Women and Family Law: Contemporary Struggles of Australian Women

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The struggle for recognition of unique women's issues within Australian family law has long been a contentious one. Family law is based upon traditional notions of the family and maintenance of the familial structure, which has impeded the ability of women to be properly supported by the legal system. Positive developments in women's rights in family law can be seen through the implementation of no-fault divorce, the increasing power of the law with regards to child maintenance and the incredibly important introduction of spousal maintenance. Although many improvements have been made to the family law system, there are still many areas that are problematic. Every day, women continue to struggle at the hands of domestic and family violence and in many cases child and spousal maintenance remain controversial. These prevailing issues need to be examined through the existence of these traditional power and family structures, as they continue to underpin social ideas of women and the family.

Traditional Notions of Family

Family law is premised upon the existence of a family structure called the 'nuclear family'. The nuclear family can be described as adhering to traditional gender and functional roles within the family; the father, the mother and their dependent children.[1] The nuclear family is seen as the basic social unit of Australian society; the ideal means to raise and support a family. What underpins this structure, is the traditional demarcation of gender roles for the mother and father. The mother's role can be defined as the primary caregiver of children and the domestic labourer, while the father's role is concerned with his capacity to work as the breadwinner of the family. This is known as the 'sexual division of labour'.[2] It further refers to the fact that traditionally men were the partner to engage in paid work while women took on unpaid work in the home.[3] This would clearly have implications upon a woman's earning capacity and is particularly concerning in the circumstance of a divorce.

Thus the law has had to develop ways to ensure women can support themselves where their earning capacity has been inhibited by the sacrifices made to raise a family. The law has been forced to recognise that family law affects women and men disproportionately. Research shows that it is mostly women that are taking on the role of the primary caregiver.[4] Therefore, women are almost always economically disadvantaged if they have had children, as they will have had to take a certain amount of time out of the workforce to have children. Moreover, women are not only losing the opportunity to earn money but in many circumstances lose the opportunity to advance their careers, an experience that most men have not had the misfortune to suffer. Therefore it is true that the law has given women formal equality with men, but it is a mistake to ignore the social realities of family law.

Divorce

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[1] See generally James M. White and David M. Klein, *Family Theories* (Sage Publications, 3rd ed, 2008).
[2] See JM Krauskopf, 'Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery' (1989) 23(2) *Family Law Quarterly.*
[3] Ibid.
[4] Belinda Fehlberg et al, *Australian Family Law: The Contemporary Context*, (Oxford University Press, 2nd ed, 2015), 413.

Since the introduction of no-fault divorce in Australia under the *Family Law Act 1975* (Cth),[5] marital partners have been able to obtain a divorce without having to prove certain moralistic grounds for divorce. Nowadays the only ground for divorce is the irretrievable breakdown of a marriage,[6] which must be proven by a period of 12 months separation.[7] While this has undoubtedly been a liberating change for unhappily married women this has also brought its challenges in terms of the economic realities for divorced women.

Krauskopf refers to the two assumptions that divorce relies on. The first is the adequacy of the economic position of 'homemakers' and children following the dissolution of a marriage. This is represented by the assumption that former homemakers are capable of earning substantially or they would remarry. The second is that both parties would benefit from what is known as the 'clean break' principle.[8] The clean break principle proposes that it is fairer and more effective for parties that divorce to sever economic ties between them.[9] This would essentially ensure the economic disproportion between divorcing mothers and fathers.

As aforementioned, divorced women who have taken time out of the workforce have a distinct disadvantage when compared to their male counterparts. There are also women who have refrained from working whilst they have the financial support of their husband and so have no financial property of their own. Thus when they divorce they can end up with little to no assets of their own and cannot afford to support themselves. This is why the implementation of schemes such child maintenance and spousal maintenance have become an indispensable support mechanism for Australian women.

