

Matrimonial property law reform and equality for women: Discourses in discord?

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This article scrutinises some of the underlying concepts which have structured law reform debates about matrimonial property and describes findings about the economic consequences of marriage breakdown for women and children. It evaluates aspects of matrimonial property law by reference to debates about the meaning of equality for women and suggests that any successful matrimonial property law reform must move beyond the rhetoric of formal equality in redressing the economic disadvantage currently experienced by women and children after marriage breakdown.

As we approach the end of the Twentieth Century, we might look back with some degree of satisfaction on this current century as the one in which women in Australia came to have the vote (they were of course preceded by their counterparts in New Zealand); were admitted to the practice of law and occasionally the judiciary; and have been largely guaranteed formal equality with men through law.¹ The purpose of this discussion is to raise some questions about matrimonial property law, examine arguments about its reform in Australia and locate the discussion within some broader issues of equality for women. In particular, it will scrutinise some of the underlying concepts which have implicitly structured reform discussions about matrimonial property law by reference to various ways of understanding equality for women.

I will begin by outlining some features of the Australian and New Zealand systems of dealing with matrimonial property upon relationship breakdown; describe what is known in Australia about the economic situation of women and the children in their care after separation; and outline current reform proposals which are expected to be enacted in Australia in 1995. I will then evaluate these against the various models of equality and illustrate the point that only a limited understanding of that central concept has to date been employed in family law reforms. After outlining some different ways to think about equality for women, I also want to caution against what I see as an increasing tendency to see matrimonial property law reform (or family law reform generally) as the central plank of our strategies for alleviating the impoverishment of women and

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1 See, for a discussion of women's citizenship in Australia, M Thornton "Embodying the Citizen" in M Thornton (ed) *Fragile Frontiers: Feminist Debates Around Public and Private* (forthcoming, OUP, 1995).

children. I will suggest a number of reasons why any reform to that system, critical as it is, will nonetheless have only a limited impact on the lives of the vast majority of women and children.

I THE CURRENT SCHEME IN AUSTRALIA

Matrimonial property in Australia and New Zealand is governed by laws passed within one year of each other, yet which are quite different.² Whereas in New Zealand a specific Act deals with matrimonial property,³ in Australia, declaration and alteration of property issues are dealt with as part of the Family Law Act 1975 (Cth). The Australian Act does not provide for community of property: instead, the Family Court is given a broad power to alter property interests (so long as it is just and equitable to do so) by reference to two main issues: contribution and need.⁴ Perhaps the most striking contrast is between the broad discretion given to the Family Court in Australia, and the relatively precise method of dealing with matrimonial property in New Zealand. Indeed, minimising judicial discretion was one of the central rationales for the enactment of the New Zealand legislation, which, it has been suggested, aims "to avoid uncertainty by providing a settled statutory concept of justice instead of leaving room for abstract and individual notions of justice".⁵ The New Zealand Act has also been seen as having the "wider legislative purpose of ensuring equal status for women in society".⁶ It specifies that monetary contributions are not automatically to be presumed to be more valuable than non-monetary contributions and contains a strong presumption in favour of equal entitlement to matrimonial property.⁷

So how do people fare under the different systems? An exhaustive Australian study undertaken by the Australian Institute of Family Studies⁸ replicates findings of overseas studies demonstrating the devastating financial consequences of marriage breakdown for women and children.⁹ These, combined with the lack of recognition of women's work

2 For a comparative analysis of the legislation dealing with matrimonial property in Australia and New Zealand, see J Carmichael "Matrimonial Property: Australian Problems - New Zealand Solutions?", paper delivered at the Australasian Law Teachers' Association (ALTA) Conference, Christchurch, September 1993.

3 Matrimonial Property Act 1976 (NZ).

4 Section 79 generally deals with alteration of property interests. And s 79(4)(e) refers the court to s 75(2) - the so-called maintenance factors - in determining the question of need.

5 See generally *Reid v Reid* [1979] 1 NZLR 572, 580-583 per Woodhouse J and *Martin v Martin* [1979] 1 NZLR 97, 99.

6 Above n 5.

7 Matrimonial Property Act 1976 (NZ), s 18(2).

8 See P McDonald (ed) and Australian Institute of Family Studies *Settling Up: Property and Income Distribution on Divorce in Australia* (Prentice-Hall, 1986) (hereafter *Settling Up*); K Funder, M Harrison and R Weston *Settling Down: Pathways of Parents After Divorce* (Australian Institute of Family Studies, Monograph No 13, 1993) (hereafter *Settling Down*).

9 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*)

in the home, women's lower earnings in the paid labour market and women's lesser access to economic resources,¹⁰ provide an important factual backdrop. Women experience considerable social and economic disadvantage in Australian society. Women's economic dependence on men, associated with marriage, is related to many aspects of their social disadvantage¹¹ and, following divorce, their often straitened financial circumstances. Likewise, differential work patterns of men and women are implicated in the poverty experienced by women after divorce.¹² Referring to Canada, Diduck and Orton commented:¹³

[S]ociety is organised around a gender based division of labour rooted in the traditional idealised family structure which has been used to define women socially as secondary earners. Further, ... this social definition has contributed to the unequal position of women in the paid labour force by perpetuating systematic pay and employment inequality and the devaluation of skills involved in domestic work.

Much of the disadvantage suffered by women flows from entrenched attitudes and stereotypes which have led to, and perpetuated, discrimination against women in the paid work force as elsewhere.¹⁴ And, in the context of legal responses to the problem, while it is difficult to suggest that women's impoverishment is **directly** aggravated by a discretionary system, it is certainly the case that broad discretions, as opposed to precise criteria, leave much more room for individual decision-makers to resort to assumptions based, amongst other things, on deeply entrenched views about gender.¹⁵ It is possible that these same attitudes might be at work when courts assess the relative contributions

[1992] 3 SCR 813 (hereafter *Moge*) and *Peter v Beblow* [1993] 1 SCR 980 (hereafter *Peter*): indeed, in *Moge*, the Court stated that this was a matter of which judicial notice should be taken: at 873. The best known United States study is that by L Weitzman *The Divorce Revolution: The Unexpected Consequences for Women and Children In America* (Free Press, New York, 1985) (hereafter *The Divorce Revolution*).

