender

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<sup>83</sup> Id.

<sup>84</sup> Campbell, op. cit., n.1.

<sup>85</sup> J. Scoular, 'The Revival of Equitable Doctrine in Scots Law-a Space for Gender Concerns?' in *Feminist Perspectives on Equity and Trusts*, ed. S. Scott-Hunt and H. Lim (2001) 126.

neutral. The context of nuptial agreements *is* political - in that the legal approach to such agreements is inextricably connected to legal aid cuts and the prioritisation of 'autonomy'. It is also gendered in that nuptial agreements often operate to protect the assets of the moneyed spouse and contract out of recognising the economic value of gendered roles such as reproductive and domestic labour.<sup>86</sup> A gender neutral approach suggests that these inequalities are determined by the choices of self-interested, liberal individuals,<sup>87</sup> rather than recognising the unequal and gendered structures of society. The aim of the 'F' in FRCT is to provide an alternative analysis of traditional doctrinal concepts in contract and to give them new meaning. As Sandra Fredman explains, current neo-liberal perspectives on contract tend to emphasise women's freedom of choice instead of acknowledging the structural constraints on these choices and the impact social systems have on women's freedoms.<sup>88</sup> A feminist perspective can take us away from a neo-liberal, binary view of choice towards an understanding of the many and varied ways in which people really make decisions, and the social, economic and legal pressures they are under when making these decisions. It ensures that disparity of power between the parties is a central rather than residual consideration. A feminist approach alters the lens in which we see law and the social world by shedding light on structural and entrenched gendered disadvantages that are perpetuated. Without a feminist approach, the gendered assumptions embedded in legal and social arrangements are rendered invisible.<sup>89</sup>

Feminist perspectives<sup>90</sup> can facilitate recognition of power imbalance, challenge binary notions of consent/non-consent and appreciate the context and (gendered) material realities of parties to agreements. This context is important because research shows that women's

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<sup>86</sup> G. Brod, 'Premarital Agreements and Gender Justice' (1994) 6 *Yale J. of Law and Feminism* 229.

<sup>87</sup> Lacey, *op. cit.*, n.41, p.12.

<sup>88</sup> S. Fredman, *Women and the Law* (1998) 288.

<sup>89</sup> Conaghan, *op. cit.*, n.13.

<sup>90</sup> Feminism is not always easily characterised (for instance, as liberal, radical or socialist), and indeed such categorisation is not always necessary, particularly because this would suggest that feminism is a supplement to other doctrines: C. Pateman, *The Sexual Contract* (1988) 5.

experiences of relationship breakdown are often different to those of men: whilst women's household income falls by approximately 31 per cent, men's household income increases by approximately 23 per cent.<sup>91</sup> Where RCT has the *capacity* to appreciate these lived realities, FRCT ensures such gendered inequities are brought to the fore.

To be clear, the value in adding a feminist perspective to RCT is that it can make gender visible by demonstrating how 'gender neutral' legal principles differentially impact men, women and men in non-traditional gendered roles as a result of power inequalities between the parties, wider structural inequalities, or both.<sup>92</sup> A feminist approach places particular emphasis upon agency and complicates traditional understandings of this concept. This is demonstrated by Martha Mahoney's perception of agency in the situation of domestic abuse. She argues that if agency is separated from its wider gendered social context, the choice to stay with an abusive partner is viewed as acceptance of that abuse.<sup>93</sup> But if a more complex understanding is employed, refusing exit can signify resistance to power imbalance rather than acquiescence. Staying in an abusive relationship or leaving is a binary choice, the parameters of which are set by the perpetrator of the abuse. Yet with a feminist and relational understanding, the choice to stay in a relationship with the aim of stopping abuse could be seen as an exercise of agency. Applying this view of agency to nuptial agreements such as prenups means that if a party is disadvantaged by the terms of an agreement but does not cancel the wedding, they have not necessarily acquiesced to those terms. Cancelling the wedding or leaving the marriage is not the only alternative to a bad agreement – another option is for the parties to negotiate an agreement that is mutually beneficial. In this example, a feminist lens zooms out of a binary and individualistic approach so that the wider gendered issues affecting contracts are not

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<sup>91</sup> H. Fisher and H. Low, 'Who Wins, Who Loses and Who Recovers from Divorce?' in *Sharing Lives Dividing Assets*, ed. J. Miles and R. Probert (2009) 48, 254.

<sup>92</sup> Conaghan, *op. cit.*, n.13.

<sup>93</sup> M. Mahoney, 'Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings' (1991) 65 *Southern California Law Rev.* 1284.

missed. Especially in the intimate context of nuptial agreements, couples often do not behave in an individualistic way and an explicitly feminist approach is critical of the masculine assumption that they do.

