
Gender and Power: Balancing Rhetoric and Reality in the Family Court

The Honourable Justice Neil Buckley*

Introduction

Family law disputes are the business of the Family Court. These disputes are rife with examples of power imbalances between family members involving both adults and children. Such imbalances are not just a symptom of relationship breakdown. They also *cause* it. They exacerbate its consequences. The behaviour which characterises it is then frequently mirrored by children and thus transmitted to the next generation of family members.

Gender plays a major role in such power imbalances. Other relevant factors may include:

- disparate financial resources between the parties,
- personal characteristics such as disability or a history of victimisation, or
- cultural characteristics such as being from a non English speaking background, or being indigenous.

It goes without saying that more than one of these factors can feature within a case and that the combined effect can compound the gravity of the relative power imbalance, particularly for women and those who lack legal representation – so many of whom are women.

Inevitably the emotional and financial consequences of relationship breakdown for adults are also experienced, directly or indirectly, by their dependent children. For adults the arrangements that were made when circumstances were different, and behaviour which was accepted because of other considerations, become public property when the relationship sours to the point of rupture. Family, friends, lawyers, mediators, governmental and private agencies may be suddenly involved, assessments of the roles played by men and women are made, as each side endeavours to justify behaviour, obtain certain advantages or ensure retribution. It is therefore not surprising that family

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law disputes are frequently accompanied by allegations of unfairness or, more specifically, bias. This may be because certain factors are seen as being over-emphasised, under-emphasised or simply ignored or inappropriately distributed, either as a consequence of primary dispute resolution or of litigation.

One of my colleagues, Justice Richard Chisholm, has recently highlighted the large discretionary element in family law, which means that disputes are dealt with on a highly individualised basis, albeit against a background of case law which supports and anticipates particular outcomes.¹ Justice Chisholm uses the example of property disputes, where the legislation provides that the court must make an adjustment which is 'proper' or 'just and equitable', each case being required to be considered on its own merits. This also applies to children's matters, where the judge must consider the best interests of the child.² Although the *Family Law Act 1975* (Cth) provides a checklist of criteria which must be considered, it is the responsibility of the decision maker to decide what weight, if any, should be given to each of them.

I mention this characteristic of family law because it is part of the context within which allegations of imbalances at the court level occur, and which accentuate the importance of the family law process and of procedural fairness. It must be remembered also that, although less than 6% of all those who file applications have a decision imposed on them by a judge, many more of our clients bargain in the shadow of the law. This may, but does not necessarily mean that they have some understanding of the law and the implications of their actions.

I would like to focus briefly on several broad issues today which are illustrative of the circumstances in which the Family Court may or does become involved in areas where power imbalances in their various manifestations are a feature. In preparing this paper I have become aware, as I so often do, of not only how easy it is to set out the problems we face, but how difficult it is to find particular and appropriate solutions to them.

Before launching into the topic proper I think it is helpful to make some explanatory comments about how I will be dealing with it.

First, I should explain that when I refer to 'the Court' I mean not only the essentially adversarial process which characterises litigation, but also the primary dispute resolution services which are such an important component of its operations. As I have mentioned, the judicial arm of the Family Court only sees a very small proportion of its clients. Those with whom it does become involved are usually only involved in cases where other forms of dispute resolution have been unsuccessful and one of the parties – not necessarily both – require an imposed outcome. Pushing a case through to litigation, together with the stress and emotional and financial cost that accompanies it, can of itself be an exercise of the power imbalance at which we are looking. A more

¹ R Chisholm 'Family Law and Perceptions of Unfairness' (Opening address, Family Law Day, College of Law, 24 February 2001).

² This important responsibility is constantly overlooked by critics of the court who accuse the judges and others of being unsympathetic to the concept of 'shared parenting'. The reality is that almost invariably the parents who litigate over their children are highly unlikely to be able to negotiate arrangements for them without embroiling those children in further disputation.

emotionally or financially powerful party can misuse the system, and often the vulnerable party has no redress.