10 Australian Bureau of Statistics (ABS) *Women in Australia*, 1993, ABS Cat No 4113.0 (hereafter *Women in Australia*) 169-208 (especially at 179).

11 For a discussion see A Diduck and H Orton "Equality and Support for Spouses" (1994) 57 MLR 681, 685-686.

12 "The Supreme Court in *Moge* accepted evidence demonstrating that implicated in the relative poverty of women and children in their care after divorce has been the differential work patterns of women as compared with men in and following marriage": Diduck and Orton, above n 11, 685.

13 Above n 11, 684-685.

14 One example is the notion of "merit" which Margaret Thornton suggests draws on the concept of "homosocial reproduction" (thereby perpetuating white Anglo-Celtic male privilege): see M Thornton "Affirmative Action, Merit and the Liberal State" (1985) 2 Australian J of L and Soc 28.

15 See R Graycar "Gendered Assumptions in Family Law Decision-Making" (1994) 22 Federal Law Review 278.

of parties to a marriage in considering applications for alteration of property interests under the broad discretion provided in section 79(4) of the Family Law Act.¹⁶

The underlying themes that emerge from the limited number of property cases actually litigated and reported¹⁷ 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 woman's own earning capacity;¹⁸ 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";¹⁹ 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 the assets (including superannuation which has been the subject of some conflicting decisions and recent recommendations).²⁰

Generally, it is easy to find examples in the Australian case law where men, particularly those with substantial assets who have built them up through their

16 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 maintenance factors, under s 75(2).

17 It needs to be acknowledged that reported cases are always a limited source of information, given their small numbers (see Graycar, above n 15, 282, and below at 25). And it must also be noted that reported cases are based on the current reliance in Australian law on contribution and need. 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 *Settling Up*, above n 8; *Settling Down*, above n 8; Australian Law Reform Commission, *Matrimonial Property*, Report No 37, 1987. And, the Government has issued a response to the 1992 *Report of the Joint Select Committee on the Operation and Interpretation of the Family Law Act 1975* (hereafter *Joint Select Committee Report*) announcing its intention to implement a number of reforms to the *Family Law Act*: 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) (hereafter *Directions for Amendment*).

18 See Fogarty J in *Best v Best* (1993) FLC 92-418, 80,295.

19 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%: *Women in Australia*, above n 10, Table 2.1 at 18. ABS data indicate 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*, above n 10, 174.

20 See Attorney-General's Department *The Treatment of Superannuation in Family Law* (March 1992); ALRC *Matrimonial Property*, above n 17, 201-213, 87-88; *Joint Select Committee Report*, above n 17, 237-252.

businesses, are recognised (and rewarded) for having enormous talent, zeal and acumen²¹ while women's work as homemakers is either not valued at all²² or judged according to normative standards, ie, was she a "good", average or inadequate homemaker?²³ Even though the accepted wisdom is that a homemaker contribution should be valued in a "substantial, rather than a token way", the language used tells us that work in the home is not the same as "real" work, ie, work outside the home, particularly work which generates income leading to the accumulation of substantial assets.²⁴

One interesting and potentially positive development which has followed from some of the more distasteful evaluations of women's homemaker contributions has been the proposal that the Family Law Act supports the notion of calculating a "negative contribution" in property cases. This is increasingly being suggested for situations where the relationship has been characterised by violence and while it has not yet received statutory endorsement, there seems to be growing support for the idea.²⁵

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- 21 See, for example, language such as "innate drive, skills and ability": *In the Marriage of Ferraro* (1992) 16 Fam LR 1 28.
- 22 And, it has been suggested that to put a monetary value on that work would demean it. See, for example, *Dwyer v Kaljo* (1992) 27 NSWLR 728 739 per Mahoney JA (dissenting). Interestingly, in *Peter*, above n 9, 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 v Moge* [1992] 3 SCR 813" (993-994).
- 23 Perhaps the best known instance of this phenomenon is the comment by Wilson J in the High Court's decision in *Mallet v Mallet* (1984) 156 CLR 605 636: "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". 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."
- 24 Examples here include *Aldred* (1988) FLC 91-933; *Gamer* (1988) FLC 91-932; and more recently *Ferraro* (1992) 16 Fam LR 1. Cf *Horsley* (1991) 103 FLR 186. H Charlesworth has discussed some of these cases, in particular those where the husband's "special skill" was a factor, in "Domestic Contributions to Matrimonial Property" (1989) 3 AJFL 147.
- 25 See Behrens "Domestic Violence and Property" (1993) 7 AJFL 7 and see the Hon Justice K Murray "The Family Court and Domestic Violence: Domestic Violence and the Judicial Process: A Review of the Past 18 Years - Should it change Direction?", paper delivered at 6th National Family Law Conference, Adelaide, October 1994. See also the speech by the Chief Justice, the Hon Alastair Nicholson, to the same conference.

In its 1992 decision in *Ferraro*,²⁶ the Full Family Court reviewed much of the established case law in this area. There the trial judge had awarded the wife 30% of the property and commented:²⁷

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.

The Full Court expressly rejected the use of the Sissinghurst Gardens analogy stating:²⁸

... an 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.

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,²⁹ rendering a conclusion of equality of contribution inappropriate, despite the acknowledgment that the wife "virtually conducted the homemaker and parent responsibilities without assistance from the husband".³⁰ So, even though the Full Court found that the wife's contributions were "outstanding", they were nevertheless not equal to the husband's, and her award was increased to 37.5% of the total assets, an increase of only 7.5%.³¹

Approaches taken in the cases make clear that business/entrepreneurial skills are considered 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:³²

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

27 Above n 26, 28.

28 Above n 26, 38.

29 Above n 26, 50.

30 Above n 26, 50.

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

32 H Charlesworth "Domestic Contributions to Matrimonial Property" (1989) 3 AJFL 147, 155.

... 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 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.