These features are important when confronting Hadfield's dilemma of choice because agency is not abandoned when feminist understandings of power are combined with relational contract's understanding of context. FRCT does not view choice simply as saying "yes" or "no" to a bad agreement and argues instead that it is possible to follow a third route; negotiating an agreement that is beneficial for both parties. And so whilst an orthodox approach might view signing a bad agreement as an irrational choice, FRCT can see that *for that individual*, signing might have been the most rational thing to do in the circumstances. Indeed, it might not be rational or practical, from their perspective, to walk away from the marriage. This is not to say that this individual has not been autonomous or has lacked agency, but it does recognise how parties' unequal opportunity to exercise power in the relationship affects nuptial agreements. In short, the advantage of FRCT is that it does not prioritise autonomy over all other considerations, unlike both orthodox contract and relational autonomy. By instead prioritising the parties' relationship, contracts can be negotiated and given effect in diverse ways.

There are two practical ways an approach based upon FRCT can do this. The first is for the court to adopt a more expansive interpretation of vitiating factors such as undue influence. Undue influence as an 'equitable doctrine of coercion' ensures that the influence of one person over another is not abused. Therefore, if the consent of one party is obtained in a way the law finds unacceptable, the transaction will not be allowed to stand. The aim of undue influence is not only to police consent; the doctrine is also about preventing 'victimisation of one party by the other'.<sup>94</sup> Relying on this doctrine requires the affected party to prove that their free will was overborne in the circumstances as a result of improper pressure from the respondent. The

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<sup>94</sup> *National Westminster Bank plc v Morgan* [1985] 1 All ER 821.

problem is that pressure must be abnormal and exceptional to justify vitiation of an agreement because gendered power imbalances are often considered to be an ordinary consequence of intimate transactions by the court.<sup>95</sup> Research shows that nuptial agreements are frequently characterised by power disparity,<sup>96</sup> and so in many cases the relevant pressure will be considered normal.

However, if undue influence is considered from the perspective of FRCT, this is not necessarily the case. Instead of measuring the prevalence of undue pressure in intimate relationships to calculate whether it is exceptional or not, an approach consistent with FRCT distinguishes between normal and abnormal pressure according to the experiences of individual couples. By taking specific relationship dynamics into account, power imbalances can be explained because they do not fit within the context of what is ‘normal’ for that couple. While this could be an effective way of detecting the impact of illegitimate pressure on the decision to make a nuptial agreement, it does not adequately address Macneil’s issue with ‘presentation’ or more simply, unforeseen changes in circumstance after the agreement is made.

This leads to the second potential way of implementing FRCT in practice – through a ‘non-bargain’ approach.<sup>97</sup> Over time, spouses’ expectations and intentions fluctuate, particularly when there are unforeseeable changes during the marriage that affect couples’ wealth or families. Wightman argues that the bargaining process of agreements is not as important as the intentions shared by the parties over the course of the relationship. Viewing parties’ intentions as developing over time means the focus is on the parties’ relationship instead of the bargaining process at the time the agreement was signed. In practice, the court could consider whether there was any evidence that the parties had an understanding of

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<sup>95</sup>R. Auchmuty, ‘The Rhetoric of Equality and the Problem of Heterosexuality’ in *Feminist Perspectives on Contract Law*, ed. L. Mulcahy and S. Wheeler (2005) 51.

<sup>96</sup> Thompson, *op. cit.*, n.8, p.109.

<sup>97</sup> *Id.*, p.182; Wightman, *op. cit.*, n.70.

financial support different from the nuptial agreement and that they consequently relied on this changed understanding. This scenario shares some similarities with the operation of common intention constructive trusts. For example, in cases where property is in a couple's joint names but quantification of each parties' beneficial interests is an issue, their conduct and changing intentions may be taken into account by the court.<sup>98</sup> A non-bargain approach would not promote estoppel claims, because estoppel requires the court to consider isolated acts of reliance and specific promises, instead of focusing first on the parties' relationship with each other.<sup>99</sup> Rather, a non-bargain approach considers parties' intentions and expectations in the overall context of the relationship. The feminist aspect of this approach is important, because it is particularly sensitive to the fact that career sacrifices or other changes in circumstance may affect women (or men in non-traditional roles) more if the nuptial agreement has not provided for these changes.