As a form of primary dispute resolution the private ordering that characterises mediation is, I am aware, an area where a great deal of concern is expressed about the potential for imbalances to impact negatively on the weaker partner, usually the woman. The court is criticised from time to time for allowing mediation to take place in inappropriate circumstances. However, we insist on comprehensive intake procedures which include an assessment of the power balance or otherwise between the parties. Court mediators are alert to the many subtle forms of intimidation that can be part of a seemingly harmless interchange. They are also quite prepared to terminate a mediation session and suggest some other form of intervention when they consider this necessary.

I am also aware of the widespread concern about the suitability of legal aid ‘mediations’, where there is considerable pressure to finalise, or at least limit, a dispute which may otherwise continue and consume legal aid resources.

It is also important to be aware of the significance of issues which are resolved prior to any final hearing, either by way of private negotiation or as a result of some intervention by solicitors and other professionals. In addition, the Family Court’s Case Management Guidelines provide for a number of steps, other than mediation, which are designed to encourage settlement and avoid litigation where legal proceedings have already been instituted. Procedural and interim matters are dealt with by registrars and, as a result of their intervention, many people finalise matters at this stage. For the vast majority this is where their contact with the Family Court ends. For many the experience may not have been a positive one, and the outcome may not have been what was desired or sought, but it represents a compromise in circumstances where there is little choice. This is often, after all, a feature of most negotiated processes and outcomes, but there is obviously an additional layer of subjectivity and emotion where family law is concerned.

The court is however aware of the stresses that accompany the settlement process and the role that may be played by threats and trade-offs of various kinds when emotions are high and there is much to lose. The court’s role is to scrutinise consent agreements which are sought to be registered, and to reject those which are not just and equitable. A legal representative also plays an important gatekeeper role in such circumstances, but as I will be discussing later lawyers may not be involved, or if so, only in a partial or peripheral sense, in many proceedings.

Certainly ‘consent’ may not be a genuine characteristic of a consent agreement and may not indicate that a matter is really resolved. The Australian Law Reform Commission several years ago demonstrated an association between intractable children’s matters which had originally been the subject of consent orders but which, for whatever reason, had become badly unstuck and later bitterly contested.³

³ Australian Law Reform Commission *For the Sake of the Kids: Complex Contact and the Family Court*, (1995) chapter 3. The Commission noted that 14 of the 48 complex cases surveyed had three or more consent orders recorded on the file.

Secondly, whilst the most overt misuse of any gendered power imbalance in a domestic relationship is family violence, our community has become more sensitised to the many subtle ways in which this manifests itself – for example verbal abuse, belittling and intimidatory behaviour, and virtual false imprisonment. The spectrum of such power and control tactics also has the potential to embroil the children of the relationship as a tool, for example by exploiting a woman’s vulnerability and anxiety about her quality of care coming under the scrutiny of child welfare authorities. Some of my more distressing periods on the bench involve parental disputes in which it becomes abundantly clear that the children are being used as pawns in a complex power battle.

Thirdly, in discussing intra-familial violence it has recently become necessary in some forums – but not this one! – to consider the issue of the gender of perpetrators. Many of you may be aware of published research which challenges what its authors refer to as ‘conventional wisdom’⁴ in relation to the roles played by women and men in domestic violence situations.

The terms ‘family violence’ and ‘domestic violence’ are gender neutral and this serves to camouflage a good deal of the reality of many people’s lives. The terms also incorporate a wide spectrum of behaviour that may be perpetrated against a number of related individuals. Mr Adam Tomison⁵ discusses the findings of several United States National Surveys of Family Violence, which report some equivalence in the extent to which men and women engage in violent acts within the home. Tomison queries these findings by drawing attention to qualitative gender differences which suggest that the high involvement of women is exaggerated. These differences include:

1. The fact that surveys exclude non physical acts of violence;
2. the extent to which attacks by men are more likely to inflict serious injury than are attacks by women; and
3. that violence by women is more likely to occur in self defence or in retaliation following initiating violence from their male partners.