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.³³ 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 section 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.³⁴

II CRITICISM AND REFORM PROPOSALS

There have been a number of criticisms of the broad discretion (and I should point out that the High Court of Australia in its 1984 decision in *Mallet*³⁵ is largely responsible for its retention, overturning what was effectively a guideline that had developed in family law decision making that, particularly in longer marriages, "equality is equity").³⁶

A 1980 Parliamentary Committee³⁷ considered replacing the discretionary system with a community of property scheme. However, the Committee recommended that before this happened there should be a comprehensive survey of community attitudes, coupled with a detailed law reform commission study of the implications of such a scheme and a comparative assessment of similar regimes overseas.³⁸

In 1983 the Australian Law Reform Commission was given a reference to inquire into matrimonial property. Its work was assisted by the Australian Institute of Family Studies (AIFS) which conducted an exhaustive empirical study of the economic

33 As my other work on personal injury damages and family provision makes clear: see, eg "Women's Work: Who Cares?" (1992) 14 Sydney LR 86; "Love's Labour's Cost: The High Court's Decision in *Van Gervan v Fenton*" (1993) 1 Torts LJ 122; "Legal Categories and Women's Work: Explorations for a Cross-Doctrinal Feminist Jurisprudence" (1994) 7 Canadian Journal of Women and the Law 34. For a general discussion of issues concerning undervaluation of women's work see M Neave "From Difference to Sameness - Law and Women's Work" (1992) 18 Melbourne ULR 768.

34 This legislative statement is also unique in the various legal regimes in which problems arise concerning the value of women's work.

35 *Mallet v Mallet* (1984) 156 CLR 605.

36 See *Wardman v Hudson* (1978) FLC 90-466.

37 Joint Select Committee on the Family Law Act (the "Ruddock Committee") *Family Law in Australia* (AGPS, Canberra, 1980).

38 Above n 37, para 5.158.

consequences of divorce. Like its Californian counterpart,³⁹ the AIFS study⁴⁰ demonstrated starkly the gross disparities in post-divorce living standards between women and men. Women living alone or as single parents experienced a vast decline in their standards of living, while men, including those who became sole parents, experienced considerable improvement. Significantly, women, especially those who were custodial parents, were likely to receive more than 50% of the basic assets,⁴¹ usually somewhere around a 60-40 division in their favour⁴² and this often enabled women who were custodial parents to stay in the matrimonial home with their children. Weitzman's Californian study had demonstrated that a strict regime of equal division led more often than not to the house being sold and the proceeds being divided down the middle, leaving neither party, particularly a woman with limited or non-existent work experience or skills, in a position to purchase another property.⁴³

The ALRC proposed a three stage model for property division.⁴⁴ The first stage was to identify the pool of property (including superannuation and "financial resources") and assess the parties' respective shares by reference to contribution, with equality of contributions to be presumed except in cases of substantial disparity. Secondly, shares were to be adjusted where there was any disparity in the parties' capacity to achieve a reasonable standard of living after separation. This required a consideration of child care responsibilities during and after the marriage and the effect of the marriage on the respective income earning capacities of the parties. Thirdly, future maintenance needs were to be assessed in light of the property arrangement.⁴⁵ After reviewing overseas jurisdictions, notably New Zealand and Ontario, the Commission indicated that it did not favour the establishment of a community of property regime, but rather one of "result equality" in which⁴⁶

39 L Weitzman *The Divorce Revolution*, above n 9.

40 *Settling Up*, above n 8.

41 It should be stressed that the AIFS used the term "basic assets" to mean only those assets, such as the matrimonial home, closely associated with the marriage.

42 *Settling Up*, above n 8, 184.

43 See L Weitzman *The Divorce Revolution*, above n 9. For some comments on this work, which has generated a vast body of literature, see M Fineman "Illusive Equality: On Weitzman's *Divorce Revolution*" (American Bar Foundation Research, 1986) 781; M Fineman "Implementing Equality: Ideology, Contradiction and Social Change. A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce" [1983] Wisconsin LR 789; and M Minow "Consider the Consequences" (1986) 84 Michigan LR 900. See also reviews of Weitzman by K O'Donovan (1987) 14 Journal of Law and Society 273; C Smart (1987) 26 Journal of Family Law 261; M J Mossman (1986) 5 Canadian J of Family L 341; and B Meteyard (1986) 14 International J of the Sociology of L 435.

44 Australian Law Reform Commission *Matrimonial Property Law* (Discussion Paper No. 22, AGPS, 1985). This was endorsed in the final report, *Matrimonial Property Law* (Report No. 39, AGPS, 1987).

45 *Matrimonial Property Law* (Report No 39), above n 44, paras 149-159.

46 *Matrimonial Property Law* (Report No 39), above n 44, para 146.

[r]ecognition of the different economic effects of the presumptively equal contributions made by the spouses to the marriage partnership may require unequal division of their property at the end of the marriage.

While it was conceded that a greater degree of certainty was required as a basis from which the parties could negotiate,⁴⁷ for the Commission, the central issue was not judicial discretion versus fixed entitlements, but rather, whether post-separation circumstances ought to be taken into account by matrimonial property law as opposed to social security or maintenance law.⁴⁸ The report pointed out that the enactment of an "equality" regime, while initially seen notionally as an advance for women, would, in practice, aggravate the economic inequality that often arises from the differing effects of marriage and childrearing on the spouses primarily to the detriment of custodial parents and women whose earning capacity has been impaired by their marriage.⁴⁹

All the evidence leads to the conclusion that equal sharing of property at the end of a marriage is not necessarily fair sharing. A just sharing of property should be based upon a practical, rather than a merely formal, view of the equal status of husbands and wives within marriage. ... Thus, a just sharing of property should take into account any disparity arising from the marriage in the standards of living reasonably attainable by the parties after separation.

