GENDERED ASSUMPTIONS IN FAMILY LAW DECISION-MAKING

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As the work of feminist legal scholars has convincingly demonstrated, gendered assumptions underpin much of our law, including areas such as tort, property, tax or company law, where women are not so readily apparent.[1] As the field of law that most overtly involves women, and deals extensively with relationships between women and men, family law shares, perhaps only with the law of sexual assault, the high visibility of women as parties or participants. It is therefore particularly susceptible to a gender analysis. However, any such analysis must take place against the background of the Family Law Act 1975 (Cth), legislation written in a gender-neutral fashion, though it operates in the context of a highly gendered world with all its consequences. The purpose of this article is to suggest some of the ways in which gender might operate under the Family Law Act to disadvantage women. I will start by looking at some of the historical incidents of gender in Anglo-Australian family law[2] before addressing

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1 For a broad discussion of gendered assumptions in a range of areas of law, see R Graycar and J Morgan, *The Hidden Gender of Law* (1990). For some specific discussions of these areas, see L Bender, "An Overview of Feminist Tort Scholarship" (1993) 78 *Cornell Law Review* 575 and references cited there; J Grbich, "The Tax Unit Debate Revisited: Notes on the Critical Resources of a Feminist Revenue Law Scholarship" (1991) 4 *Canadian Journal of Women and the Law* 512; and K Lahey and S Salter, "Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism" (1985) 23 *Osgoode Hall Law Journal* 543. On property, see A Bottomley, "Self and Subjectivities: Languages of Claim in Property Law" in A Bottomley and J Conaghan (eds), *Feminist Theory and Legal Strategy* (1993); for contract, M J Frug, "Re-reading Contracts: A Feminist Analysis of a Contracts Casebook" (1985) 34 *American University Law Review* 1065; and on remedies, see C Boyle "Book Review" (1985) 63 *Canadian Bar Review* 427 reviewing R J Sharpe, *Injunctions and Specific Performance* (1983) and S M Waddams, *The Law of Damages* (1983).

2 Of course, there is a serious issue as to what is "family law", ie, how broadly or narrowly do we describe the reach of an area of doctrine dealing with the family. In Australia, there is a tendency to confine "family law" to marriage, divorce and related issues. This narrow approach is often justified by resort to constitutional limits on federal legislative power in Australia (see s 51(21) and (22)). Compare the discussion in R Graycar and J Morgan,

the reforms of the 1970s. I will suggest that despite our no-fault, gender-neutral reforms, gender inequality is still manifest in family law (as it is in law more broadly). Finally, I will briefly examine some possibilities for change, drawing on examples from other jurisdictions which are attempting to address and resolve these issues.

FAMILY LAW IN THE 19TH CENTURY

Having explained that one of the main themes of the 1975 Family Law Act is gender neutrality, with a purported symmetry of women and men, it is important to realise that, until very recently, the relative positions of women and men in family law were quite formally asymmetrical. Women's situation was quite different from men's: women occupied a position of inequality and disadvantage. Relations between women and men in family law could not under any circumstances have been described as gender neutral in the nineteenth century. Consider some brief illustrations.

Property

Prior to the introduction of the Married Women's Property Acts,[3] married women (along with infants and lunatics) had no legal capacity. Amongst other incidents of their status of couverture (as Blackstone put it, "husband and wife are one, and the husband is that one"[4]), wives could not own property, except through some limited exceptions created by courts of equity.[5] The doctrine of unity of husband and wife produced numerous detrimental legal consequences for married women. As Holcombe pointed out, in relation to property, the unity doctrine "meant that the law recognized the husband as the family's sole arbiter". She continued:

> Under the common law the property that a woman possessed or was entitled to at the time of her marriage and any property she acquired or became entitled to after marriage became her husband's to control. Moreover, if a woman who accepted a proposal of marriage sought, before the marriage took place, to dispose of any of her property without the knowledge and consent of her intended husband, the disposition could be set aside as a legal fraud. Were it otherwise, a man could be deprived of the property he had expected to acquire when he made his proposal. In addition, any will made by a single woman disposing of her property was revoked by marriage, as was a man's will, for the husband took over her property upon marriage and her testamentary capacity during marriage was severely limited. Finally, husband and wife could not make gifts to each other after marriage; by the act of marrying, a woman in effect made a gift of her

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above n 1, ch 6, especially at 121-126 and see also The Honourable B Wilson, "Women, the Family and the Constitutional Protection of Privacy" (1992) 17 *Queens Law Journal* 5.

3 The first of these was introduced in England in 1882; for an account of their gradual adoption by the Australian States, see E Campbell, "Appendix: The Legal Status of Women in Australia" in N MacKenzie, *Women in Australia: A Report to the Social Science Research Council of Australia* (1962). This also contains a comprehensive account of the then legal status of women in a number of areas of "public" and "private" life.

4 Blackstone, *Commentaries*, cited by L Holcombe, *Wives and Property* (1983) at 18. See also the discussion by A Eppler, "Battered Women and the Equal Protection Clause: Will the Constitution Help them When the Police Won't?" (1986) 95 *Yale Law Journal* 788 at 792.

5 See, discussion by L Holcombe, above n 4, in particular, on the role of the courts of equity, ch 3.

property to her husband, while the fact that a married woman could not legally hold property prevented her husband from making over anything into her possession.[6]

A number of equitable doctrines such as the trust were developed by the Court of Chancery in Britain to ameliorate the harshness of the common law rules relating to women's ownership of property. These equitable doctrines conferred beneficial interests in property upon married women. The constructive trust, in particular, has been utilised as a means of providing property settlements in disputes arising out of *de facto* relationships in jurisdictions where there is no relevant statutory scheme.[7] And, while equity created some categories of property for married women (such as the "separate estate"), these doctrines largely benefited only wealthy women.[8] It was not until the passage of the Married Women's Property Acts in the nineteenth century that married women were permitted to own property. Even then, and until very recently, married women remained subject to various legal disabilities such as the inability to sue their husbands in tort.[9]

Custody

Historically, fathers had absolute rights to the custody of their legitimate children, even to the extent of being able to will away testamentary guardianship.[10] It was not until the enactment of legislation empowering courts of equity to consider applications for custody[11] that mothers were even able to apply for custody of their children. It is also important to note that this did not result in a shift from fathers' rights to mothers' rights, as is often asserted, but rather, the shift was from a father's absolute right to the *court's* right to make the decision.[12] And, as we know, until recently, courts relied on a form of biological essentialism to elevate the status of motherhood to a sacred virtue:[13]

6 L Holcombe, above n 4 at 18.

7 Compare De Facto Relationships Act 1984 (NSW). As Marcia Neave points out, even where, as in New South Wales, there is a relevant statutory scheme, constructive trust principles developed by the courts in this context are still important, as the statutes usually do not oust equitable principles: see M Neave, "The New Unconscionability Principle: Property Disputes Between De Facto Partners" (1991) 5 *Australian Journal of Family Law* 185 at 187.

8 A V Dicey, *Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century* (1920) at 383, cited by L Holcombe, above n 4 at 47.

9 See R Graycar and J Morgan, above n 1 at 116. For a detailed discussion of a wide range of common law restrictions on married women's legal capacity, and details of the modifications to some of these doctrines in each of the Australian jurisdictions, see H A Finlay and A Bissett-Johnson, *Family Law in Australia* (1972), ch 5, "The Legal Effect of Marriage" (discussing such matters as interspousal immunity; contractual capacity; competence and compellability of spouses to give evidence etc); E Campbell, above n 3.

10 For an Australian discussion, see H Radi, "Whose Child?" in J Mackinolty and H Radi (eds), *In Pursuit of Justice: Australian Women and the Law 1788-1979* (1979).

11 For New South Wales, see the Infants' Custody and Settlements Act 1899.

12 For some discussion of these assertions, and the role of fathers' rights groups in Australia, see R Graycar, "Equal Rights versus Fathers' Rights: The Child Custody Debate in Australia" in C Smart and S Sevenhuijsen (eds), *Child Custody and the Politics of Gender* (1989).