In the US there are cases that suggest a non-bargain approach could be effective in practice. In the state of Oregon, the court in *Baxter v Baxter*<sup>100</sup> held that the parties' mutual intentions had changed since the prenup was signed. The prenup specified that ownership of the parties' assets would remain separate. Though the parties kept their assets separate during the first 13 years of the marriage, the wife subsequently left her job to work unpaid in her husband's business and paid off some of the business debt using her separate assets. Considering this course of conduct instead of only focusing on the point the agreement was signed persuaded the court to vary the agreement. This approach contrasts with that in England. In *Z v Z (No 2)*<sup>101</sup> the wife claimed that the husband had made assurances not to enforce their nuptial agreement, but the court would not decide whether the agreement could be varied orally, and whether this would make it unfair to enforce. And so the agreement was varied

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<sup>98</sup> *Jones v Kernott* [2011] UKSC 53.

<sup>99</sup> *Wightman*, op. cit., n.70.

<sup>100</sup> 911 P 2d 343 (Oregon 1996).

<sup>101</sup> [2011] EWHC 2878.



because of needs rather than through an assessment of how the parties' relational autonomy had been affected. This highlights the limitations of focusing on the bargain and whether in each discrete moment it would be varied. A non-bargain approach would have enabled the court to recognise this course of conduct as evidence that the parties' intentions had changed, and it could vary the agreement accordingly.

FRCT has potential to empower contracting parties. By adopting an expansive interpretation of vitiating factors and/or a non-bargain approach, FRCT creates a space in which the voices of both parties are heard, not just the party with the most bargaining power. While FRCT can be used to recognise and mitigate power imbalances between individuals or between individuals and institutions,<sup>102</sup> it still operates within a legal framework criticised by many feminists.<sup>103</sup> As Carole Pateman argues, the roots of contract are based in inequality and informed by a status quo that treats everyone in a neutral way.<sup>104</sup> It is therefore important to note that although FRCT challenges these broader political, legal and social issues, it does not resolve them. Instead, FRCT looks to how theory can work within the boundaries of law to inform *current* legal practice,<sup>105</sup> so that patterns of power between individuals can be recognised in the context of everyday contracts. At the everyday level of nuptial agreements, there are diverse ways in which parties can negotiate power, and alternative insights into how decisions are made when making nuptial agreements. As the next section will show, FRCT is already evident in aspects of the law and so could be developed into a functional judicial framework. This does not require a wholesale transformation of the law, but instead suggests that this new perspective could provide more mutually beneficial solutions to some of the issues of power raised by entering into family property agreements. These possibilities are highlighted

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<sup>102</sup> For instance, it was applied in the context of religious tribunals in Sandberg and Thompson, *op. cit.*, n.79.

<sup>103</sup> Munro, *op. cit.*, n.35.

<sup>104</sup> Pateman, *op. cit.*, n.90.

<sup>105</sup> This forms part of a trend within feminist legal studies to re-evaluate liberal analysis rather than 'straw manning' the liberal target: Munro, *op. cit.*, n.35, p.52.

on examination of *Thorne v Kennedy*,<sup>106</sup> an Australian case that followed a relational approach aligned with the aims of FRCT.

### **PART 3: THORNE V KENNEDY – MOVING TOWARDS FRCT IN ACTION**

In November 2017, the High Court of Australia (HCA) handed down a judgment that was reported by the press as having potentially ‘changed prenups in Australia forever’.<sup>107</sup> The sole issue in this case was whether the wife challenging the nuptial agreements she had signed was subject to duress, undue influence or unconscionable conduct. As a result, the HCA had to use the tools of contract law to address the power imbalances in this agreement. But by using a relational approach, the court worked within the limits of the law to produce a more nuanced and contextual analysis of the agreement.

In *Prenuptial Agreements and the Presumption of Free Choice*, I argued that the law on duress, undue influence and unconscionability falls short of recognising issues of power affecting nuptial agreements.<sup>108</sup> My assessment was based on caselaw from England, Wales, the United States and Australia, and concluded that contractual doctrine narrowly constrains the court’s ability to recognise the prevalent yet subtle pressures arising out of the relationship between parties to a nuptial agreement. Therefore prior to the HCA’s decision in *Thorne*, I would have concluded that an approach influenced by FRCT would have recognised the coercion experienced by the wife, but that previous caselaw would make a finding of undue influence unlikely in the circumstances. However, the HCA *did* find undue influence because it considered the wider relational context in which the nuptial agreements were signed. This approach, which is consistent with FRCT, took a broader view of what could constitute undue

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<sup>106</sup> Op. cit., n.14.

<sup>107</sup> J. Shoebridge and S. Turnbull, ‘How advice at the hairdressers to a millionaire’s ex might have changed prenups in Australia forever’ *ABC News*, 11 Nov 2017, <<http://www.abc.net.au/news/2017-11-10/prenup-shake-up-in-landmark-thorne-v-kennedy-case/9138030>>.