Public submissions to the ALRC inquiry showed overwhelming community support for result equality over rule equality⁵⁰ and for consideration of "the particular situation of the couple concerned, even if that means uncertainty and some extra cost or delay", over a fixed entitlement system.⁵¹

47 Something which the High Court's decision in *Mallet* (1984) 156 CLR 605 had made less possible with its rejection of a 50-50 starting point. See also R Mnookin and L Kornhauser "Bargaining in the Shadow of the Law: the Case of Divorce" (1979) 88 Yale LJ 950.

48 Australian Law Reform Commission *Matrimonial Property Law* (Report No 39), above n 44, para 270.

49 Above n 48, para 273.

50 These included submissions from the National Women's Consultative Committee, Western Australian Women's Advisory Council and the New South Wales Domestic Violence Committee. In a submission endorsed by the New South Wales Women's Legal Resources Centre, they argued that the court should retain its discretionary power to allocate property by reference to both past contributions *and* future needs, and stressed that custodial parents should be compensated for the expenses of housing and rearing children and for their loss of earning capacity.

51 Australian Law Reform Commission *Matrimonial Property Law*, (Report No 39) above n 44, para 272. For further discussion of some of these submissions, see R Graycar, "Feminism and Law Reform: Matrimonial Property and Models of Equality" in Sophie Watson (ed) *Playing the State: Australian Feminist Interventions* (Verso, London, 1990).

The ALRC report was never implemented and a further Parliamentary Committee was established.⁵² In November 1992, that committee recommended that "equality of sharing should be the starting point in the allocation of matrimonial property" (Rec 71), but that the court should have a discretion to depart from this to take account of "exceptional circumstances" (sic) (Rec 73). Those circumstances suggested as relevant (Rec 74) are those which are most routine: eg, care and control of children; future needs of spouses, etc. The Federal Government has agreed in principle with this recommendation and has also endorsed another: that pre-, during and post- marital financial agreements be recognised, and enforceable. That is, the policy of the Government is to encourage increased reliance on private ordering of the financial aspects of marriage breakdown.⁵³ Another recommendation, only partly accepted by the Government, was that farming properties should be distinguished from other types of matrimonial property. Instead it is proposed that the Act should be amended to indicate that one of the issues to be taken into account is "the need to retain any property or business as a functional unit". The Government is also believed to be examining more equitable ways to deal with superannuation which has to date been treated in a somewhat arbitrary fashion after cases have established that it is not "property" (though can be taken into account as a "financial resource").⁵⁴

There is considerable debate in Australia at the moment about the merits of these proposals, though there still remains some uncertainty as to what precisely will be involved in any new statutory scheme. While the Parliamentary Committee used the language of "equal sharing", the Government's more recent pronouncements suggest that what is proposed is a presumed equality of contribution (except where the contributions are not equal).⁵⁵ And, equal sharing of what? Is there to be a distinction between matrimonial property and other property, or will *all* property be liable to sharing? In October 1994, a forum on these reforms,⁵⁶ to which the Federal Government, the Family Court and the profession contributed, showed how little clarity there was on some of these issues. And, there is considerable disquiet about general direction with the Family Law Section (the profession) saying that the reforms will be "bloody disastrous" for women and a "bonanza for men".⁵⁷ Other commentators have pointed out some of the dangers for women of the increasing shift toward private ordering.⁵⁸ For

52 *Joint Select Committee Report* above n 17.

53 For a critique of this see M Neave "Private Ordering in Family Law: Will Women Benefit?" in *Fragile Frontiers* above n 1.

54 See *Crapp v Crapp* (1979) FLC 90-615 and see Government's response *Directions for Amendment* above n 17, 42-43.

55 This was suggested in the draft of a draft bill, circulated for comment in 1994.

56 Sixth National Conference on Family Law, Adelaide, 21 October 1994.

57 Rod Burr, Chair, Family Law Section, Law Council of Australia, quoted in *The Bulletin* 18 October 1994, 25-26.

58 M Neave, above n 53. In answer to the question "Why do women do poorly when they negotiate family ... contracts?" she notes that women negotiate agreements against the background of pervasive gender inequality. Women earn less and own less; after marriage breakdown they may have difficulty meeting short term living costs (let alone paying legal and accounting fees); and legal aid is probably not available: "Thus they are more likely to be forced to make separation agreements (or to rely on

example, Neave notes that women's bargaining power is affected by men's violence against women which is known to escalate at the time of separation.⁵⁹ Women with violent partners are vulnerable to being pressured to make agreements to end the violence and protect their children. While in theory a woman pressured into an agreement could later get it set aside, in practice a woman who is desperate to avoid contact with an ex spouse will not pursue the matter. This is all exacerbated by the failure to treat violence as relevant in family law matters generally.⁶⁰

Another concern Neave expresses about private ordering flows from studies showing that women as well as men tend to undervalue non-financial contributions. Neave refers to research showing that people express their preferences in terms of what they perceive to be their entitlements. But their notion of those entitlements is moulded by social context. So, for example, advantaged people see themselves as more entitled than disadvantaged people.⁶¹ If, until recently, women's contributions to family welfare were not given economic recognition, it is not surprising that women do not see them as valuable. This is supported by the AIFS findings in *Settling Up*.⁶²

Women generally acknowledged their husband's financial contributions, while men were more likely to overlook financial contributions made by their wives. Both men and women regarded financial contributions as more significant than non-financial ones.

The current uncertainty about the future of these reform proposals makes it unwise to discuss in any detail what might happen in Australia so I propose in the remaining part of this paper to stand back a little and ask what all of this tells us, if anything, about understanding equality for women. Prior to this, however, it might be helpful to look at the reality of women's economic lives following divorce.

alternative dispute resolution) because they can't afford to litigate". They may lack accurate information about their partner's earning capacity or assets. The latter may be held in complex trust or company arrangements (on women's lack of control over business information see also: *Settling Up* above n 8, 320). She suggests that more rigorous disclosure requirements would make some difference but not solve the problems. She also notes that the AIFS recommended that the Family Court use independent auditors which, she suggests, could improve the situation of women bargaining with their husbands.