13 For an example (though it should be noted that this was a dissenting judgment), see the comments by Glass JA in *Epperson v Dampney* (1976) 10 ALR 227 at 241: "The bond between a child and a good mother ... expresses itself in an unrelenting and self-sacrificing fondness which is greatly to the child's advantage. Fathers and stepmothers may seek to emulate it

this led to the development of the "tender years" doctrine, finally discarded by the High Court only in 1979.[14]

The rule of thumb: family violence

Until recently, Blackstone's rule of thumb was part of our law. For those unfamiliar with the term, former Canadian Supreme Court Judge, Madame Justice Wilson, described it graphically in her 1990 decision in *R v Lavallée*.[15] There she explained that it was not so long ago that the law not only failed to protect women from battering, but positively sanctioned this form of injury to women through the device of the "rule of thumb" under which it was permissible for a man to beat his wife so long as he did so with a switch no thicker than his thumb.[16] Apparently, Welsh law had an even more precise standard: the rod had to be no longer than a man's forearm.[17]

Domicile

One particular way in which legal doctrine created and reinforced the notion of married women's lack of legal capacity was through the doctrine of dependent domicile.[18] Domicile is a private international law notion which, broadly speaking, defines a person's legal home. It is customary to describe a person's domicile as being where he is actually residing, so long as he also intends to make that place his permanent home.[19] The choice of pronoun in this last sentence is quite deliberate: neither minors nor, until recently, married women, had legal capacity to acquire a domicile of choice. Instead, their domiciles were deemed by law to be those of their fathers and husbands respectively. As Lord Denning pointed out in 1962, the consequences for women could be "severe":

> [I]n point of law, when [a woman's] husband deserts her, she is still bound by his domicil ... with all the legal consequences which follow from it, not only on her marriage, but on her will and many other things.[20]

It was not until the Domicile Act 1982 (Cth) that the bar on married women's acquisition of a domicile of choice was finally removed in Australia.

Marital rape

The final example of the impact of gender on the laws regulating the family is "marital rape". Of course, that term was an oxymoron; until recently, the law did not recognise the possibility of a man raping his wife, as marriage was deemed to provide an irrevocable consent to sexual activity.[21] Although the marital rape exemption has now

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and on occasions do so with tolerable success. But the mother's attachment is biologically determined by deep genetic forces which can never apply to them".

14 *Gronow v Gronow* (1979) 144 CLR 513. This decision rests, at least in part, on a dubious factual basis, discussed below.

15 [1990] 1 SCR 852.

16 Ibid at 872.

17 Professor Christine Boyle, Walter S Owen Lecture, 10 September 1992, University of British Columbia, Vancouver.

18 Sometimes described as "domicil".

19 See, for a general discussion of domicile, E I Sykes and M C Pryles, *Conflict of Laws: Commentary and Materials* (3rd ed 1988), ch 8.

20 *Formosa v Formosa* [1962] 3 All ER 419 at 421-422.

21 For a discussion by the High Court of Australia, see *R v L* (1991) 174 CLR 379.

been abolished by statute in all Australian jurisdictions, and abrogated by judicial decision in England,[22] prosecutions are rare. This is perhaps not surprising in light of the pervasiveness of the public/private distinction which has served to protect what goes on in the private sphere from the scrutiny of the law.[23]

GENDER IN A GENDER-NEUTRAL SYSTEM: FAMILY LAW IN THE 1990s

It is certainly tempting to look back at these examples of nineteenth century law and see them as having occurred in the dark ages, while reassuring ourselves that "things have changed". But, can we really presume that those who made and administered the bad old laws were using principles and techniques of interpretation so absolutely different from those we see today? We must remember that they were using legal rules and principles that *they* thought were fair, equitable and appropriate. An important question, then, is how will an observer of our current family law view what we do today when she looks back in 100 years' time? How will she see gender relations manifested in 1990s Australian family law?

In a De Facto Relationships Act 1984 (NSW) case, a judge of the Court of Appeal stated: "It is not to be assumed that there is sex/gender inequality".[24] Yet there are a number of ways in which women remain significantly disadvantaged under current Australian family law. This results from, among other things, a failure by courts to pay attention to the incidents of gender inequality in our broader society, inequality which persists even in legal contexts which are formally gender-neutral. Some of the themes that emerge from an examination of our case law will be examined next, before a discussion of the social context in which the Family Law Act operates and some suggestions as to how we might think about addressing some of the concerns raised here.[25]

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22 *R v R* [1992] 1 AC 599. It has been suggested that it is not as clear as has been assumed that the common law conferred such an immunity: see, for example, Brennan J's discussion in *R v L* (1991) 174 CLR 379. However, the more widely held view is that it was necessary to clarify the situation by passing legislation which unequivocally stated that rape is rape, irrespective of the relationship between the perpetrator and his victim.

23 And, as is now notorious, recently one Australian Supreme Court judge summed up to a jury in a marital rape case as follows: "There is, of course, nothing wrong with a husband, faced with his wife's initial refusal to engage in intercourse, in attempting, in an acceptable way, to persuade her to change her mind, and that may involve a measure of rougher than usual handling. It may be, in the end, that handling and persuasion will persuade the wife to agree": see *R v Johns*, summing up to jury by Bollen J, 24 August 1992, *Case stated by DPP (No 1 of 1993)* (1993) 66 A Crim R 259. For a general account of the role of the public/private distinction in the subordination of women, see K O'Donovan, *Sexual Divisions in Law* (1985). For a discussion by the Full Family Court of the notion of privacy in the context of violence, see *Schwarzkopff* (1992) FLC 92-303 at 79,291: "Family violence is not a private matter and must be treated seriously by the Courts, not only when prosecuted as a criminal offence in the ordinary way, but also where violence is an element of a breach of an order of the Family Court".

24 *Dwyer v Kaljo* (1992) 27 NSWLR 728 at 733 per Mahoney JA. Perhaps significantly, this was a dissenting opinion.

25 It is important to stress that this discussion, in particular its examination of case law, is focused on the articulation of emerging themes and ideologies and does not purport to be empirically sound or even necessarily representative. Clearly, only a fraction of cases are

Property

The underlying themes that emerge from the cases on property[26] are the widespread undervaluation of women's work as homemakers and carers; the failure to recognise how women's non-financial contributions assist in the acquisition of financial assets and enhance their husbands' earning potential at the same time as they diminish the women's own earning capacity;[27] the failure to recognise the unpaid work that many women do in their husbands' businesses or on farms; the fact that women are overwhelmingly responsible for the care of children after divorce, a phenomenon masked by the gender-neutral term "sole parent family";[28] the failure to see women who work outside and inside the home as carrying a double burden or as working a double shift; and the failure to include in the pool of property to be divided, all assets (including superannuation which has been the subject of some conflicting decisions and recent recommendations).[29]

The empirical work undertaken by the Australian Institute of Family Studies (AIFS)[30] has now overwhelmingly established the disastrous financial consequences of

litigated and fewer still reported and, although we know that many cases are settled "in the shadow of the law", many others are resolved with no reference to the formal (or sometimes informal) justice system. For example, as Marlee Kline has pointed out, for Aboriginal women (her work involved Canadian First Nations people), their disputes are more likely to be with the state than with a former partner: see M Kline, "Race, Racism and Feminist Legal Theory" (1989) 12 *Harvard Women's Law Journal* 115. For a discussion of research methodology issues in the context of child custody, see S B Boyd, "Investigating Gender Bias in Canadian Child Custody Law: Reflections on Questions and Methods" in J Brockman and D Chunn (eds), *Investigating Gender Bias: Law, Courts and the Legal Profession* (1993).