These observations lead me to my next point, but as an aside Professor Reg Graycar, in an aptly named recent paper, illustrates the power of anecdotal material on issues such as family violence in the current debates. I quote from her paper ‘Law Reform by Frozen Chook: Family Law for the New Millennium?’⁶

In August 1999, the Australian published a cover story about the Family Court in which Lone Fathers’ Association spokesperson Barry Williams gave us some insight into that organisation’s sources of data on family law and social policy issues. He told the paper that “official statistics on family violence ...used by the Family Court, academia, law societies and other professional bodies are incorrect”. He maintains, for example, that men and

⁴ B Headey, D Scott and D de Vaus, ‘Domestic Violence in Australia: Are Women and Men Equally Violent?’ (1999) 2(3) *Journal of the Melbourne Institute of Applied Economic and Social Research*.

⁵ Australian Institute of Family Studies, *Exploring Family Violence; Links Between Child Maltreatment and Domestic Violence Issues*, Child Abuse Prevention No 13 (Winter 2000).

⁶ (2000) 24 *Melbourne University Law Review* at 737.

women are equally violent. “My ex-wife, for example once chucked a frozen chook at me”, he says by way of illustration.⁷

Fourthly, in my approach to this topic, I appreciate that when it comes to the consequences of marriage breakdown there are also a number of structural issues which are relevant at the broader level, given that society still does not provide a level playing field for men and women. A key dimension is the law itself. The so called ‘black letter law’ which governs family law proceedings may purport to be gender neutral, but obviously it operates within a gendered society and it may be interpreted in a gendered way. Furthermore, the law has a gendered pedigree, as Professor Margaret Thornton has explained in the following terms:

In light of the privileged status of law within our society it cannot be neglected, or social relations will continue to be reproduced within social discourse as they have always been; that is from a masculinist point of view.⁸

The final introductory point which in a sense leads on from Professor Thornton’s comment, is that “masculinism” can appear in the arena of legislative *change*⁹ as well as judicial decision making. From my vantage point, family law matters, including child support, provide a graphic illustration of gendered lobbying of our lawmakers. Interestingly, notwithstanding the strength of women’s lobby groups, organisations which identify themselves as championing the rights of men appear to have held significant sway in recent years. The above reference to Mr Barry Williams is an example of this. Although their numbers appear to be fairly small, their impact has been considerable, their activities have been quite vigorous and they receive a disproportionate amount of media attention.¹⁰

Professor Graycar’s¹¹ ‘Frozen Chook’ paper draws attention to the number of recent proposals for changes in family law and child support which rely on and give credence to anecdotal material at the expense of published research findings. These proposals are relevant to a consideration of power imbalances, because they serve to increase the opportunities for those with more ‘pulling power’ to gain a voice and thus influence government policy and legislative change. This trend runs a very great risk of distorting reality, whilst reducing complex issues to, at best, a mere litany of half truths.

Economic Consequences of Marriage Breakdown

Turning now to the major areas of discussion in my paper, I want to examine first the extent to which imbalances in the wider community have an impact on family law outcomes – specifically financial settlements – where women’s access to income producing employment is typically reduced because of their child rearing activities.

⁷ *Ibid.*

⁸ M Thornton, ‘Feminism and the Contradictions of Law Reform’ (1991) 19 *International Journal of the Sociology of Law* at 453.

⁹ Which is not synonymous with legislative reform.

¹⁰ M Kaye and J Tolmie, ‘Fathers’ Rights Groups in Australia’ (1998) 12 *Australian Journal of Family Law* 19.

¹¹ *Supra* n 7.