59 H Astor points out that one USA estimate puts the rate at 36-60% of divorcing couples; an English sample, 28 out of 60 cases: H Astor "Domestic Violence: The Facts", paper prepared for Family Court of Australia, Gender Awareness Seminar, Kooralbyn, April 1994.

60 M Neave, above n 53.

61 M Neave goes on to apply this to cohabitation and separation agreements: Neave, above n 53.

62 *Settling Up*, above n 8, 240.

III WHAT DO WE KNOW OF THE ECONOMIC CONSEQUENCES OF DIVORCE?

Martha Minow, in her review of Lenore Weitzman's *Divorce Revolution*,⁶³ asks why the disastrous economic consequences of divorce for women and children were not anticipated? Why did those devastating findings, and the overwhelming disadvantage experienced by women, provoke so much surprise?

In Australia, the follow up to the 1986 AIFS study, published in 1993⁶⁴ showed that the greater detrimental effect of separation was still being experienced by women. It found that the overall differences between the situations of mothers and fathers had changed little between 1984 and 1987. Respondents were surveyed in 1984 and again in 1987. By 1987, the fathers had returned to income levels of the pre-separation level while mothers continued to indicate losses.⁶⁵ The consequences for children are obvious since they usually lived with their mothers.

While not as comprehensive as the AIFS study, one New Zealand survey shows that, at least as far as their perceptions are concerned, people feel they are "better off" after separation than they were before. This is despite a finding that women were financially worse off after separation. The apparent contradiction is explained by a sense that their "living standard" (or quality of life) had improved. For some women, this was constituted by their greater feeling of "control" over their lives and finances even though they may in fact have less money after divorce.⁶⁶

Another (very small) New Zealand survey indicates that even though women receive a much larger share of matrimonial property under the Matrimonial Property Act than they did under prior law, various factors, both statutory and otherwise, influence settlements to favour the income producer (normally the husband) where the value of the property exceeds average amounts.⁶⁷ More generally, it was found that the standard of living for women and children is lowered more than that of men after divorce and equal property division does not correct that imbalance. Property division was described by some as achieving "[e]quality in law, but inequality in fact".⁶⁸

63 M Minow, above n 43.

64 *Settling Down* above n 8.

65 Above n 64. According to this study, in 1984 both partners reported falls in household incomes since the last year of their marriages but thereafter incomes improved. However, mothers indicated much greater average decline in income than fathers (34% losses in income compared with 4%). By 1987 the mothers were indicating losses of around 26%.

66 *A Lee Family Court Custody and Access Research Report 2: A Survey of Parents Who Have Obtained a Dissolution* (Policy and Research Division, Department of Justice, New Zealand, 1990) 26-27.

67 J M Krauskopf and C J Krauskopf "Comparable sharing in practice: A pilot study of results under the Matrimonial Property Act of 1976" (1988) 18 VUWLR 21, 34.

68 Above n 67, 33.

Let me now briefly step outside the context of family law for a moment and look at some of the different ways in which we might understand equality for women. As Diduck and Orton suggest, equality, "like all social constructs, has a cultural, contingent, and relational meaning".⁶⁹

1 *Formal equality, or gender neutral treatment*

One approach, known as formal or rule equality, sees equality as a matter of gender neutral treatment: women and men are to be treated exactly the same in all circumstances. An advantage of this model is its simplicity: no law may validly distinguish between women and men in any way.⁷⁰ However, it has some important deficiencies. Historically, women and men have not been treated identically. Treating them exactly the same now may only reinforce the already existing disadvantage of women. Further, the treatment of men is the yardstick for equality since the model uses a male standard as its unquestioned benchmark. Women must conform to male-defined norms or lose further ground.

This model also has nothing to offer where there is no comparable male experience by which to claim women's right to identical treatment. Nor can it respond to structural disadvantages faced by women. Indeed, it may play an important role in further entrenching those disadvantages. As Sheehy suggests: "unequal gender relations thrive when the rhetoric of gender neutrality denies their existence".⁷¹

2 *The Differences Approach*

A second approach to equality recognises that women do not necessarily have the same experiences as men. It acknowledges women's differences from men and suggests that women and men should not be treated identically in all circumstances, and that women's differences from men need special recognition. Sometimes recognising differences between women and men, such as the capacity to bear children, can promote women's equality. This can assist in the provision of employment-related benefits such as maternity leave.

A problem with the way differences between women and men have been dealt with by law is that "different" treatment has more often meant less favourable treatment for women. The approach also seems to assume that differences between women and men

69 A Diduck and H Orton, above n 11, 689.

70 E A Sheehy *Personal Autonomy and the Criminal Law: Emerging Issues for Women* (Canadian Advisory Council on the Status of Women, September 1987) 3. Other advantages noted by Sheehy include that it is politically acceptable and falls squarely within a liberal political framework and it carries the important message that women should not be distinguished as "other" by our society (at 4) (extracted in R Graycar and J Morgan *The Hidden Gender of Law* (The Federation Press, 1990) 40.

71 Above n 70, 41.

will always justify different rules. In this way, women can be further disadvantaged because discriminatory practices will be justified by resort to women's differences from men. For example, this approach has been used to exclude women from certain jobs, such as in the lead industry⁷² or as a prison guard.⁷³

It has been suggested that this approach is simply a variant of the formal equality or gender neutrality approach.⁷⁴ What they have in common is that both use men as the benchmark: the first requires women to be the *same as* men; while the second stresses women's *differences from* men. Neither challenges maleness as the standard. Emphasising women's similarity to, or difference from, men has the effect of distracting attention from the major issue of systemic inequality between women and men. That is, it is not difference as such which has led to inequality for women, but rather, differences between women and men have been relied on to disadvantage women.⁷⁵

3 *Subordination, Dominance or Disadvantage Approach*

A third approach, commonly referred to as the subordination or dominance approach, but which I will refer to as the disadvantage approach, analyses inequality not as an issue of whether women are the same as, or different from, men, but as the consequence of the relative distribution of power between women and men.⁷⁶ It looks at laws, policies and practices to determine whether they operate to maintain women in a subordinate position. In order to apply this understanding of equality it is necessary to engage in a careful analysis of the reasons for a particular law or practice including its historical origins and its current social and economic effects on women, ie, how inequality has been created.