Child Maintenance

Research shows that 'single-mother families continue to be among the most financially disadvantaged groups' whereby the risk of poverty is substantially high.[10] Therefore it is critical that the law ensures that absent fathers continue to contribute to the family as well as offering support mechanisms where enforcement proves difficult. The principle means of child support come through the introduction of the Child Support Scheme (CSS) by way of the *Child Support (Assessment) Act 1989* (Cth) (CSA) and the *Family Law Act 1975* (Cth) (FLA).[11] The CSS directly undermines the clean break principle, by ensuring that both parents remain financially responsible for their children following the breakdown of a marriage. The CSS possesses multiple functions; it attempts to alleviate the presence of child poverty by ensuring children are properly provided for, to prevent the reliance of struggling partners on social welfare provisions and to enforce the financial responsibility of the absent parent.[12]

Prior to the enactment of the CSA the Family Court of Australia could only make an order for the payment of child maintenance, but there was no sufficient mechanism for enforcement of that order. The original proposals under the CSS sought to enforce maintenance through the Tax Office and introduced a formula to calculate the necessary average costs of maintenance of a child.[13] This

[5] *Family Law Act 1975* (Cth).
[6] *Marriage Act 1961* (Cth) s 48(1).
[7] Ibid s 48(2).
[8] Krauskopf, above n 2.
[9] Ibid.
[10] Lixia Qu, Ruth Weston, Lawrie Moloney, Rae Kaspiew and Jessie Dunstan, *Post-Separation Parenting, Property and Relationship Dynamics after Five Years,* Australian Institute of Family Studies, Melbourne, 2014, 26-7.
[11] *Child Support (Assessment) Act 1989* (Cth); *Family Law Act 1975* (Cth).
[12] *Child Support (Assessment) Act 1989* (Cth) s 4.
[13] CCH Australia, *Background to the child support formula*, CCH Commentary: Australian Family Law & Practice Premium Commentary (at 29 May 2013) ¶2-120.

formula could be appealed in circumstances requiring adjustments to the amount of maintenance payable.[14] The original formula for the assessment of child support amount was met with much criticism as it was heavily dependent on the taxable income of the non-resident parent and did not consider the income of the resident parent. Due to the high costs incurred by the non-resident parent through the instalment of this scheme it was deemed highly unfavourable, particularly by non-resident fathers.[15] This led to a number of reports recommending improvements to the formula and subsequently to numerous changes to the existing system.

As it stands today there are currently six formulas in part 5 of the CSA that are used to ascertain the annual rate of child support payable by a parent.[16] These six formulas were created to provide for more individualised administrative assessments by recognising the different arrangements and situations encompassed by parents, children and also carers. Although this consideration makes assessments appear more fitting to each arrangement it has rendered the assessment process invariably more complex through the consideration of more factors. It has thus re-established the difficulty for single mothers of attaining sufficient funds for child support as it decreases the amount of child support payable.

Furthermore, another relevant consideration is the presumption of 'shared parental responsibility' enshrined by s 61DA of the FLA.[17] This fundamental provision states that unless proven otherwise, both parents are equally responsible for the welfare of their child, and this is not merely financially. Therefore, if the parents are to equally share in the contributions to raising a child it is only natural that if the non-financial contributions are perhaps more encompassed by one party the financial contributions do rateably fall upon the other. The law even acknowledges that it is not in the best interests of the child to live equally between two separate houses and subsequently receive non-financial support equally from both parents. Accordingly it seems unreasonable to expect that the resident parent perform the role of the homemaker alongside that of the breadwinner when there is an equal parent who does not have to perform this homemaker role and they have the full financial capacity. If the clean break principle has to be sacrificed to ensure that the needs of a child are met by both parents, the law should properly acknowledge both financial and non-financial contributions to that child's best interests.

Alongside the enforcement of child maintenance orders, the Family Court also has the capacity to recognise and formalise private child maintenance agreements under div 1A of the CSA.[18] These child support agreements are registrable by filing an application with the CSA, ATO or Centrelink where they are noted for the purposes the Family Tax Benefit Part A.[19] Alternatively, when the provisions of the CSA and the FLA are an insufficient means of financially supporting a child there remains the availability of social welfare. The social welfare system for families in Australia is represented by the Family Tax Benefit (FTB); a two part payment which assists with the associated costs of child raising.[20] The FTB offers payments under two separate parts; FTB Part A which is an amount paid for each child and FTB Part B which supplements families with one income or a single parent.[21] These mechanisms offer much-needed assistance to struggling mothers and can often be supplemented by spousal maintenance.

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[14] *Child Support (Assessment) Act 1989* (Cth) s 98W.