<sup>108</sup> Thompson, op. cit., n.8, p.129.

influence to recognise a more extensive range of power imbalances affecting nuptial agreements. I will explain why by first outlining the facts in *Thorne*, followed by an analysis of what English caselaw suggests the approach the courts in this jurisdiction would have taken, before assessing the HCA decision.

### *1. Background*

Unlike England and Wales, nuptial agreements are binding under legislation in Australia,<sup>109</sup> though there are similarities in the courts' treatment of such agreements in both jurisdictions. For example, section 90F of the Family Law Act 2000 prevents one party from leaving the other unable to support himself or herself and the caselaw in England and Wales is clear that a nuptial agreement must not leave one party in a position of 'real need'.<sup>110</sup> Independent legal advice is a requirement in Australia under section 90G(1) and the parties must also sign a statement that the advantages and disadvantages of signing were explained to them. Independent and competent legal advice is encouraged in England and Wales but is not mandatory.<sup>111</sup> There is also scope for the Australian courts to set aside agreements according to the equitable doctrine of 'unconscionable conduct' if it can be shown that the innocent party was under a 'special disadvantage', preventing them from making an agreement in their own interests.<sup>112</sup>

In *Thorne* the HCA's assessment related to whether the nuptial agreements at issue were voidable on the basis of duress, undue influence or unconscionable conduct. On the face of it, the facts of this case do not suggest there had been duress or undue influence: both parties

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<sup>109</sup>Specifically, the Family Law Act Part VIIIA.

<sup>110</sup>*Radmacher*, op. cit., n.2, p.81.

<sup>111</sup>*Kremen v Agrest* [2010] EWHC 3091.

<sup>112</sup>*Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14. It is important to note the distinction between this doctrine in Australia and English law's *description* of behaviour as unconscionable in *Radmacher*, where the Supreme Court noted the relevance of unconscionable conduct such as undue pressure (falling short of duress) or 'other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage': op. cit., n.2, p.71.

had obtained independent legal advice, it was both parties' second marriage and although the prenup was signed shortly before the wedding, the subsequent postnup was 'substantially identical'<sup>113</sup> and was entered into without any time pressure. Nevertheless, the wider context of the parties' relationship in *Thorne* does indicate they were not on an even playing field when they made the agreement. The wife (Ms Thorne) was 36 years-old, Eastern European, of limited financial means and living in the Middle East when she met the husband (Mr Kennedy). He was a 67-year-old Greek-Australian property developer worth between \$18 and \$24 million. The husband made it clear to the wife from the beginning of their courtship that his money was for his children. "You will have to sign paper", he said.<sup>114</sup> Eleven days before the wedding, he told Ms Thorne that they were going to sign a prenuptial agreement, and if she did not sign it the wedding would not go ahead. Ms Thorne was advised against signing the prenup by her lawyer, and understood that the agreement was the worst her lawyer had ever seen because the provision it made was 'very poor...from someone in Mr Kennedy's circumstances'.<sup>115</sup> The same lawyer later urged her not to sign the postnup that was virtually identical to the prenup.<sup>116</sup> But she did not listen to her lawyer's advice, as she wouldn't consider the possibility of divorce and her only concern was that she would have protection if Mr Kennedy predeceased her.<sup>117</sup> This highlights the limits of independent and competent legal advice<sup>118</sup> – sometimes individuals will not take this advice because they do not think they will ever divorce.<sup>119</sup> But Ms Thorne's expectations were not borne out. Mr Kennedy did predecease her as she feared, but not before they had separated, less than four years into the marriage. This complex set of

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<sup>113</sup> *Thorne*, op. cit., n.14, p.1.

<sup>114</sup> *Id.*, p.1.

<sup>115</sup> *Id.*, pp.8-12.

<sup>116</sup> *Id.*, p.14.

<sup>117</sup> *Id.*, p.12.

<sup>118</sup> S. Thompson, 'Levelling the Prenuptial Playing Field: Is Independent Legal Advice the Answer?' (2011) 4 *International Family Law* 327.

<sup>119</sup> Baker and Emery, op. cit., n.51.

facts makes *Thorne v Kennedy* a fitting case study to test orthodox contractual approaches to nuptial agreements as against an approach consistent with FRCT.