This approach does not focus on whether some differences between women and men justify different treatment, but instead looks at the effects on women of a particular legal rule or practice. For example, the fact that women and men have different reproductive capacities should not of itself lead to women's lesser social status and limited access to paid work opportunities. However, because caring for children has been seen as a "woman's role" and most jobs have not been designed to take account of child care responsibilities, the effect has been to deny women appropriate work opportunities. This, in turn, has led to women occupying a disadvantaged position in the workforce.

72 See *Mt Isa Mines Limited v Marks & Ors* (1992) EOC 92-420; cf *International Union, UAW v Johnson Controls* 111 S Ct 1196 (US S Ct 1991).

73 *Dothard v Rawlinson* is a good example: women were excluded from jobs as prison guards on the grounds that they were susceptible to rape: 433 US 321 (1977).

74 Most notably by C A MacKinnon in *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, Cambridge, MA, 1987) and *Toward a Feminist Theory of the State* (Harvard University Press, Cambridge, MA, 1989).

75 "Gender might not even code as difference, might not mean distinction epistemologically, were it not for its consequences for social power": C A MacKinnon *Feminism Unmodified* above n 74, 40.

76 It owes much to MacKinnon's work on equality: see, for example, "Difference and Dominance" chapter two of *Feminism Unmodified* above n 74.

The disadvantage approach is concerned with whether a practice or rule has harmed women or has been detrimental to them. In some circumstances, it is convenient to assess this disadvantage by examining the comparative situation of men. To this extent, in practice, it might appear to be similar to the other models of equality, in that it too uses a male comparator. However, the disadvantage approach uses a quite different methodology from the other two models. It is less concerned with formal or abstract notions of rights, or formal similarities or differences between women and men, and more with whether women's lives are characterised by incidents of lesser social power, such as being paid less than men in paid work; having their work undervalued generally; living in poverty after relationship breakdown; and greater vulnerability to violence.

While all three models might have something to offer, depending on the circumstances,⁷⁷ it has been argued that the disadvantage analysis, in its focus on outcomes, can best ensure that inequalities are not entrenched. For example, a disadvantage analysis might lead us also to say, whilst access to maternity leave is essential to women's full participation in paid work, its availability does not challenge either the assumption that women are the primary caregivers or that workplaces may need to be restructured to take account of caretaking responsibilities.

IV MATRIMONIAL PROPERTY AND "EQUALITY?"

How does this relate to matrimonial property? In her book, *The Illusion of Equality*, Martha Fineman points out that the dominant reform model, the partnership approach, under which economic and non-economic contributions are treated as notionally equal, is clearly based on a model of formal equality.⁷⁸ Treating marriage partners as if they were in the same situation clearly has considerable political purchase in the "gender neutral" 1990s. The other main conceptual focus, need, is based on a view of women as dependent and seems to flow from the "differences" approach. Yet there is considerable distaste often expressed about reliance on need. As Fineman put it:⁷⁹

need is cast as a negative ... [and] ... there is a strong preference for the legal presentation of women as equal partners within marriage and as independent, equal economic actors outside of it.

77 After all, formal equality secured women the vote - non-Aboriginal women (and men) had to wait until 1962; similarly, although the 1972 Equal Pay decision did not lead to women earning as much as men, it was still an important symbolic victory for women - prior to this, wages for men were explicitly structured around the idea of what a man needed to support his wife and children; wages for women were set on the basis that they had no dependants: see *Ex Parte H v McKay* (1907) 2 CAR 1 (the *Harvester* case) and B Cass "Rewards for Women's Work" in C Pateman and J Goodnow (eds) *Women, Social Science and Public Policy* (Allen and Unwin, Sydney, 1985).

78 M Fineman *The Illusion of Equality, The Rhetoric and Reality of Divorce Reform* (The University of Chicago Press, Chicago, 1991) 45.

79 Above n 78.

She suggests that the two key issues, past contribution and future needs, are related to the competing symbolic values of rule equality versus the more instrumentally oriented result equality⁸⁰ and goes on to point out that "[t]he stereotypes of dependency and partnership are polar opposites".⁸¹

For Fineman, insisting on formal equality in the context of divorce denies the reality that women function in an unequal world where they must "meet greater demands with fewer resources. ... Feminists, consistent with their desire to assist women, should be advocating the need for unequal treatment - for result equality - in divorce."⁸²

Fineman's discussion helps to illustrate just how limited the debate in this area has been. In this it echoes a number of other issues concerning women in law where responses have been limited to one or the other of these two approaches: treat women as if they were the same as men, as equal partners, or treat them as dependants in need of some form of "special protection".⁸³ These include how to treat the woman who is a director in a two director company with her husband;⁸⁴ how to deal with the presumption of advancement when the parties are a mother and son;⁸⁵ and what to do about, for example, guarantees.⁸⁶ While I do not have a simple solution to any of these problems, or an instant fix for matrimonial property law reform, I do feel reasonably confident that until we transcend these two limited ways of conceptualising the situation of women in legal discourses we will never satisfactorily provide women with equality through, and in, law.

One suggestion for how we might better approach these issues is to have regard to the realities of women's lives and not make assumptions which have no basis in fact.⁸⁷ A common example in the family law context is the view that "as more women work

80 See M Fineman "Implementing Equality: ...", above n 43, 791-792, .

81 M Fineman *The Illusion of Equality* above n 78, 46.

82 M Fineman "Implementing Equality ...", above n 43, 826. See also M Fineman "Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce" (1989) 23 FLQ 279.

83 For a New Zealand example, see *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC).

84 See the descriptions of Mrs Lewis in *Metal Manufacturers v Lewis* (1986) 11 ACLR 122 (on appeal at (1988) 13 NSWLR 315) and compare the treatment of Mrs Morley in *Statewide Tobacco Pty Ltd v Morley* (1990) 8 ACLC 827 (affirmed on appeal, (1992) 8 ACSR 305).