26 This discussion is focused around reported case-law based on the current reliance on contribution and need. Of course, many commentators (most notably, in Australia, the Australian Institute of Family Studies and the Australian Law Reform Commission (ALRC)) have recommended changes in the way the law deals with the division of property after divorce: see P McDonald (ed), *Settling Up* (1987); K Funder, M Harrison and R Weston, *Settling Down* (1993); ALRC, *Matrimonial Property* (Report No 37, 1987). The Government has issued a response to the *Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act* (1992), announcing its intention to implement a number of reforms to the Family Law Act in 1994: see Commonwealth Attorney-General's Department, *Directions for Amendment, Government Response to the Report by the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act 1975* (December 1993).

27 Cf Fogarty J in *Best v Best* (1993) FLC 92-418 at 80,295.

28 In 1992, there were 340,000 sole parent families of which 310,000 were headed by women. The number of sole parent families headed by women has risen by 30% since 1986 while the number of sole parent families headed by men has decreased by about 1%: see Australian Bureau of Statistics, *Women in Australia*, 1993, ABS Cat No 4113.0, Table 2.1 at 18. ABS data indicates that sole parent families are more likely than others to be poor and dependent on social security: 66% of sole mothers received below the annual average income for all women (which is, of course, well below the average income for men): *Women in Australia* at 174.

29 See Attorney-General's Department, *The Treatment of Superannuation in Family Law* (March 1992); ALRC, *Matrimonial Property* (1987) at 201-213 and 87-88; Joint Select Committee, above n 26 at 237-252.

30 See *Settling Up* and *Settling Down*, above n 26.

divorce for women and children.[31] This, combined with women's lower earnings in the paid labour market and women's lesser access to economic resources,[32] provides an important factual backdrop to an examination of the cases. Women are economically disadvantaged in our society and much of that disadvantage flows from entrenched attitudes which have led to, and perpetuated, discrimination against women in the paid work force, as elsewhere (for example, the notion of merit[33]). It follows that those same attitudes might be at work when, for example, courts assess the relative contributions of parties to a marriage in considering applications under s 79(4) of the Family Law Act 1975 (Cth).[34] The case law demonstrates this very clearly.

Generally, it is easy to find examples in the case law where men, particularly those with substantial assets who have built them up through their businesses, are recognised (and rewarded) for having enormous talent, zeal and acumen (see, for example, language such as "innate drive, skills and ability"[35]) while women's work as homemakers is either not valued at all (and, it has been suggested that to put a monetary value on that work would demean it)[36] or judged according to normative standards, that is, was she a "good", "average" or "inadequate" homemaker?[37] Even though the accepted wisdom in the judgments is that a homemaker's contribution should be valued in a "substantial way", the language used tells us that work in the home is not the same as "real" work, that is, work outside the home, particularly work

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31 This has also recently been formally acknowledged by the Supreme Court of Canada in two cases: *Moge v Moge (Women's Legal Education and Action Fund, intervener)* [1992] 3 SCR 813 and *Peter v Beblow* (1993) 44 RFL (3d) 329: indeed, in *Moge*, the Court (at 873) stated that this was a matter of which judicial notice should be taken. The best known United States study is that by L Weitzman, *The Divorce Revolution: The Unexpected Consequences for Women and Children* (1985).

32 *Women in Australia* (1993), above n 28 at 169-208 (especially at 179).

33 Amongst others, Margaret Thornton has written critically about the concept of merit: M Thornton, "Affirmative Action, Merit and the Liberal State" (1985) 2(2) *Australian Journal of Law and Society* 28. She suggests that merit is a concept which, while appearing to be gender neutral, can be used to reproduce existing inequalities. This is because it often leads to a perception that those considered most meritorious are those most like the people assessing merit. Thornton refers to this process as "homosocial reproduction or cloning".

34 This section provides for the alteration of property interests by reference to a number of factors including financial and non-financial contributions. It also requires the Family Court to take into account future needs, or the maintenance factors under s 75(2).

35 *In the Marriage of Ferraro* (1992) 16 Fam LR 1 at 28

36 See, for example, *Dwyer v Kaljo* (1992) 27 NSWLR 728 at 739 per Mahoney JA (dissenting). Interestingly, in *Peter v Beblow* (1993) 44 RFL (3d) 329, McLachlin J of the Supreme Court of Canada said that the suggestion that it is distasteful to put a price on domestic services is untenable and "pernicious" and "devalued the contribution which women tend to make to the family economy. It has contributed to the phenomenon of the feminisation of poverty which this court identified in *Moge* [1992] 3 SCR 813" (at 340).

37 Perhaps the best known instance of this phenomenon is the comment by Wilson J in the High Court's decision in *Mallet v Mallet*: "The quality of the contribution made by a wife as homemaker or parent may vary enormously, from the inadequate to the adequate to the exceptionally good. She may be an admirable housewife in every way or she may fulfil little more than the minimum requirements": (1984) 156 CLR 605 at 636. He also went on to comment: "Similarly, the contribution of the breadwinner may vary enormously and deserves to be evaluated in comparison with that of the other party." (Ibid).

which generates a substantial income leading to the accumulation of substantial assets.[38]

In its decision in *Ferraro*[39] the Full Family Court reviewed much of the established case law in this area. There the trial judge had awarded the wife 30 per cent of the property and commented:

> The parties' property empire blossomed because the husband had the innate drive, skills and abilities to enable him to succeed in his chosen occupation, whereas the wife's contribution was neither greater nor less than when the husband had been a carpenter. To equalise the parties' contributions is akin to comparing the contributions of the creator of Sissinghurst Gardens, whose breadth of vision and imagination, talent, drive and endeavours led to the creation of the most beautiful garden in England, with that of the gardener who assisted with the tilling of the soil and the weeding of the beds.[40]

The Full Court expressly rejected the use of the Sissinghurst Gardens analogy and stated that there is a shift "towards giving real substance to the phrase 'substantial and not token' rather than paying lip-service to it".[41] The Court acknowledged that:

> [A]n assessment of the quality of a homemaker contribution to the family is vulnerable to subjective value judgments as to what constitutes a competent homemaker and parent and cannot be readily equated to the value of assets acquired. This leads to a tendency to undervalue the homemaker role.[42]

However, despite this acknowledgment, the Full Court confirmed that the husband's business skills in cases such as this were "special skills" entitled to recognition as an extra or "special" contribution,[43] rendering a conclusion of equality of contribution inappropriate, despite the Court's acknowledgment that the wife "virtually conducted the homemaker and parent responsibilities without assistance from the husband (other than financial), particularly in the latter years".[44] So, even though the Court found that the wife's contributions were "outstanding", they were nevertheless not equal to the husband's, and the Full Court increased her award to 37.5 per cent of the total assets, an increase of only 7.5 per cent.[45]

This approach makes clear that business/entrepreneurial skills are intrinsically more valuable than homemaker contributions. It is certainly difficult to imagine a non-financial contribution ever being seen as sufficiently exceptional to reach the standard of a "special" contribution. Professor Hilary Charlesworth points out that in cases such as this, husbands are

> ... rewarded twice over: their contribution to the marital property is seen as more energetic, strenuous and direct and they are therefore entitled to retain a greater

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38 Examples here include *Aldred* (1988) FLC 91-933; *Gamer* (1988) FLC 91-932; and more recently *Ferraro* (1993) 16 Fam LR 1. Compare *Horsley* (1991) 103 FLR 186. Hilary Charlesworth has discussed some of these cases, in particular those where the husband's "special skill" was a factor, in her "Domestic Contributions to Matrimonial Property" (1989) 3 *Australian Journal of Family Law* 147.

39 *In the Marriage of Ferraro* (1992) 16 Fam LR 1

40 Ibid at 28.

41 Ibid at 47.

42 Ibid at 38.

43 Ibid at 50.

44 Ibid.

45 However, the Full Court also increased the pool of property available for distribution and this led to an increase in the wife's share in absolute terms.