The Australian Institute of Family Studies has recently released the results of a new survey which examined the financial effects of marriage breakdown on women, men and their dependent children.¹² The survey data shows, depressingly, that outcomes have not changed since the mid 80s (prior to the introduction of the Child Support Scheme) when the Institute conducted its earlier research on this topic. The major findings are that:

- Women and the children in their care are more likely than men to experience financial hardship after divorce; this is due to their limited and often sporadic pre-separation workforce participation, which is usually designed to fit in with their child-rearing responsibilities.
- Re-partnering is still a key way out of financial difficulties for divorced women and their children. However many mothers do not re-partner, and such an outcome may not necessarily be the appropriate one for themselves or the children in their care;
- Earning capacity is probably the most important of each spouse's personal resources upon divorce. Many separated couples have few tangible assets of any value, and the income stream they are able to generate is therefore a very valuable long term resource.

Economic vulnerability is an almost universal consequence of marriage breakdown for women and the children in their care. It was found to be so in the 1980s, and it is still the case. The converse of this is not that men are doing particularly well either – the pool of assets is typically very small, often eroded by debt. However men are usually in a position where they have had continuous employment and can at least maintain their workforce participation.

The question becomes how can or should a court take account of these factors over and above those it is directly required to consider by the legislation? Understanding what is occurring and then equalising actual and potential economic effects of the role-divisions adopted by husbands and wives is difficult to achieve, particularly when the parties' resources are limited and evidence is sparse, as is usually the case.

The Family Court is 'on the record' as recognising the effects of the economic consequences of marriage breakdown by considering the roles played by men and women in the marriage and making some compensatory adjustment accordingly. Equitable sharing of both the advantages and disadvantages flowing from the division of responsibilities was considered and dealt with in *Best v Best*¹³ and *Mitchell v Mitchell*.¹⁴ In the latter case on the issue of spousal maintenance the Full Court took judicial notice of the AIFS research findings on the economic consequences of marriage in considering the likelihood of a former wife being able to support herself as a nurse, when she had not worked in that profession for 30 years.

Of course, these two cases were big money cases – they would not have been litigated let alone appealed otherwise - and Full Court decisions are rare and not necessarily

¹² G Sheehan and J Hughes, 'Division of Matrimonial Property in Australia' (2001) Research Paper No 25, Australian Institute of Family Studies.

¹³ (1993) FLC 92 418.

¹⁴ (1995) FLC 92 601.

representative of the lives of many of our clients.¹⁵ The extent to which they filter through to those outside the litigation arena is one thing, as is the extent to which spousal support is a practical outcome, or has general community acceptance.¹⁶

However, a further issue of grave concern is the Institute's most recently published research which examined the interaction and effects of violence towards women and their children on property division.¹⁷ It documents the commonality of violence amongst the Australian divorcing population, the authors commenting that "When broadly defined, spousal violence¹⁸ is not an exceptional circumstance for divorced women and men, but rather the norm". The research then proceeds to show that women who report spousal violence during their marriage are more likely than those who do not do so, to have received a minority share of the property.¹⁹ In particular, women who reported experiencing severe abuse were about three times as likely as those who reported no abuse to receive less than 40% of the total and domestic assets. Tellingly, almost half of these most vulnerable women were not in the paid workforce when the marriage ended, had spent at least one third of their time since marriage out of work, and nearly all had major child responsibilities after separation.

The authors refer to family violence impacting on the settlement process by "creating a substantial power imbalance between the parties that disadvantages the victim of violence in terms of their ability to negotiate a fair settlement, in turn, reducing the share of property received".²⁰

I note that similar outcomes have been documented by the National Association of Community Legal Centres.²¹

How should the law deal with family violence in the context of an application for property division? Although not the first to do so, the Family Law Council considered this issue comprehensively in 1998 in its Discussion Paper 'Violence and the Family Law Act: Financial Remedies'. That paper raised a number of difficulties, including whether violence should be taken into account at the contributions stage or adjustments stages of the process, or as a separate matrimonial tort. It also considered the definition of violence, and particularly what considerations should be given to non-violent behaviour which has a detrimental effect on a spouse. A year earlier the Full Court of the Family Court had handed down its decision in *Kennon v Kennon*²² in which it (by

¹⁵ In fact, probably the converse ie. they are 'aberrant'.