## 2. *English Law and the Facts of Thorne*

The ‘nuptial agreements have decisive weight out of respect for autonomy unless unfair’ approach in England and Wales ostensibly gives the court two options if faced with a case like *Thorne*. First, the court could decide that the wife did not freely enter into the nuptial agreements or did not understand them. The wife must show that she was *either* subject to duress, undue influence or improper pressure<sup>120</sup> or that she didn’t know what she was doing. In *GS v L*<sup>121</sup> it was clear that neither party understood the effect of their agreement and in *Kremen v Agrest*<sup>122</sup> a combination of no legal advice, proper disclosure or explanation of the agreement meant the wife was deemed not to have understood it. ‘Understanding’ a nuptial agreement therefore means that its terms have been explained to each party in an independent setting and that they had the information they needed, or at least the opportunity to attain this information. On this basis, the wife in *Thorne* did know what she was doing. She had been warned by her solicitor that both agreements were terrible, and that she should not sign either of them. And so English caselaw would suggest she had material understanding of the agreement.

Would the English courts have decided she had been coerced? The Supreme Court in *Radmacher* did not set a clear threshold for the type of pressure the court will consider, but caselaw has shown that pressure and coercion are difficult to establish in the nuptial agreements context.<sup>123</sup> However, there are additional facts in *Thorne* that must be considered. The agreement was signed only days before the wedding, the wife’s family had travelled to

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<sup>120</sup> *Radmacher*, op. cit., n.2.

<sup>121</sup> [2011] EWHC 1759.

<sup>122</sup> *Kremen*, op. cit., n.111.

<sup>123</sup> *Hopkins v Hopkins* [2015] EWHC 812 (Fam).

Australia for the wedding and the wife would not be able to get a visa to stay in the country unless she married. This combination of factors might lead to a finding of improper pressure in England and Wales though there is no caselaw dealing with these particular facts so far. On the other hand, the husband had made his intentions to sign a prenup clear from the start of the relationship, and the wife later signed a postnup without the pressure of an impending wedding. As a result, it is unclear whether each of these individual instances would add up to sufficient pressure to have the agreements set aside, and whether the postnup that was subsequently signed diminishes the importance of the coercive circumstances in which the prenup was signed.

It was also apparent that the husband in this case wouldn't marry without a prenup, and the Supreme Court has said this is an 'important' factor.<sup>124</sup> Whether this would amount to undue influence, however, is unlikely. Actual undue influence was found in the context of a postnup in *NA v MA*, but the threats in this case were more extreme than in *Thorne*.<sup>125</sup> The wife was given an ultimatum to sign the postnup or end the marriage, and the court found severe pressure because the husband 'knew that she wanted above all else to save the marriage, felt overwhelmingly guilty and did not want her affair to destroy her children's lives'.<sup>126</sup> I have previously argued that English courts are more likely to determine there is no undue influence because there is a realistic alternative to signing by not getting married.<sup>127</sup> Cancelling a wedding is different from the wife in *NA v MA* being forced to leave her marriage, her home and her children if she did not sign. Furthermore, there are many examples of prenups that were given effect where one party (or one party's family) insisted the agreement was signed.<sup>128</sup> Ms Thorne's chances in the English courts are lessened even more by the fact this was her second

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<sup>124</sup> *Radmacher*, op. cit., n.2, p.72.

<sup>125</sup> [2006] EWHC 2900 (Fam).

<sup>126</sup> *Id.*, p.128.

<sup>127</sup> *Thompson*, op. cit., n.8, p.115.

<sup>128</sup> *V v V*, op. cit., n.31.

marriage, as the Supreme Court in *Radmacher* noted a previous marriage ‘may explain the terms of the agreement, and may also show what they foresaw when they entered into the agreement’.<sup>129</sup>

Caselaw suggests that it is unlikely that an English court would find that Ms Thorne had been subject to undue influence because she technically could have chosen to not enter the prenup and to not marry. This is further emphasised by *KA v MA*,<sup>130</sup> an English High Court case similar to *Thorne* in that the wife rejected professional advice and signed a prenup, which the husband told her she must sign in order to marry him. In Roberts J’s view, the wife was ‘psychologically torn’ between proceeding with the wedding and signing an agreement ‘which might well, at some point in the future, operate to her significant financial detriment’.<sup>131</sup> Clearly, Roberts J was able to understand the wife’s reasons for entering the prenup, finding that the wife ‘took this course for what may have been the best of reasons...motivated principally by what she perceived to be in their son’s best interests’.<sup>132</sup> She even suspected that the wife did not make much attempt to ask for more under the agreement<sup>133</sup> out of fear that the wedding would not go ahead.<sup>134</sup> But this pressure was not enough to lead the court to a conclusion that the wife’s free will was overborne, and adjustments were instead made to the agreement according to her needs. However, by adopting a feminist lens, FRCT could have allowed Roberts J to understand the wife’s actions from a relational perspective, enabling her to ask whether the parties could have had a third option to negotiate a mutually beneficial agreement that would have enabled the wife to express her relational autonomy.