[15] Fehlberg et al, above n 4, 425-6.

[16] *Child Support (Assessment) Act 1988* (Cth) pt 5 div 2.

[17] *Family Law Act 1975* (Cth) s 61DA.

[18] *Child Support (Assessment) Act 1989* (Cth) div 1A.

[19] Fehlberg et al, above n 4, 452.

[20] Australian Department of Human Services, *Family Tax Benefit* (16 March 2016) Australian Government Department of Human Services < https://www.humanservices.gov.au/customer/services/centrelink/family-tax-benefit>.

[21] Ibid.

Spousal Maintenance

Spousal maintenance is one of the more controversial means of assistance to struggling divorced women but represents the significant recognition of the value of domestic work. It is the continuing financial support from one partner to another after the breakdown of a marriage or de-facto relationship for a period of time. Section 72(1) of the FLA recognises the right of a divorced party to maintenance if they are unable to support themselves by reason of (a) the care of a child under the age of eighteen,[22] (b) 'by reason of age or physical or mental incapacity for appropriate gainful employment',[23] and (c) 'for any other adequate reason'.[24] It is controversial as it diverts from traditional notions of property, in that each person is entitled to what they have earned themselves, but progressive as it recognises the social reality of property division in divorce for women.

O'Donovan poses the question of whether spousal maintenance is at opposite ends to the idea of feminine individualism, as it essentially supports the stereotype that "women need looking after".[25] But this proposition should only be supported if the following were true; there is equality between marital partners including financial equality, there is equal participation of marital partners in the earning of wages, wages are earned by the partners as individuals and not as the heads of families and the partners provide for their children equally in terms of financial and non-financial care.[26] As such, there is rarely a case in which these premises are completely true and thus in divorce one party is usually at an economic disadvantage. One might also conclude that the state has an interest in maintaining the structure of the nuclear family, as it appears to the strongest support mechanism for the raising of a family.

There are a number of factors that are to be taken into account under s 75 of the FLA, which consider the circumstances of the relationship.[27] The main considerations include the age and state of health of the parties,[28] the income, property and financial resources of the parties,[29] and responsibilities that parties may have to other person.[30] Sub-section 2(g) allows for the consideration of 'a standard of living that in all the circumstances is reasonable' where parties are divorced or separated.[31] This is significant as it acknowledges that parties cannot expect to continue to attain such as a high standard of living as they did during the marriage, if their spouse was particularly wealthy. For example, if the husband was a millionaire they could not expect to receive such substantial maintenance payments to enable them to continue to live a millionaire's lifestyle. However, ss 75(2)(k) is highly significant as it addresses the question of whether it is reasonable to expect a full-time homemaker to then seek full-time paid work after a lifetime devoted to being the homemaker.[32] It takes into account the duration of the marriage and the extent to which this has affected their earning capacity.[33] As aforementioned, these considerations are extremely relevant for women who have taken time out of the workforce or perhaps have never entered the workforce and therefore have little employment.

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[22] *Family Law Act 1975* (Cth) s 71(1)(a).
[23] Ibid s 71(1)(b).
[24] Ibid s 71(1)(c).
[25] Katharine O'Donovan, 'Should All Spousal Maintenance be Abolished?' (1982) 45 *Modern Law Review* 424-33.
[26] Ibid.
[27] *Family Law Act 1975* (Cth) s 75.
[28] Ibid s 71(2)(a).
[29] Ibid s 71(2)(b).
[30] Ibid s 71(2)(e).
[31] Ibid s 71(2)(g).
[32] Ibid s 71(2)(k).
[33] Ibid.

Despite these provisions there are limitations on the institution of spousal maintenance agreements. These include; the death of one or both of the parties,[34] the making of a binding financial agreement that excludes a claim for maintenance under s 90G of the FLA,[35] and if the right of one or both of the parties to maintenance has been surrendered under an approved maintenance agreement under s 87.[36] However, a remarkable feature of the legislation is that the Court is able to set aside a binding financial agreement if the party is not able to support themselves and is forced to rely on social welfare.[37] It is clear here that the State has an interest in maintaining the economic standards of divorced parties, so that less of the responsibility can be attached to the state. Aside from spousal maintenance, the state is interested in dividing assets fairly as according to financial and non-financial contributions.