> proportion of it than their former wives; and at the end of the marriage their earning potential remains the same or better than it was before.[46]

This way of dealing with the issue reinforces the view that women's work as carers or homemakers is simply not economically valuable. The failure to give economic and legal recognition to women's work is, of course, a problem that is much wider than its manifestations within the Family Law Act.[47] But of all areas of law which deal with women's work, family law is the one where it might have been hoped that the law would value that work, given the express provisions of s 79(4)(b) and (c) which clearly indicate to decision-makers that the work of homemaker and parent warrants economic recognition in the form of alteration of property interests. This legislative statement is also unique in the various legal regimes in which problems arise concerning the value of women's work.

Caregiving work

The implicit message in discussions of caregiving work is that this is women's work and the traditional division of functions between breadwinning (male) and homemaking (female) still operates. This is evident from the ways in which courts elaborate on the facts in cases where a man has custody, or has been the carer, in contrast with the way in which *women's* caring work disappears from view where it is the woman who has that role.

Central to the treatment by courts of work in the home is the erroneous view that as more women work outside the home, housework is increasingly shared by men and women, a view which seems to sit comfortably with the gender-neutral language and focus of the legislation.[48] This proposition was relied upon by the High Court in its 1979 decision in *Gronow v Gronow*[49] to reject any notion of a maternal preference in custody cases:

> [T]here has come a radical change in the division of responsibilities between parents and in the ability of the mother to devote the whole of her time and attention to the household and the family. As frequently as not, the mother works, thereby reducing the time which she can devote to her children. A corresponding development has been that the father gives more of his time to the household and to the family.[50]

It is noteworthy that no authority was cited for this proposition (and it would be close to impossible to find any). On the other hand, a large body of recent empirical evidence clearly tells us that women's increased participation in the paid labour market has had little or no effect on the distribution of housework:[51] men still do very little

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46 H Charlesworth, above n 38 at 155.

47 As my other work on personal injury damages and family provision makes clear: see, eg "Women's Work: Who Cares?" (1992) 14 *Sydney Law Review* 86; "Love's Labour's Cost: The High Court's Decision in *Van Gervan v Fenton*" (1993) 1 *Torts Law Journal* 122; "Legal Categories and Women's Work: Explorations for a Cross-Doctrinal Feminist Jurisprudence" (1994) 7 *Canadian Journal of Women and the Law* 34.

48 For an analogous discussion in the context of personal injury damages, see R Graycar, "Women's Work: Who Cares?" above n 47 at 88, footnote 16.

49 (1979) 144 CLR 513.

50 (1979) 144 CLR 513 at 528 per Mason and Wilson JJ.

51 It is noteworthy that the Family Court has rejected an argument that a woman who has made contributions both through paid work and through her homemaking work should have her contribution valued at more than 50%: see *Zdradkovic* (1982) 8 Fam LR 97 at 103.

and women continue to carry the double burden.[52] This is the situation where both parents are living together: yet in the post-separation situation it is far more likely that women will have the children living with them and therefore will have the overwhelming sole responsibility for childcare after divorce.[53]

Interestingly, reliance by courts on assumptions of "fact" is particularly common in cases involving women's work in the home.[54] When courts consider these issues, it is common for them to rely on assumptions rather than evidence and to resort to judicial notice and "commonsense" understandings of the world which are themselves gendered; as has been suggested "'common knowledge' is actually male knowledge and therefore the version of reality that has authority."[55] So how is this "commonsense" discussed in the case law on caring work? Evidence from the British Columbia report on *Gender Equality in the Justice System* suggests that in property cases, a division of assets which recognises childcare responsibilities (that is, one which awards more than half to the carer) is "most commonly exercised where the father has custody of the children".[56] In Australia, the case law seems to show that, since responsibility for the children is an accepted basis for awarding more than 50 per cent of basic assets to the caregiver, this skewing towards father carers in the outcome of cases may not be so marked. At an ideological level, however, the same phenomenon can be found in Australia if we consider the ways in which men who have (exceptionally) taken on atypical roles as homemakers or carers of children are discussed or described in the cases.[57]

When a man's contribution to the household is being assessed, judges frequently praise his efforts, describing them in great detail,[58] even though he may have had assistance from other women or may have been doing less than what is regarded as

52 See, for example, M Bittman, *Juggling Time: How Australian Families Use their Time* (1991); Australian Bureau of Statistics, *Women in Australia*, above n 28 and *How Australians Use Their Time*, Cat No 4153.0 (February 1994) for clear empirical evidence that in Australian households, women still do the overwhelming majority of work in the home and this is not affected by their participation in paid work outside the home. See also J Baxter and D Gibson with M Lynch-Blosse, *Double Take: The Links between Paid and Unpaid Work* (1990).

53 Compare the tendency to ignore this in the gender-neutral terminology "sole parent family": see above n 28.

54 This is a matter I am exploring at length in research currently being supported by the Australian Research Council: see also "The Gender of Judgments: An Introduction" forthcoming in M Thornton (ed), *Fragile Frontiers: Feminist Debates around Public and Private* (1995).

55 M Eberts, "New Facts for Old: Observations on the Judicial Process" in R F Devlin (ed), *Canadian Perspectives on Legal Theory* (1991) at 475.

56 Law Society of British Columbia Gender Bias Committee, *Gender Equality in the Justice System* (1992) at 5-33.

57 See eg *Park* (1978) FLC 90-509; *Mueller and Hegedues* (1979) FLC 90-708; *Mahon* (1982) FLC 91-242; *Burden v Nikou* (1977) FLC 90-293. While the gendered "asymmetry" is most pronounced in custody cases it can also be found in property cases where the husband has the care of the children.

58 In *Mueller*, the father cared for the two children, each of whom had some kind of physical and/or intellectual disability. While this is admittedly a considerable and exceptional burden for any carer, the judge emphasised at great length the efforts of the father, (despite the fact that he had also engaged paid assistance in the form of a live-in housekeeper) and also drew attention to the "inadequacy" of the wife's performance of her role as a carer: see ibid, at (1979) FLC 90-708 at 78,769-78,772.

"the norm" for women.[59] Yet it is rare for the courts specifically to draw attention to the fact that the wife has the sole responsibility for the children after dissolution of the marriage,[60] even though this is the norm. My point here is not to suggest that it is wrong for courts to assess men's homemaker contributions, nor that the particular cases where this has occurred have been wrongly decided, but rather to draw attention to the language and assumptions which underpin them. What is significant is that when we hear the details about the lives of the atypical men who are carers, the focus is on the man whose behaviour is exceptional or aberrational. This contrasts with the absence from view of the routine nature of women's work and the relegation of women's double burden and their much greater incidence of sole parenthood to the shadows.[61]

Custody

Turning to custody, we see a lack of symmetry in treatment between the woman who is a sole parent and has sole responsibility for both child care and income earning, and the man who is in the position of juggling paid work and child care work. For example, in one case, the Family Court said of a man: "The very occupation of gardening which the husband has pursued for the last four years was selected by him in order that he would have the flexibility to enable him to look after [the child/ren] ..."[62] The Court pointed out:

> While the parties lived together the wife found it difficult to cope with the task of looking after the children. It was indeed an enormous physical and emotional task and the wife had little assistance in this work ... The position however is that the husband has met these onerous obligations very well as a single parent for the last ten years.[63]

While the fact that a husband or sole father engages in paid work carries no negative connotation, women's paid employment has a complicated standing in custody cases.[64] This is illustrated by the discussion in a number of cases. One custody dispute over two school-aged children which received considerable public attention in 1987 involved two professional parents, both doctors. The judge said: "[T]he major

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59 For example, in a *de facto* relationship case the woman was a widow with brain damage needing day-to-day care; the man "managed her financial affairs" and did the cooking and housekeeping. The New South Wales Court of Appeal found that the man's homemaker contributions had not been taken into account by the trial judge as required by s 20 of the De Facto Relationships Act 1984 (NSW). The Court held that "the appellant was a loving, caring companion who took the respondent into his home, apparently assisted her to overcome her problems of alcoholism, cooked and cared for her and gave her many years of happy life": *Scott v Briggs* (1991) 14 Fam LR 661 at 670.