¹⁶ See M Neave, "From Those Who Have Nothing, Even What They Have Will be Taken Away" – Is There Still a Cause for Spousal Maintenance?", *Conference Handbook* (2000) (proceedings of the 9th National Family Law Conference, Sydney) Family Law Section, Law Council of Australia and Television Network at 299-316.

¹⁷ G Sheehan and B Smyth, 'Spousal Violence and Post-separation Financial Outcomes' (2000) Vol 14 No 3 *Australian Journal of Family Law* 102.

¹⁸ *Ibid* at 117. The definition included the occurrence, attempt or threat of physical or sexual violence. See also s 60D(1) *Family Law Act*.

¹⁹ Financial disputes had frequently been resolved without Court intervention.

²⁰ *Supra* n 15 at 110.

²¹ N. Seaman, 'Fair Shares? Barriers to Equitable Property Settlement for Women' (April 1999) National Association of Community Legal Centres.

²² (1997) FLC 92 757. That case involved a marriage of 2 1/2 years duration (which had been preceded by over two years cohabitation) between a husband with nearly 9 million dollars in assets and an annual income of \$1 million, and a considerably younger wife who had brought

majority) found that a course of violent conduct by one party towards the other during the marriage which could be shown to have had a significant adverse impact on that party's contribution to the marriage is a factor which a judge may take into account in assessing the parties' respective contributions under s 79 of the *Family Law Act*.

As John Dewar has asked in a recently published paper 'Where Now?'²³ many of my judicial colleagues would welcome legislative change in this area to clarify our responsibilities, but we are also cognisant of the many difficulties involved.

Legal Representation – And Its Absence

Power imbalances may also occur and intensify where one party is legally represented and the other is not, whether the lawyer is privately employed or funded by legal aid. The recently released report of the Justice Research Centre found that legally aided clients are systematically disadvantaged by the limited resources available for their cases and the types of matters they can pursue – although the outcomes they achieve and the quality of the services they receive do not appear to disadvantage them.²⁴

Turning to the subject of legal representation, it is useful to remember that the ready availability of legal aid was an essential component of the *Family Law Act* when it came into operation in early 1976. It was considered necessary because the conferral of rights on people in marriage and other relationships and their children becomes meaningless if these rights cannot be pursued and enforced.

That ready availability has diminished in recent years and women's organisations have been prominent and vigorous in leading the protest against the restrictions which have led to increasing levels of unrepresented parties appearing in the Family Court of Australia. They argue, and I am sure justifiably, that many of the women they see cannot access the family law system because they lack the necessary resources to do so. Interestingly, a recent analysis of reasons for self-representation in the Family Court pointed to a significant minority of sample respondents failing to apply for legal aid at all, because they had been told they had no chance of success.²⁵ This led the authors to conclude, quite reasonably, that official legal aid refusal rates are an inaccurate guide to the availability of legal aid in family law matters.²⁶

virtually no property into the marriage and had less than average earnings. She brought a cross-vested claim for damages for assaults which allegedly occurred throughout the marriage. The trial judge found 4 of the 11 specific instances of assaults proven, and assessed damages, including aggravated and exemplary damages, in relation to these. However he found that the violence had not affected the wife's contributions to the marriage and to the extent to which her health had been affected by the assaults she had been adequately compensated by the damages award.

²³ J Dewar, 'Family Violence and Property Distribution: Where Now?' *Conference Handbook* (2000) (proceedings of the 9th National Family Law Conference, Sydney) Family Law Section, Law Council of Australia and Television Network at 291 - 298.

²⁴ R Hunter et al, *Legal Services in Family Law* Justice Research Centre (2000).

²⁵ J Dewar, BW Smith and C Banks, *Litigants in Person in the Family Court of Australia*, Family Court of Australia Publications Unit 2000.

²⁶ An analogy can be drawn here with official employment statistics and the incidence of discouraged work seekers who no longer register for work.