Therefore, if Ms Thorne could not prove she did not enter into the agreement freely and with full understanding of its implications, her only other option would be to argue that the

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<sup>129</sup> *Radmacher*, op. cit., n.2, p.72.

<sup>130</sup> [2018] EWHC 499 (Fam).

<sup>131</sup> *Id.*, p.63.

<sup>132</sup> *Id.*, p.65.

<sup>133</sup> The husband increased his proposal once after the wife suggested it was ‘a bit mean’: *Id.*, p.63.

<sup>134</sup> *Id.*, p.63.

agreement was unfair. The advantage of arguing this is that it enables the wife to ask the court to take a ‘second look’ at the agreement and to take any change in circumstances into account. She might also be successful in the English courts too, as her agreement purported to contract out of maintenance and would arguably have left her in a predicament of real need,<sup>135</sup> and nuptial agreements following *Radmacher* tend to have been set aside or varied on this basis.<sup>136</sup> However, having an agreement set aside out of unfairness is problematic because it tells us nothing about *how* the parties reached their decision. Instead, assessing the wife’s nuptial agreements as unfair is based on the court’s sense of justice rather than respect for the parties’ autonomy, and so the court inevitably falls back on the tension between not being able to protect the vulnerable spouse without undermining spouses’ agency. This tension has also led to ‘fairness’ being interpreted restrictively by the court because it is viewed as leading to judicial paternalism. Even if this route provided relief to the wife in *Thorne*, the unfairness test circumvents any judicial analysis of the parties’ relationship and the pressures they were under. Using the facts of *Thorne* as a case study in contrast with the approach in England and Wales shows the limits of a neo-liberal version of autonomy that equates legal advice with freedom to contract.

### 3. *Thorne in the High Court of Australia*

The majority found that the agreements should be set aside because Ms Thorne had been subject to both undue influence and unconscionable conduct, with Nettle J and Gordon J dissenting and finding unconscionable conduct only. This is significant because both undue influence and unconscionable conduct require more than just improper pressure. The court had to zoom out of the discrete circumstances in which the nuptial agreements in this case were

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<sup>135</sup> See *WW v HW* [2015] EWHC 1844 (Fam) for guidance on the meaning of this ‘real need’.

<sup>136</sup> *Luckwell v Limata* [2014] EWHC 1035 (Fam); *Z v Z*, op. cit., n.101. *KA v MA*, op. cit., n.125.



signed to understand *why* Ms Thorne decided to sign, that she had been subject to undue influence.

Indeed, an approach consistent with FRCT is evident in the court's finding of undue influence. Citing my earlier work,<sup>137</sup> the court considered a range of factors that shifted focus away from the circumstances surrounding the discrete moment the agreements were signed and noted that factors which may have prominence include:

- (i) whether the agreement was offered on a basis that it was not subject to negotiation;
- (ii) the emotional circumstances in which the agreement was entered including any explicit or implicit threat to end a marriage or end an engagement;
- (iii) whether there was any time for careful reflection;
- (iv) the nature of the parties' relationship;
- (v) the relative financial positions of the parties; and
- (vi) the independent advice that was received and whether there was time to reflect on that advice.<sup>138</sup>

These factors were pivotal in satisfying the HCA that there was undue influence and the decision of the Full Court should be overturned. For instance, this contextual view enabled the HCA to take the view that threats to end an engagement can be just as coercive as threats to end a marriage as suggested by my earlier work.

The HCA's reasoning in *Thorne* demonstrates a radical departure from the approach of other Australian and English courts and demonstrates relational thinking in a contractual context. By focusing on the context of the parties' relationship instead of only on the contractual transaction, the judgment reflects the spirit of RCT and Wightman's non-bargain approach. However, the feminist aspect of this judgment is also clear – the court's chief

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<sup>137</sup> Thompson, op. cit., n.8 p.115.

<sup>138</sup> *Thorne*, op. cit., n.14, p.60.

concerns in *Thorne* are the material realities of the agreement for the wife. Importantly, the court considered whether *the wife* was under pressure within the constellation of relationships and circumstances *she* was experiencing. This led to the conclusion that Ms Thorne had no choice ‘as she saw it’ because ‘every bargaining chip and every power’ was in Mr Kennedy’s hands.<sup>139</sup>

This is poles apart from the neo-liberal and abstract assessment of the lower court in *Thorne*. It adopted the conventional neo-liberal perspective taking factors such as the solicitor’s recommendation not to sign as evidence that Ms Thorne was not subject to undue influence because she understood it was a bad agreement. But by prioritising the relational power imbalances the HCA moved beyond this factual assessment and asked instead *why* she would knowingly sign such a bad agreement. The ‘significant gap’<sup>140</sup> between Ms Thorne’s actions and her lawyer’s advice was considered by the court to be evidence of undue influence, as she would do anything to ensure the wedding would go ahead. This is an example of a shift away from neo-liberal approaches to autonomy and follows the broader relational approach suggested in my work which was cited in the judgment.