60 *Horsley* (1991) 103 FLR 186 and *Dench* (1978) FLC 90-469 are exceptions.

61 One woman who wrote to the Australian Law Reform Commission as part of its reference on "Equality for Women Before the Law" graphically described this phenomenon: "[I]n the time of the 'sensitive new age guy' all manner of concessions must be made to a man who can adequately care for children. The identical skills in a woman are not considered to be worth any comment, as they are presumed to be the natural domain of women." (Confidential submission, on file with ALRC and author).

62 *Mueller v Hegedues* (1979) FLC 90-708 at 77, 770.

63 (1979) FLC 90-708 at 77, 772.

64 For an excellent Canadian discussion of this phenomenon, see S B Boyd, "Child Custody and Working Mothers" in K Mahoney and S Martin (eds), *Equality and Judicial Neutrality* (1987). See also S B Boyd, above n 25.

question mark hanging over the wife ... is whether she would be prepared to sacrifice her career for the sake of the children". The wife had recently remarried and had given evidence that she and her husband planned to have a child, but the judge was not satisfied that she would give up her job and said: "[S]he wants her cake and eat it too: unremarkable in these days of equality of opportunity". In a decision (subsequently overturned on appeal)[65] the judge awarded the wife (in her late thirties) custody on a conditional basis: if she resigned her job and came back to court pregnant two months later, she would be awarded custody; otherwise, custody would be given to the father who was working full time, but had a new wife who would care for the children. There was certainly no adverse inference drawn from his continuing to work full time.

While courts sometimes congratulate men (who, unlike women, are presumed to be in the paid workforce) for looking after their children so well, what is rarely acknowledged is the frequency with which, when men have custody, the care is actually provided by another woman.[66] A good example is *Mathieson*[67] where the Court awarded the father custody of the younger child and suggested that this was a case of "role reversal", where the father had "tailored his life so as to act as mother and father to the three older children running the home efficiently and well with assistance from the older daughter, and his mother and sister".[68] The fact that the combination of the roles of carer and provider is routine for women results in its either being ignored altogether (the most benign result), or being treated as a negative factor in the context of custody. Further, I could find no case where the Court described what a lone mother did as "acting as both father and mother", nor where a Court talked about a mother needing domestic assistance.

Perhaps the best way to illustrate some of the gendered assumptions in custody is through a discussion of a case from California where the Supreme Court overturned a custody decision involving a two year old child. The trial court had awarded custody to the father (who had not until later in the child's life had anything to do with him and was not married to the mother) on the basis of considerations found to be discriminatory by the Supreme Court. Two of these were that the mother was in paid work, while the father could afford to have his wife stay home and look after the child, and the father's higher income.[69] The Supreme Court pointed out that reliance on these two considerations had the effect of discriminating against women:

> [U]nder the trial court's rationale, it is the mother — not the father — who would be penalized for working out of the home. She and she alone would be placed in this Catch-22 situation. If she did not work, she could not possibly hope to compete with the father in providing material advantages for the child. She would risk losing custody to a father who could provide a larger home, a better neighbourhood, or other material goods and benefits.
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> If she did work, she would face the prejudicial view that a working mother is by definition inadequate, dissatisfied with her role, or more concerned with her own needs

65 See *Swaney v Ward* (1988) FLC 91-928.

66 This phenomenon is recognised by former Family Court Justice Peter Nygh in his discussion "Sexual Discrimination in the Family Court" (1985) 8 *UNSWLJ* 62 at 67-68.

67 [1977] FLC 90-230.

68 [1977] FLC 90-230 at 76,221.

69 *Burchard v Garay* 229 Cal Rptr 800 (1986). A third consideration was the "friendly parent rule", ie, that the father would permit ready access, while the mother was less willing to do so.

than with those of her child. This view rests on outmoded notions of a woman's role in our society. Again, this presumption is seldom, if ever, applied even-handedly to fathers. The result — no one would take an unbiased look at the amount and quality of parental attention which the child was receiving from each parent.

In an era where over 50 per cent of mothers work and almost 80 per cent of divorced mothers work, this stereotypical thinking cannot be sanctioned. When it is no longer the norm for children to have a mother at home all day, courts cannot indulge the notion that a working parent is ipso facto a less satisfactory parent. Such reasoning distracts attention from the real issues in a custody dispute and leads to arbitrary results.

... [T]he relationship between maternal employment and the "presumed facts" about the child's best interests is not supported by reason or experience. Typically, it is the mother who provides most day-to-day care, whether or not she works outside the home ...

The double standard appears again when, as here, the father is permitted to rely on the care which someone else will give to the child. It is not uncommon for courts to award custody to a father when care will actually be provided by a relative, second wife, or even a babysitter ... However, the implicit assumption that such care is the equivalent of that which a nonworking mother would provide "comes dangerously close to implying that mothers are fungible — that one woman will do just as well as another in rearing any particular children."

The reasons on which this trial court relied are discriminatory. They fall unequally on women and men. They penalize women for failing to conform to a 19th century role which is no longer possible or desirable for many. They imply that a woman who leaves her "proper sphere" to participate fully in modern life cannot be an adequate mother. Such a view denies full humanity to women. It cannot be tolerated in our courts.

To force women into the marketplace and then to penalize them for working would be cruel. It is time this outmoded practice was banished from our jurisprudence.[70]

There are a number of other ways in which gendered assumptions can disadvantage women in custody litigation, while at the same time favouring men who may have played little if any role in the care of their children during the subsisting relationship. While it is beyond the scope of this discussion to explore all these issues in any detail,[71] one proposed solution warrants discussion. This is to look to past practices during the subsisting relationship in order to determine what is in the future best interests of the child once a relationship has broken down, that is, to focus on who was the "primary caregiver" during the relationship, rather than focusing on the situation once the relationship has broken down. Proponents of this position suggest that in a disputed custody case, the best interests of the child might best be served by ensuring that the parent who has taken primary responsibility for the past care is awarded custody. While it may be that current social practice indicates that women are generally the primary caregivers, this is nonetheless a gender-neutral rule,[72] which has

70 *Burchard v Garay* 229 Cal Rptr 800 (1986) at 809-810. The court was here quoting from N Polikoff, "Why Are Mothers Losing?: A Brief Analysis of Criteria Used in Child Custody Determinations" (1982) 7 *Women's Rights Law Reporter* 235 at 241. (All original references have been omitted from this extract from the judgment.)

71 For further discussions, see R Graycar, above n 12; and R Graycar and J Morgan, above n 1, ch 10.

72 For some discussion of the primary caregiver model, see S Boyd, "From Gender Specificity to Gender Neutrality? Ideologies in Canadian Child Custody Law" in C Smart and S Sevenhuijsen (eds), above n 12; S Boyd, "Potentialities and Perils of the Primary Caregiver Presumption" (1990) 7 *Canadian Family Law Quarterly* 1; L Sack, "Women and

the potential to avoid the pitfalls of earlier gendered practices such as the "tender years" doctrine.[73]

THE RELEVANCE OF VIOLENCE IN FAMILY LAW

Of all areas of law, family law is the one in which violence, while it may not be the issue in question in a particular case, is nonetheless often central to the context of a dispute. This is not surprising in view of the fact that much of the violence against women is perpetrated by men known to them, in particular, by men with whom they are or have been in intimate relationships.[74] Thus, the Family Court, more than any other court except perhaps the local or magistrates' courts,[75] is the court most likely to encounter women who have been the targets of violence since it is within the family relationships that are the basis of that court's jurisdiction that violence most frequently occurs.