Distribution of Assets

The fair distribution of assets under the FLA can be fairly complex as legislation has moved away from traditional property notions. Much like spousal maintenance, the legislation aims to consider the relative contributions that each partner has made to the household and the circumstances of the relationship. This means that the Court is able to consider non-financial contributions to the household such as child-raising and domestic duties alongside that of purely financial contributions.[38] The legislation therefore gives economic value to those activities that are traditionally classed as non-economic work, thereby acknowledging the indirect contributions that are usually performed by women.

There are four steps that the case of *Stanford v Stanford*[39] has identified for the fair distribution of assets in an application. The first is to identify the value of all property of the parties; and for this purpose there is no distinction between matrimonial and business property. This is to ensure that the financially superior party cannot hide their assets in their business and deprive their former spouse of much needed and valuable assets.[40] The second is the assessment of financial and non-financial contributions to the welfare of the family.[41] Thirdly, there are the host of other factors under s 75(2) of the FLA that are to be similarly considered as that under spousal maintenance.[42] These are the age, health and responsibilities to other persons considerations.[43] The final and most important step in the process is to determine whether the proposed distribution is 'just and equitable'.[44] It is an amalgamation of all of the considerations with the ultimate goal of deciding what will be a fair distribution of assets. It is particularly relevant for non-financial contributors and encompasses the distribution of all of the assets; including superannuation.

Up until recently marital and de-facto partners were able to isolate their superannuation funds as separate from their regular assets, thus depriving their partner of an incredibly valuable asset. With the introduction of pt VIIIB - Superannuation Interests into the FLA, the Court was able to divide superannuation interests between parties to a marriage or de-facto relationship.[45] Section 90MA

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[34] Ibid s 82(1).
[35] Ibid s 90G.
[36] Ibid s 87.
[37] Ibid s 90K(1)(c).
[38] Ibid s 79(4).
[39] [2012] HCA 52.
[40] Ibid.
[41] *Stanford v Stanford* [2012] HCA 52; *Family Law Act 1975* (Cth) s 79(4)(a)-(c).
[42] *Family Law Act 1975* (Cth) s 75(2).
[43] Ibid.
[44] *Stanford v Stanford* [2012] HCA 52[2].
[45] *Family Law Act 1975* (Cth) pt VIIIB.

allows for the provision of splittable payments in respect of a superannuation interest,[46] while s 90MB affirms that this Part overrides other relevant pieces of law such as the general law of superannuation and trust deeds.[47] It is important to note that the splitting of superannuation interest does not convert it into a regular cash asset; it remains subject to superannuation laws as separate species of asset.

These provisions are an incredibly progressive move towards decreasing levels of economic disproportion between men and women after the breakdown of a relationship. As noted, women who have devoted themselves to the role of homemaker for a period of time are being deprived of an income. Not only this, they are deprived of the opportunity to contribute to their own superannuation fund; an important source of funds for retirement. Thus, the splitting of superannuation represents an important tool to ensuring separated women are financially supported for the future.

Domestic and Family Violence

Although the bulk of family law deals with the aftermath of the breakdown of a family relationship, it also extends to the subject of family violence. In 2016, the ABS reported that for the whole of Australia 16 per cent or roughly 1.5 million women have experienced partner violence.[48] In New South Wales alone there were 65, 120 domestic violence related incidents reported to authorities between 2014 and 2015, with a total of 264, 028 incidents recorded for the whole of Australia.[49] Women are experiencing instances of domestic and family violence at disproportionate rates to men. This was further evidenced by the 2010 Australian Law Reform Commission report, which identified that the biggest risk factor for becoming a victim of domestic and family violence was simply being a woman.[50] With these staggering statistics it is clear that despite contemporary society and the law condemning violence against women, it continues to be a huge problem that Australian women face.

These statistics also present the issue of underreporting which plagues the prosecution of domestic violence, as it was shown that 80 percent of women who had experienced domestic violence from a current partner had never contacted the police.[51] The most common reason cited for this phenomenon was fear of retaliation and further violence from the partner.[52] Domestic violence is an incredibly destructive form of violence that has the capacity to affect the whole family, and becomes more complicated where there are children involved.