85 *Brown & Anor v Brown & Anor* (1993) 31 NSWLR 582; see Lisa Sarmas "A Step in the Wrong Direction: The Emergence of Gender "Neutrality" in the Equitable Presumption of Advancement" (1994) 19 Melbourne ULR 758.

86 *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447; *Barclays Bank v O'Brien* [1994] 1 AC 180.

87 Likewise, we need to be careful about so-called "facts" and "truth". For interesting discussion about "facts" in law see the work of Kim Lane Scheppele, including "Just the Facts Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth" (1992) 37 New York Law School R 123 and "Facing Facts in Legal Interpretation" in Robert Post (ed) *Law and the Order of Culture* (University of California Press, Berkeley and Los Angeles, 1991) 60.

outside the home, housework is increasingly shared". This view seems to sit comfortably with the gender-neutral language and focus of the Australian legislation⁸⁸ and was relied upon by the High Court in its 1979 decision in *Gronow*⁸⁹ to reject any notion of a maternal preference in custody cases. The Court stated:⁹⁰

[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.

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:⁹¹ men still do very little and women continue to carry the double burden.⁹²

Interestingly, reliance by courts on assumptions of "fact" is particularly common in cases involving women's work in the home.⁹³ When courts consider these issues, it is common for them to rely on assumptions rather than evidence; 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."⁹⁴

How might we take more account of the reality of women's lives? One reform proposal concerns altering property interests by considering the "opportunity costs" of having children. Women's labour force participation and hours of work are

88 For an analogous discussion in the context of personal injury damages, see R Graycar "Women's Work: Who Cares?" above n 33, 88, n 16.

89 *Gronow v Gronow* (1979) 144 CLR 513.

90 Above n 89, 528 per Mason and Wilson JJ.

91 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, 103.

92 See, for example, M Bittman *Juggling Time: How Australian Families Use their Time* (1991); *Women in Australia*, above n 10 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* (AGPS, Canberra, 1990).

93 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" in *Fragile Frontiers* above n 1.

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

overwhelmingly affected by the presence of children. A consequence of this is that 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.⁹⁵ Under the current Australian system, women bear this cost alone:⁹⁶

When a marriage ends, the costs of the depreciated earnings which were previously absorbed by the partnership are carried by the partner whose paid work has been interrupted and whose individual earnings are reduced.

Men are left with an "asset" of the partnership (ie, increased earning capacity), whilst women are left with a "loss" (in the form of depreciation in earnings). Funder (and the AIFS) suggest that this loss should be allocated to the partnership, not just to the woman.⁹⁷ Here, the concept of partnership used goes beyond the "formal equality" model, as the reality of women's lives is accounted for. While this proposal identifies that the persons in the marriage relationship are "partners", it acknowledges that the gendered division of child care responsibilities results in the partners occupying different, rather than identical, positions, a state of affairs that has significant economic consequences for both parties.⁹⁸

V FROM FORMAL EQUALITY TO RECOGNISING DISADVANTAGE

Recently, in two decisions on spousal support, the Supreme Court of Canada has moved from the equal partnership model to a recognition of the realities of the economic consequences of marriage breakdown (including the needs created) for women.⁹⁹ In *Moge*, the Court noted the empirical evidence about the decline in women's living standards after divorce and the increase in women's poverty and considered the relationship between this and family law's emphasis on the clean break principle or on economic self-sufficiency.¹⁰⁰

95 See J Beggs and B Chapman *The Foregone 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 McLean (eds) *Economic Consequences of Divorce, The International Perspective* (Clarendon Press, Oxford, 1992).

96 K Funder, above n 95, 155.

97 Above n 96.

98 It has economic consequences for both parties in the sense that the woman (and it is usually she who has childcare responsibilities) is disadvantaged, while the man benefits economically from not having to undertake those responsibilities personally.

99 *Moge* above n 9 and *Peter* above n 9.

100 Above n 99.

The Supreme Court suggested, after citing Canadian studies similar to the work carried out in Australia by the AIFS, that:¹⁰¹

[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.

And, in the second decision, *Peter*, (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*".¹⁰² The two decisions (*Moge* and *Peter*) are generally seen as progressive; as "good for women" since they acknowledge the post separation poverty of women and children. In that sense, they are far more grounded in reality than are judgments which resort to the rhetorical, yet empty, notion of formal equality. For example, Diduck and Orton state that in *Moge*:¹⁰³

the fact that the court participated in and promoted a shift in how the law constructs "husbands", "wives" and their realities acknowledges the fluidity of these legal subjects. They are no longer to be seen as natural, predetermined or static. ... [The decision] contributed to reshaping the "wife" of legal discourse, by legitimating women's calls to take their lived realities into account in the law.

However, I want to end my discussion on a somewhat different note by drawing attention to some important limits on the ability of family law, including revised ways of dealing with matrimonial property or spousal support, to redress women's economic disadvantage, a limit also recognised by the Supreme Court of Canada in *Moge*.¹⁰⁴ This is not to say that we should not work to improve both judges' ways of dealing with the issues and the statutory framework within which the law operates. But it is important to remember first, that (at least in Australia) very few cases are ever litigated (less than 5%)¹⁰⁵ and aside from the very good reasons why people stay out of court, there are also other significant barriers to women's access to justice.

In an analysis of the AIFS' proposed response to its empirical findings about the economic disadvantage suffered by women after marriage breakdown, Kate Funder pointed out:¹⁰⁶

101 *Moge* above n 9, 873. See also the Hon C L'Heureux-Dubé "Recent Developments in Family Law" (1993) 6 Canadian J of Women and the L 269.

102 *Peter*, above n 9, 993 per McLachlin J.

103 A Diduck and H Orton, above n 11, 701.

104 The Court said "Given the multiplicity of economic barriers women face in society, decline into poverty cannot be attributed entirely to the financial burdens arising from the dissolution of marriage": *Moge* above n 9.