Writing about matrimonial property law, Juliet Behrens suggested: "[T]he courts have retreated behind no fault discourse to strike out any allegations of ... violence".[76] She pointed out that courts only take violence into account where it has "financial consequences": that is, where the woman can show that the effects of the violence have diminished or destroyed her earning capacity, or created needs which must be met, such as for medical expenses.[77] Even then, only the *consequences* of violence are considered relevant, rather than the violence itself.[78] Not only does Behrens argue that violence *is* relevant, but she also contends that there are "strong normative arguments for allowing the fact of violence against women in the home to benefit women in financial adjustment proceedings".[79] According to Behrens, violence could be

Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases" (1992) 4 *Yale Journal of Law and Feminism* 291; R Neely, "The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed" (1984) 3 *Yale Law and Policy Review* 168. Neely is a judge whose article graphically documents the ways in which fathers often use demands for custody to coerce and control their former partners, often with no serious intention of continuing to care for the children on a full-time basis.

73 See, eg, submission of the National Committee on Violence Against Women (NCVAW) to Joint Select Committee, above n 26 at 50; Law Society of British Columbia, *Gender Equality in the Justice System* (1992) at 5-47.

74 See the discussion of this by, amongst others, the NCVAW in its *National Strategy on Violence Against Women* (1992).

75 These courts exercise jurisdiction over restraining and protection orders made under various State and Territory domestic violence laws: see Family Law Act s 114AB and Regulation 19 for a list of those prescribed.

76 J Behrens, "Domestic Violence and Property Adjustment: A Critique of 'No Fault' Discourse" (1993) 7 *Australian Journal of Family Law* 9 at 13.

77 For example, *Fisher* (1990) FLC 92-127; *Sheedy* (1979) FLC 90-710; *Hack* (1980) FLC 90-886.

78 *Fisher* (1990) FLC 92-127 at 77, 847. Of course this distinction is a difficult one to apply: many women who are the targets of violence by their spouses suffer consequences much less obvious than would lead a court to find a direct economic consequence. For some insightful discussions of the harms suffered by women who are the targets of violence, see C Littleton, "Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women" [1989] *University of Chicago Legal Forum* 23; M Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation" (1991) 90 *Michigan Law Review* 1.

79 J Behrens, above n 76 at 9.

considered by the Family Court — under the existing statutory scheme — on either of two bases: contribution or need. As to the former, violence against women in the home is "of itself, an indication of a negative contribution to the welfare of the family and is therefore relevant in the determination of how to adjust property interests following the breakdown of a marriage".[80] Secondly, in the case of need, Behrens maintains that "it is only by detailing evidence of the violence against the woman that took place in the home that one can understand the true need of the woman in such a case."[81] That is, it is only by understanding the *cause* of the need that we can understand the need itself.[82]

Finally, Behrens anticipates the response (to which I return later) that treating violence as relevant in property disputes reintroduces "fault" to the Act: she argues that violence is a form of conduct quite distinct from all other forms of "fault" conduct. First, it goes directly to the relevant statutory factors in property cases (such as the relative needs and contributions of both parties to the marriage); secondly, policy arguments suggest that violence should justify a greater share of matrimonial property being awarded to the woman;[83]it is unjustifiable to hold the view that "conduct" should not be considered in other proceedings related to marriage dissolution simply because the "cause" of the breakdown is not relevant in the initial proceedings;[84]and, finally, violence is a gender issue and therefore "[e]xposing it in the courts is justified where detailing other types of conduct (like adultery, for example) is not."[85]

Perhaps even more disturbingly, in the context of custody and access disputes, there are some decisions suggesting that the courts have made quite clear distinctions between violence toward the child(ren), which is conceded to be relevant, and violence between the adult parents, which is not readily seen as going to the "welfare of the child", the statutory "paramount consideration" in these matters.[86] As the National Committee On Violence Against Women pointed out in its submission to the 1992 Joint

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80 Ibid at 16.

81 Ibid at 19.

82 Here, it might be relevant, for example, to draw a clear distinction between a loss of future earning capacity which flows from the violence in the marriage, and a similar loss caused by a car accident.

83 Ibid. Examples of such arguments are elaborated in her article at 20-25. These include: economic deprivation is often one of the consequences of violence and giving the woman, as the target of this violence, a greater share of matrimonial property can help redress the balance by enabling her, for example, to establish her life elsewhere (the promotion of future security); the need for compensation and the recognition that family law (as opposed to tort law or criminal injuries compensation) is an appropriate arena in which to pursue it. There are a number of rationales given for this view: battered women rarely seek compensation for their injuries and, if there is already a dispute about property, the additional costs involved in pursuing compensation would be unlikely to outweigh the possible benefits of receiving compensation; the injury for which compensation would be sought arises from the marriage the financial consequences of which are before the court. Finally, Behrens argues that "[a] decision to make the *very cause* of this power imbalance [the violent relationship] a factor in the decision making process would go a long way towards increasing the bargaining power of battered women in general ..." (at 22). Emphasis in original.

84 Ibid at 24.

85 Ibid.

86 See Family Law Act 1975, s 64(1)(a) for the welfare principle.

Select Committee, there is now a large body of evidence demonstrating the harm done to children by witnessing violence against their mothers.[87]

A particular way in which the routine nature of violence against women frequently disappears is in the disjunction between the treatment in the reported cases of incidents of violence against women (rarely visible), and incidents of alleged "violence" by women toward men. Compare, for example, the early case of *Soblusky*[88] where the Court went into graphic detail about what the wife did to the husband, with a property case where the Court noted that "as a result of an incident which took place between the applicant and the respondent, the applicant [the wife] became a quadriplegic".[89] In other words, any suggestion of violence by a woman is treated as aberrational: the spotlight focuses on the woman whose behaviour does not conform to stereotypes. Yet at the same time, we see little or nothing of the routine incidence of violence towards women.

In one of the earliest custody cases heard by the Family Court (and discussed by the National Committee on Violence Against Women (NCVAW)), the allegations of the husband's violence were struck out as irrelevant to the husband's suitability as a custodial parent.[90] While the husband was not granted custody, an injunction restraining his access to the matrimonial home was refused. The judge stated: "[I]f the generous access which I envisage being granted to the husband is to work, relationships between the parties will have to be rebuilt". The judge pointed out that "[a]ccess is not going to work if either party, through damaged relationships, continues to bear bitterness and hostility towards the other".[91]

The Law Reform Commission's Reference on Equality Before the Law

In 1993, the Australian Law Reform Commission (ALRC) received a reference on "Equality for Women before the Law".[92] In the few months after it released its discussion paper in July 1993, nearly 600 written and oral submissions were received. One of the most striking features of the Commission's work is the extent to which women around Australia, at public and closed hearings, and in many of the written submissions, have spoken out about the violence in their lives and the failure of the legal system to respond to it. Some women have told their own stories in their own ways; some have provided relevant documents, such as the Family Court judgments in

87 See NCVAW above n 73 at 18-19, and P Parkinson, "Children Who Witness Domestic Violence" (February 1994, unpublished conference paper).

88 (1979) 12 ALR 699.

89 *In the Marriage of Hack and Hack* (1980) FLC 90-886 at 75,593.

90 *Heidt* (1976) FLC 90-077. "I should emphasise that there is no suggestion that Mr Heidt has ever treated his children with the violence with which he has treated his wife ... [I]n assessing his potential as a custodial parent I have largely disregarded his behaviour as a husband": at 75,362. For a discussion, see J Behrens, above n 76 at 27, footnote 59. This issue is also explored by S Berns, "Living Under the Shadow of Rousseau: The Role of Gender Ideologies in Custody and Access Decisions" (1991) 10 *U Tas L Rev* 233. See also *In the Marriage of Chandler and Chandler* (1981) FLC 91-008.

91 (1976) FLC 90-077 at 75,363.

92 ALRC, *Equality Before the Law* (Discussion Paper No 54, 1993); *Equality Before the Law: Women's Access to the Legal System* (Report No 67 (interim), 1994).

their cases;[93] others have analysed their personal experiences by reference to issues raised in the Commission's July 1993 discussion paper.[94]

Other submissions have been made by groups of women working in the law, such as lawyers in state legal aid commissions, women's legal resources centres and workers from specialist domestic violence services.[95] In many of these submissions, the central focus has been violence against women and the inadequacy of legal responses.