In terms of law, the s 4AB(1) of the FLA defines family violence as 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the ***family member***), or causes the family member to be fearful.'[53] Subsection 4AB(2) goes on to list to examples of behaviour that can be considered family violence, and includes offences such as sexual

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[46] Ibid s 90MA.
[47] Ibid s 90MB.
[48] Australian Bureau of Statistics, *Personal Safety, Australia, 2016* (November 2017) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4906.0~2016~Main%20Features~Key%20Findings~1>.
[49] Clare Blumer, 'Australian police deal with domestic violence every two minutes', *ABC News* (online) 21 April 2016 <www.abc.net.au/news/2016-04-21/domestic-violence/7341716>.
[50] ALRC and NSWLRC, *Family Violence: A National Legal Response, Final Report*, ALRC and NSWLRC, Sydney 2010
[51] Australian Bureau of Statistics, *Personal Safety, Australia, 2012* (December 2013) <www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/25AF91125718ADF1CA257C3D000D856A?opendocument>.
[52] Ibid.
[53] *Family Law Act 1975* (Cth) s 4AB(1).

assault, assault and property damage.[54] Most significantly it includes provisions for what is known as economic violence, where offending partners ensure their partner's economic dependence upon them by withholding familial wealth.[55] Subsequently, subsections 4AB(2)(g)(h) list the unreasonable withholding of financial autonomy and financial wealth respectively, as a form of family violence.[56] This is significant as research has indicated that on average 15.7 per cent of women of all age groups have experienced economic abuse, and this form of abuse is more frequent among women who have experienced physical and psychological violence.[57]

It appears that family and domestic violence represents a bigger problem to society when there are children involved. The legislation is largely devoted to the procedure and considerations where there are accusations of family violence in a particular application. In deciding whether to make a parenting order in relation to a child, under s 60CA of the FLA the Court must consider the best interests of that child as paramount.[58] S 60CC(2) further sets out the primary considerations in which there subsection (b) denotes 'the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.'[59] It should be noted that the preceding consideration is a representation of the principle of shared parental responsibility, as it states the right of both parents to a meaningful relationship with their child.[60]

Arguably, the primary consideration in all circumstances should be whether there is family violence so as to protect not only the child, but also the mother. There are often circumstances where shared parental responsibility is honoured and this provides an unwanted continuous link between the parents of the child. To rebut the presumption of shared parental responsibility, what must be proven is that there are reasonable grounds to that believe that a parent of the child has engaged in family violence.[61] In the more subtle forms of violence and abuse, this may be hard to prove. Even with regards to child maintenance, shared parental responsibility maintains the relationship between parents via financial means and this can often be abused as a form of economic violence. Therefore is imperative that the law regards family and domestic violence as the paramount consideration in all circumstances, to protect both child and mother.

Conclusion

Through examination of the contemporary struggles of Australian women, it can be demonstrated that the law has a significant role in ensuring equality and support to women in the family context. Although Australian society and the law has advanced to provide more opportunities and equal outcomes to women, the issues that women continue to face trace back to traditional notions of family and gender roles of which are difficult to entirely displace from society. Despite this, the *Family Law Act 1975* (Cth) represents an incredibly powerful tool that aids women with regards to

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[54] Ibid s 4AB(2)(a)(b)(e).

[55] See Carmen Diana Ceere, Jacqueline Contreras and Jennifer Twyman, 'Patrimonial Violence: A Study of Women's Property Rights in Ecuador' (2014) 41(194) *Latin American Perspectives* 143, 144.

[56] *Family Law Act 1975* (Cth) s 4AB(2)(g)(h).

[57] Jozica Kutin, Roslyn Russell and Mike Reid, 'Economic abuse between intimate partners in Australia: prevalence, health status, disability and financial stress' (2017) 43(3) *Australian and New Zealand Journal of Public Health* 269.

[58] *Family Law Act 1975* (Cth) s 60CA.

[59] Ibid s 60CC(2)(b).

[60] Ibid s 60CC(2)(a).

[61] Ibid s 61DA(2).

divorce, child and spousal maintenance and even family violence.[62] The most crucial duty that the Act must perform however, is that it is continually updated and improved upon so as to effectively protect the rights of women and ensure a fair outcome in family law proceedings.

[62] Ibid.