*Thorne* is an example of what FRCT could look like in practice. The benefits of FRCT are first that one gleans a richer understanding of how and why decisions are made. Second, this richer understanding enables agreements to be assessed contextually without resorting to a paternalistic approach that undermines parties’ agency. This kind of assessment is a more effective way of recognising patterns of power imbalance. It shows an understanding of the many varied ways in which autonomy is exercised; the wife in *Thorne* may have been autonomous on one level when she decided to sign the agreements, but she did not exercise autonomy when the terms of that agreement were formulated. The HCA has demonstrated the

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<sup>139</sup> Id., p.47

<sup>140</sup> Id., p.56.

potential to expand equitable doctrines like undue influence by moving beyond the binary question of whether there was free consent or not and by considering other subtler indications of power imbalance, such as *why* insistent warnings against signing nuptial agreements are ignored. It was clear Ms Thorne did not think the agreement would ever come into effect, and relational contract theory highlights this issue whereby decisions are made in the present about an unforeseen future (presentiation). Finally, a feminist perspective further highlights the power disparities in this case.<sup>141</sup> Ms Thorne's two options – sign the contract or leave Australia – constrained the choice she made. Had the playing field been equal, she could have had a third option – to make a mutually beneficial agreement. Being able to see this third way from a feminist perspective that recognises the relational context of the agreement confronts the dilemma of choice head on, by recognising that both protection of economic vulnerability and promotion of agency are possible when an approach aligned with FRCT is employed.

## CONCLUSION

There is a pressing need to develop FRCT in England and Wales given the dominant influence of neo-liberal autonomy underpinning the courts' approach especially but not exclusively in relation to nuptial agreements. This is accompanied by a perception among policy makers that individuals are best placed to decide the legal consequences of their own relationships rather than having these consequences imposed upon them by abstract legal processes.<sup>142</sup> Indeed, when every individual family conflict is different, it may be logical to infer that families are better reaching their own agreements based on their own experiences.

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<sup>141</sup> *Thorne* (op. cit., n.14) is not the best example of a case with a clear gendered power imbalance, but it is not difficult to imagine future cases where the gender dimension would play a bigger role as a result of the non-financial work of one party over the course of the relationship.

<sup>142</sup> Kaganas, op. cit., n.34.

There are clear benefits to making such agreements; autonomy and self-determination are both achievable and important values<sup>143</sup> that can be exercised when family property agreements are made. Crucially, however, research findings warn of the practical cost of prioritising autonomy and self-determination over other values. An examination of the length of time for recovery after divorce shows clear disparity between men and women.<sup>144</sup> Research suggests that a lack of financial orders dividing one of the most valuable matrimonial assets – the pension – is leading to potential long-term inequality between husbands and wives.<sup>145</sup> And prenuptial agreements, which enable the touchstones of financial relief to be side stepped (namely non-discrimination and equality) are being used to guarantee that the spouse contributing non-financially to the relationship will not get what they would otherwise be entitled to on divorce.<sup>146</sup> Clearly there are issues both with the way family property agreements are made and given effect on relationship breakdown which often disadvantages one party, typically the wife.

These issues are exacerbated by the fact that austerity and the withdrawal of legal aid have pushed the resolution (or in many cases, the failed resolution) of family disputes further into the private sphere, and further away from judicial intervention. The concept of neo-liberal autonomy has justified this change.<sup>147</sup> It has arguably been *the* driving influence on policies surrounding family breakdown in recent years and more generally has legitimised the roll back of the welfare state. Indeed, a rich range of literature criticises the supremacy accorded to autonomy, arguing that its celebration promotes an individualised form of justice that does not engage with disparity of power between the parties. It is therefore regrettable that, as Diduck

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<sup>143</sup> M. Friedman, *Autonomy, Gender, Politics* (2003) 53.

<sup>144</sup> Fisher and Low, *op. cit.*, n.12.

<sup>145</sup> H. Woodward and M. Sefton, *Pensions on Divorce: An Empirical Study* (2014).

<sup>146</sup> Radmacher, *op. cit.*, n.2, p.134.