While it is difficult to single out submissions for discussion (there are, of course, also issues of confidentiality),[96] it is worth quoting from the judgment in a case decided in the latter part of 1993. The husband had on a number of occasions breached an access order and serious allegations of violence and sexual assault had been made against him by the wife. The Family Court judge stated:

> I [do] not intend to make findings relating to the wife's allegations of violence and sexual abuse, except in so far as it related to the parties [*sic*] capacity as parents and to credit. To embark upon such an investigation would have been lengthy and in my opinion irrelevant to the issues before me relating to custody.[97]

Another woman wrote about her ex-husband's abduction of her children who were returned following protracted proceedings pursuant to the Hague Convention on the Civil Aspects of International Child Abduction. The father was sentenced to a short jail term, yet in 1993 he returned to the Family Court seeking restrictions on his wife's behaviour when with the children, an application presumably dealt with as an isolated instance rather than as part of a continuum of harassment and abuse.[98] As the woman stated in her submission:

> This is not about our children, although he seeks the sanction of the Family Court by purporting that it is. His behaviour is a continuing statement of his obsession with gaining power and control which is at the heart of all domestic violence.[99]

Yet another woman has written about her custody case, heard by the Family Court in July 1993, in which she lost custody of her two young daughters.[100] She points out that the formal reason for the decision was preservation of the "status quo" (that is, the children had remained with their father when she left the home) but in her view, the law and the Family Court take no account of how that situation came about. In response to the question in the ALRC Discussion Paper[101] about whether the Family Court gives appropriate weight to the existence of violence against women when deciding custody, access and property disputes, she stated:

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93 The submission referred to in n 98 below, is one of a number of examples of these.

94 ALRC, *Equality Before the Law* (Discussion Paper No 54, 1993).

95 A full list of those received is contained in the interim report, *Equality Before the Law: Women's Access to the Legal System* (Report No 67 (interim), 1994).

96 Some women referred to Family Law Act s 121 (the confidentiality provision) and pointed out that they had been advised not to talk about their cases.

97 Reasons for judgment, at 2, included in confidential submission (on file with ALRC and author).

98 See confidential submission (on file with ALRC and author). This of course raises interesting evidentiary questions about how treating a case in its full historical context might be facilitated given current rules of evidence and procedure.

99 Confidential submission, addendum (on file with ALRC and author).

100 See confidential submission (on file with ALRC and author).

101 ALRC, above n 94 at para 8.14.

> The Family Court gives no weight to the existence of violence. *It adopts an ostrich-like attitude of the paramountcy of the interests of the child as the situation exists at the time of the court hearing and completely ignores how the situation has evolved.* The best interests test is far too subjective and involves far too much discretion. A history of violence should be stated to be a consideration in the determination of custody cases.[102]

This woman also speculated that " ... probably 90% of the cases where children have been abducted from this country have occurred where there has been a history of violence. This is the final act of abuse a man can perpetrate against a woman".[103] She stated that:

> It is very convenient for [the judge] totally to ignore the history of the violence in the marriage — there is no mention of it anywhere in the judgment ... I believe [the judge's] failure to address this issue [violence] in the judgment is extremely insensitive and a total whitewash of an important factor of the family history.
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> It seems that the message of my case is that a woman must not leave a dreadful and revolting relationship unless she can get the children out with her. If she leaves without the children, then she will effectively lose them, as status quo will be established by fair means or foul, and the status quo will then prevail. It is as though the Family Court makes its decisions in a total moral vacuum, hiding behind the supposed paramountcy of the interests of the children. Murphy did a wonderful thing with his idea of no fault divorce, but it seems to me there has been no justice in this case. *The manner in which status quo has been established should be a consideration.*[104]

The Illawarra Legal Centre in Warrawong NSW made a detailed submission after undertaking extensive research, including a phone-in, in the local community.[105] The Centre made the point that while responses were sought in the phone-in to a wide range of issues to do with women and the law, over 70 per cent of those who called spoke of their experience of violence. "The inability of the legal system to protect women from domestic violence, or to deal effectively with violence when it occurs, was a recurring theme". Importantly:

> [F]or some of these women, it is their treatment within the legal system and the feeling that they were "denied justice" that they remember with most bitterness, rather than the mistreatment they experienced from their partner.[106]

The submission points out another important consequence of violence: the failure by women who have been targets of violence in their relationships to pursue their entitlements to property. In a number of case studies, they document reasons why some women have been led to feel that they have no choice but to abandon everything they had in order to preserve their personal safety and that of their children.[107]

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102 Confidential submission (on file with ALRC and author). Emphasis in original.

103 Ibid.

104 Ibid. Emphasis in original.

105 Illawarra Legal Centre, *A Human Right to Justice: Experiences of Women and the Law in the Illawarra Region.* Submission prepared for the Australian Law Reform Commission by Judy Stubbs, (No 284) (extracted in Appendix 2 of ALRC, *Equality Before the Law: Women's Access to the Legal System*, Report No 67 (interim), 1994).

106 Submission No 284 at 16.

107 An American judge, R Neely has documented the extent to which property has so frequently been used as a bargaining tool by men who threaten custody disputes against women: see R Neely, above n 72.

Some submissions suggested that violence was not taken sufficiently seriously by the Family Court counselling service. For example, a submission from a Victims of Crime organisation stated:

> Family Court counsellors sometimes seem to operate in blissful ignorance of the power inequalities involved in domestic violence and child abuse. Victims — both women and children — are often pressured by the Family Court counsellors into agreeing to face-to-face meetings with the offenders despite the trauma that this creates for the victims. In many domestic violence cases, the Family Court counsellors expect the man and woman to be able to sit down together and discuss and negotiate issues, in complete disregard of the years of violence and intimidation that the woman may have suffered at the hands of the man.[108]

And, in the case which involved a kidnapping, referred to above, the woman wrote:

> My former husband and I attended a court-ordered counselling session of almost 4 hours with a Family Court counsellor, who refused to allow my request for separate counselling, despite policy on matters involving domestic violence. I was required by the Counsellor to account for almost every statement I made and my husband was not. I felt as though I was in a room with two adversaries. It was a most distressing experience. I felt disbelieved and that the Counsellor had little understanding of the dynamics of domestic violence and his clinical skills reflected that. His report was subsequently fairly even-handed.[109]

Why does this problem persist? The "no fault" philosophy

When attempts are made to raise the issue of violence and to argue that the law should pay more attention to violence and its consequences, advocates are often understood as attempting to reintroduce fault into the Family Law Act. Perhaps the woman who wrote about her case to the ALRC and described the Court's attitude as ostrich-like, at the same time as she congratulated the late (former Attorney-General and High Court Justice) Lionel Murphy for the no-fault divorce reforms, put her finger precisely on the conceptual failure of the argument that to take conduct into account is to reintroduce "fault". The "no-fault" divorce provisions of the Family Law Act appear to form the basis of the view that it is appropriate to disregard violence against women in a number of contexts outside divorce, such as custody and, more particularly, access and property.[110] The no-fault philosophy has permeated so deeply that instead of being seen as a change in the way we deal with divorce — a progressive response to the bad old days when proof of such matters as adultery, desertion and cruelty was required before people were allowed to end their relationships — it has come to be seen as the central tenet in all discussions of family law. Hence, a suggestion that violence should be taken into account in, say, custody or property, is countered with the view that "yes, but the men want adultery taken into account" (or some such similar response). These are quite unrelated issues, as Juliet Behrens has cogently argued.[111]

This view, that no-fault dissolution means that we must ignore all forms of conduct in contexts other than dissolution, also emerges from some of the submissions received by the Law Reform Commission. For example, in one case in 1986, a woman had

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108 Submission No 142 at 10.