105 See above n 17.

106 K Funder, above n 95, 147.

It is unrealistic to expect individuals and the legal system, to attempt to redress structural inequalities (ie gender differences) in employment and earnings. Thus discussion of the impact of the present law on the economic circumstances of men, women and children after divorce must distinguish between the general social economic influences on income ... and those factors which are particular to marriage and the law relating to its dissolution.

Canadian Professor Susan Boyd has suggested that, as a response to women's poverty, family law is a very limited site and one which may actively "lend ideological support to the state's privatization of economic responsibility".¹⁰⁷ So single women, women who live independently of men, women who separate from poor men, women who stay married to poor men, or separated women who cannot get a man to pay up, fall through the net of family law and must negotiate welfare, with the result that, ideologically, heterosexual relationships and women's roles as wives and mothers are reproduced.¹⁰⁸

As well as the (perhaps not so obvious) fact that there has to be some property for family property law to make a difference, the case must be heard by a court, or settled in the "shadow of the law".¹⁰⁹ Yet a number of factors militate against this happening. First, the availability of legal aid in Australia has been narrowing over the years: recent studies have shown that increases in the proportion of legal aid spending going to criminal defendants (particularly in the aftermath of *Dietrich*,¹¹⁰ the High Court's decision concerning the right to representation in serious criminal matters) have been at the expense of legal aid in family and civil matters.¹¹¹

Canadian Law Professor Mary Jane Mossman points to the same trend in Canada. Scrutinising the priority that has traditionally been given to criminal defendants in legal aid spending, she notes that the main rationale is the important liberty interest at stake when a man might be imprisoned. But is this interest inherently more important than a woman losing her children; or, we might ask, in the context of property, a woman losing her home through inability to garner the legal resources to fight for it?¹¹²

107 S B Boyd "(Re)Placing the State: Family, Law and Oppression" (1994) 9 Canadian J of L and S 39, 68.

108 Above n 107, 68-69.

109 Cf: R Mnookin and L Kornhauser, above n 47.

110 *Dietrich v The Queen* (1992) 177 CLR 292.

111 See Legal Aid and Family Services *Gender Bias in Legal Aid Litigation* (1994). See also ALRC *Equality Before the Law; Justice for Women, First Main Report* (Report No 69, Part One, 1994) ch 4.

112 M J Mossman "Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change" (1993) 15 Sydney LR 30; M J Mossman, "Gender Equality, Family Law and Access to Justice" (1994) 8 IJLF 357.

In Australia, Professor Hilary Astor has drawn our attention to another barrier to women securing their entitlement to matrimonial property which follows from the increasing use of mediation:¹¹³

There is evidence that the most likely injustice to arise in mediation of disputes involving violence is that the target will accede to a disadvantageous property settlement in order to maintain custody of the children. In California the Senate Task Force on Family Equity found evidence that failure to consider violence could result in women agreeing to unsatisfactory custody and financial arrangements to avoid the threat of loss of custody in mediation or at trial.

This phenomenon, of men using threats of custody litigation to persuade their ex-wives to withdraw from claims on property, has been widely documented.¹¹⁴ It is not confined to mediation and is likely to be magnified if the Australian Government's plans to amend the Family Law Act so as to increase reliance on private ordering (including pre-nuptial agreements) go ahead.¹¹⁵ Astor points out that the problem is exacerbated by lack of availability of legal aid in family cases and the consequent inability of mediators to refer impecunious parties for legal advice where they consider it appropriate.¹¹⁶ Women leaving violent men are unlikely to have the financial resources to afford legal assistance and although a woman's impoverishment may notionally entitle her to legal aid under the means test "it is increasingly becoming a condition of legal aid that parties try mediation first."¹¹⁷

The Illawarra Legal Centre's study,¹¹⁸ prepared for the ALRC's inquiry, *Equality for Women Before the Law*, pointed out that a number of women who were the targets of violence in their relationships did not pursue their entitlements to property. For such women, safety was a priority and engagement with their ex-partner and with the legal

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- 113 H Astor "Violence and Family Mediation: Policy" (1994) 8 AJFL 3, 9. The reference to the California study is *California Senate Task Force on Family Inequity* (Final Report, 1987) (see fn 26 of her article). For another discussion on domestic violence as a limitation on the use of mediation see: The Hon Chief Justice Alastair Nicholson "Mediation in the Family Court of Australia" (1994) 32 Family and Conciliation Courts Review 138, 142-144.
- 114 L Weitzman *The Divorce Revolution* above n 53; R Neely "The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed" (1984) 3 Yale L and Policy R 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.
- 115 See M Neave "Resolving the Dilemma of Difference: A Critique of 'The Role of Private Ordering in Family Law'" (1994) 44 U of Toronto L J 97; M Neave "Private Ordering in Family Law - Will Women Benefit?", above n 51.
- 116 It should also be noted that in the draft version of Part VIII (the property law amendments) there was no requirement for independent legal advice for people entering agreements.
- 117 H Astor, above n 113, 9.
- 118 J Stubbs "A Human Right to Justice", submission prepared for Illawarra Legal Centre to the Australian Law Reform Commission, 1993.

system was simply untenable in the face of the history of violence in their relationships. For women who leave violent relationships and who are forced into shelters or public housing, improvements in the way in which law deals with women's work in the home and a recognition of the feminisation of poverty in deciding property cases may be of little more than marginal relevance to their lives.

Professor Mary Jane Mossman has recently argued that "(re)conceptualising family law reform as a matter of public policy rather than the enforcement of private familial obligations permits us to ask different questions about the goals of family law reform".¹¹⁹ As she puts it: "It is important to confront the fact that neither families nor family law ... have been understood as problems about justice".¹²⁰

In conclusion, I would like to repeat my concern that we not too readily assume that treating women and men the same will bring about equality and that gender-neutrality is an appropriate framework for a gendered system operating in a gendered world. As Isabel Marcus has suggested: "Gender free or even gender neutral divorce law in a gendered society is an oxymoron".¹²¹

119 M J Mossman "Running Hard to Stand Still: The Paradox of Family Law Reform", forthcoming in Dalhousie L J.

120 Above n 119.

121 I Marcus "Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York" (1987) 42 U of Miami L R 55, 55.