<sup>147</sup> Mant, *op. cit.*, n.33.

has put it, '[a]utonomy has become more than one aspect of justice in the new, "modernised" family justice system, it is becoming almost its very essence'.<sup>148</sup>

As a result, the need for a new approach is critical. FRCT is a way to counter the power of traditional legal perspectives and listen to the otherwise unheard voices of those on the short end of power inequality. RCT recognises the problems associated with contract making in long-term situations (like marriage) where circumstances often change in a way that cannot be predicted. The theory also appreciates that parties to agreements can be simultaneously self-interested and inter-dependent; these characteristics are not mutually exclusive.<sup>149</sup> By providing an alternative to the mechanisms of orthodox contract law, RCT produces a much richer conception of how people navigate contracts like nuptial agreements. However, it does not explicitly address the gendered power dimension that research has proven to be a feature of nuptial agreements and family law disputes in general. FRCT is distinguishable from other theories because it requires an overtly feminist approach, which is well equipped to appreciate (gendered) patterns of power and the lived realities of the parties to agreements. This combination of feminist perspectives and relational contract produces a clear message: contract law must appreciate parties' changing understandings and should not only be concerned with 'wealth maximisation'.<sup>150</sup> This helps ensure that the voices of those on the short end of power because of economic disadvantage incurred through care or otherwise are not drowned out by those wishing to guarantee their assets will be protected.

The potential of this approach is demonstrated by the radical interpretation of undue influence by the High Court of Australia in *Thorne v Kennedy*. The lower court assessed the nuptial agreements only in relation to the discrete circumstances in which they were signed, and so unsurprisingly found that the wife had made a free choice. As a neutral, atomised

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<sup>148</sup>Diduck, op. cit., n.40, p.134.

<sup>149</sup>J. Nedelsky, *Law's Relations* (2011) 151.

<sup>150</sup>Wightman, op. cit., n.70, p.93.

individual, her will was not overborne because she had received excellent legal advice and signed both agreements knowing their effect could be disastrous. But the HCA took a different approach and instead asked whether *the wife* felt *she* had no choice. This is an example of a shift away from a neo-liberal contractual approach towards a relational approach and could significantly affect how intimate agreements are evaluated in future. Such a focus upon subjective motives has been open to the English courts following *Edgar v Edgar* but the English caselaw has not yet taken up this opportunity.

By considering relational factors as in *Thorne*, courts do not need to conclude that the wife had *no* autonomy; but that the reasons for her choice to enter both nuptial agreements need to be understood from a feminist perspective. *Thorne* shows how it is possible to move away from binary perceptions of choice, that an ‘assessment of the will-power of a person is not an exercise of mathematical precision’<sup>151</sup> and that it is not necessary to find that ‘the party seeking relief was reduced entirely to an automaton’.<sup>152</sup> Understanding the way people make decisions and enter agreements is not based on the isolated rational man, and this richer understanding does not force the court to choose between either respecting party autonomy or protecting those rendered economically vulnerable under an agreement. A deeper *relational* enquiry enables the court to do both.

*Thorne* demonstrates the potential for FRCT to reconceptualise contracts in practice. This is important in light of criticisms that feminist contract theories go against core and immutable legal principles such as autonomy and freedom of contract. Yet the practical potential of FRCT shows that the significance of contractual obligations is not diffused, but instead gives new meaning to these concepts. As Wheeler argues, such change *is* possible, for on ‘close examination [of contract law] its universal rules melt away into a series of special

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<sup>151</sup> *Thorne*, op. cit., n.14, p.62.

<sup>152</sup> *Id.*, p.32.

cases and relationships to which different rules and different dispute resolution regimes apply'.<sup>153</sup>

By working within existing legal structures, FRCT, as *Thorne* demonstrates, has enormous potential to highlight gendered dimensions of power that were previously hidden by orthodox approaches and to change our understanding of how and why family property agreements are made. The potential for this to change how these agreements are evaluated in practice should not be underestimated, as the flexibility of the law in this area already provides greater scope for the court to adopt a different approach. A different approach is not just possible, it is imperative. Research shows that power imbalance in the context of family property agreements is endemic, but in most cases, is not being addressed by the court.<sup>154</sup> And so it is now time for family property agreements to be evaluated differently.

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<sup>153</sup> *Op. cit.*, n.66, p.75.

<sup>154</sup> *Brod, op. cit.*, n.86; A. Barlow and J. Smithson, 'Is Modern Marriage a Bargain? Exploring Perceptions of Pre-Nuptial Agreements in England and Wales' (2012) 24 *Child and Family Law Q.* 304.