109 Confidential submission (on file with ALRC and author).

110 See, eg, *Fisher* (1990) FLC 92-127; *Barkley* (1977) FLC 90-216.

111 Behrens explains why violence against women is quite distinguishable from other forms of behaviour that might be called "fault": above n 76 at 23-24.

written to the then Attorney-General and put her view that the provisions of the Family Law Act dealing with violence needed strengthening. His reply is illuminating:

> The provisions of the *Family Law Act* providing civil procedures to deal with domestic violence including s.114AA, probably go as far as would be appropriate in the *Family Law Act*, having regard to the fundamental objectives and philosophy of this legislation.[112]

The Chief Justice has recently issued a practice direction on family violence and this initiative manifests a commitment to deal with the issue seriously.[113] But such an effort will only be effective if the widespread and pervasive nature of violence against women is recognised: not as something that happens in an isolated gender-neutral fashion (as language such as "an incident between the parties" or "relationships between the parties will have to be rebuilt" suggests)[114] but as the historical legacy of a cultural and legal system that operated by the rule of thumb.[115]

WHY DOES GENDER INEQUALITY PERSIST IN FAMILY LAW?

A recent Canadian discussion points out that the wave of family law reforms of the 1970s was characterised by several themes:

> [T]he introduction of gender neutral legislation, the elimination of the concept of fault, and equal application of the law to both men and women. It was thought that equality in family law meant equal treatment and that spouses who were equally treated by the courts would become equal in society ...[S]tudies and reports are now showing that the "divorce revolution" has had disastrous results for women. The theory of equal treatment of the sexes in family law ignores social and economic reality; it confuses what ought to be with what is, and creates what some women have begun to call "equality with a vengeance".[116]

A brief empirical fact sheet will help to demonstrate the context in which our current family law operates:[117] a world where women earn about 80 per cent of what

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112 Submission No 96. Section 114AA is the section dealing with enforcement of the provisions on injunctions.

113 Interestingly, the woman who wrote of her custody case and her concern about the use of "status quo" referred to this policy which she had heard the Chief Justice discuss in the media: confidential submission, above n 102.

114 See *Heidt*, discussed above at n 90. The NCVAW pointed out in its submission to the Joint Select Committee, above n 26 that there is no specific reference to "violence" in the Family Law Act: see NCVAW submission, Part 1 at 12.

115 See above at 281.

116 F Steel and K Gilson, "Equality Issues in Family Law: A Discussion Paper" in K Busby, L Fainstein and H Penner (eds), *Equality Issues in Family Law: Considerations for Test Case Litigation* (1990) at 24-25.

117 In a discussion of the two recent Canadian cases, *Moge* and *Peter*, Susan Boyd reminds us that family law is a limited field in which to hope to address (and change) women's relegation to poverty. For one thing, many poor women are in "intact" two parent households living in poverty: reforms to family law will not affect them. Others are sole parents through widowhood or choosing to bear a child alone. And, for many divorced women or unmarried separated cohabitants, there is not enough property or money generally to ensure any meaningful redistribution from men to women: see S B Boyd, "(Re)Placing the State: Family, Law and Oppression" (1994) 9 *Canadian Journal of Law and Society* 39 at 67-69. Ultimately, attention needs to be focused on the labour market and the welfare system, and the interrelationship of the three forms of support for women: paid

men earn (if they work full time); where the term sole parent family masks overwhelmingly poor woman-headed households; where the average woman forgoes in a lifetime an estimated $336,000 in (1987) earnings if she has a child, and considerably more if she is a highly educated woman;[118] where women suffer a dramatic decline in their living standards after divorce and are considerably less likely than men to repartner.[119]

These phenomena are sometimes collectively known as the "feminisation of poverty", or the impoverishment of women. Recently, the Supreme Court of Canada acknowledged that "the feminisation of poverty is an entrenched social phenomenon". The Court noted the empirical evidence about the decline in women's living standards after divorce and the increase in women's poverty in that country and considered the relationship between these phenomena and the reformed model of family law, particularly its emphasis on the clean break principle or self-sufficiency:[120]

> Women have tended to suffer economic disadvantages and hardships from marriage or its breakdown because of the traditional division of labour within that institution. Historically, or at least in recent history, the contributions made by women to the marital partnership were non-monetary and came in the form of work at home, such as taking care of the household, raising children, and so on. Today, though more and more women are working outside the home, such employment continues to play a secondary role and sacrifices continue to be made for the sake of domestic considerations. These sacrifices often impair the ability of the partner who makes them (usually the wife) to maximise her earning potential because she may tend to forgo educational and career advancement opportunities. These same sacrifices may also enhance the earning potential of the other spouse (usually the husband) who, because his wife is tending to such matters, is free to pursue economic goals.
>
> [O]nce the marriage dissolves, the kinds of non-monetary contributions made by the wife may result in significant market disabilities ... In effect, she is left with a diminished earning capacity and may have conferred upon her husband an embellished one.[121]

The Court suggested, after citing Canadian studies similar to the work carried out in Australia by the AIFS, that:

> [T]he general economic impact of divorce on women is a phenomenon, the existence of which cannot reasonably be questioned and should be amenable to judicial notice.[122]

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work, dependence on men and dependence on the state: see T S Dahl, "Women's Rights to Money" (1984) 12 *International Journal of the Sociology of Law* 137 and see more generally, R Graycar and J Morgan, above n 1, Part 2.

118 J Beggs and B Chapman, "The Forgone Earnings from Child-Rearing in Australia", ANU Centre for Economic Policy Research, Discussion Paper No 190, commissioned for the AIFS, June 1988, at 40-41. Further, this figure assumes there is no capacity to receive interest on the sum. If there is this capacity the figure jumps dramatically. It also rises not only with educational attainment, but with an increase in the number of children a woman has. For an analysis of the manner in which the opportunity costs of women's withdrawal from the workforce may be calculated, see K Funder, "Australia: A Proposal for Reform" in L J Weitzman and M MacLean (eds), *Economic Consequences of Divorce: The International Perspective* (1992).

119 See *Settling Up* and *Settling Down*, above n 26.

120 *Moge v Moge (Women's Legal Education and Action Fund, intervener)* [1992] 3 SCR 813.

121 Ibid at 861-862.

122 Ibid at 873. See also the Honourable C L'Heureux-Dubé, "Recent Developments in Family Law" (1993) 6 *Canadian Journal of Women and the Law* 269.

And, in another recent decision, this one involving unmarried cohabitants, the Court suggested that the devaluation of women's work in the home "has contributed to the feminisation of poverty which this court identified in *Moge*".[123]

The issues discussed here — the failure to value women's work, the gendered assumptions underpinning the treatment of caring work and custody and the failure to treat violence against women with the serious response it requires — have all been the subject of scrutiny by task forces in the United States of America and Canada which have examined gender bias in their justice systems.[124] Their reports show surprising similarity in identifying problems across jurisdictions. Why do these gendered phenomena persist when we have a gender-neutral law? They persist because gender relations are still characterised by a fundamental inequality between women and men. This inequality underpins our law, as it does social relations more broadly, yet it remains unarticulated, indeed, masked by its gender-neutral form. A marked societal asymmetry is treated, in the name of equality and gender neutrality, as a purported symmetry and gender inequality is erroneously treated as a thing of the past, as something which ceased to exist when the language ceased to recognise it, rather than as being entrenched in our reformed family law. By paying attention to these issues, as numerous task forces on gender bias in the courts in North America have done and as the highest court in Canada has now done, we can hope to do something so that next time we have a wave of family law reform, we will not be left saying, as Harvard Law Professor Martha Minow has,[125] "We learn too late".

123 *Peter v Beblow* (1993) 44 RFL (3d) 329 at 341 per McLachlin J.

124 See, for a discussion of the task forces' approach to violence, K Czapanskiy, "Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts" (1993) 27 *Family Law Quarterly* 247. J Resnik, "Ambivalence: The Resiliency of Legal Culture in the United States" (1993) 45 *Stanford Law Review* 1525 contains a complete list of the United States state task force reports on gender bias in the legal system in an appendix and discusses the report of the Federal 9th circuit task force.

125 Reviewing L Weitzman, *The Divorce Revolution* (1985) in "Consider the Consequences" (1986) 84 *Michigan Law Review* 900.