Whilst factors such as lack of formal education, limited income and assets and no paid employment are associated with lack of representation,²⁷ women have not been found to be disproportionately without such representation in family law matters. Empirical research commissioned by the court and conducted by a research team led by Professor John Dewar during 1999 found²⁸ slightly more than half of all litigants in person are men, a finding which is consistent with a previous court study.²⁹

A dimension of gendered power is however seen in *Legal Aid in Victoria - At the Crossroads Again*, published by the Fitzroy Legal Service,³⁰ which deals with bias against women in the delivery of legal aid services. This is particularly apparent in property proceedings, where women rarely obtain legal aid and where men typically control the family assets and receive the higher income. There is also an indication in the Rhoades, Graycar, Harrison³¹ research that in children's matters men can obtain legal aid for contravention proceedings but women cannot, (except in exceptional circumstances), obtain it to vary contact arrangements where there are allegations of violence against the contact parent.

Professor Dewar's research also found that lack of legal representation was associated with a number of effects such as:

- Considerably increased time in court (as the issues are more confused); more appearances; increased costs
- Frustration, stress and anger; violence and security problems
- Injustice
- Reduced settlement chances
- Confusion at the proceedings; because parties are unclear as to what is happening and the reason for their presence
- Clients becoming vexatious, continually filing applications and protracting disputes

The extent to which the lack of legal representation prevents a litigant from bringing a legitimate argument to the court cannot be measured. It can only be assumed that many people simply give up for a number of obvious reasons.

In this context it is not surprising that even where a party is represented, there can be very difficult consequences in having to deal with an unrepresented opponent. I would suggest that women with a history of dealing with oppressive partners cannot be shielded by legal representation alone.

²⁷ *Supra* n 25.

²⁸ *Ibid.*

²⁹ See also B Smith, *Study of the Effects of legal aid cuts on the Family Court of Australia and its Litigants*, Research Report No19 (FCA 1999) at 4 which found 64% of litigants in person in that study were men.

³⁰ J Giddings (ed), *Legal Aid in Victoria- At the Crossroads Again*, Fitzroy Legal Service Melbourne 1998.

³¹ H Rhoades, R Graycar and M Harrison, *The Family Law Reform Act 1995: The First Three Years*, University of Sydney and the Family Court of Australia (2000).

This is particularly apparent where an unrepresented litigant attempts to cross-examine his former partner, particularly where violence has been a characteristic of the relationship. In these circumstances, a judicial officer must tread a very fine line and seek to balance the obligation to permit a party to test the evidence of a witness, while at the same time attempting to protect the witness from oppressive, intrusive, and often offensive questioning. Looking more generally at the difficulties, the Chief Justice has made the following observations with which I agree:

At a time of turmoil in people's lives, denial of legal aid puts additional pressures not just on the unrepresented person, but also on the other parties in the dispute, their legal representatives and on the court. It inevitably increases the opportunities for delay and reduces settlement opportunities. For some, the sense of injustice that is caused becomes expressed against the former partner or their children, or the latter become pawns in the process. While violence is the most extreme manifestation, we also see heightened obstructionism and unwillingness to comply with orders or other post-separation arrangements.

...

Before a matter goes to hearing, when opportunities to settle disputes often present themselves, it is understandable that individuals with a high level of animosity towards each other are unable to negotiate and possibly find a solution. There is no objective advice available to them.

Where matters proceed to hearing, legal technicalities can be significant despite the court's best efforts to overcome such difficulties. Even where the disputes are legally straightforward, self-represented persons can rarely do adequate justice to the case they wish to present. In addition to the normal difficulties they would have in other jurisdictions, the nature of family law means that it is almost impossible for persons to examine or cross-examine their former partners or family members in an objective, effective or meaningful way. Often, questions exacerbate the dispute and further cloud the opportunity to arrive at a satisfactory solution.

Allegations of spousal violence or child abuse present special difficulties and one party (usually but not necessarily the woman) may be further intimidated. When the welfare of an unrepresented child is in dispute in the Family Court, and neither party is represented, there is no meaningful cross-examination of witnesses by anyone and the child's circumstances are extremely difficult to ascertain.³²

Against this backdrop, the court has sought to improve its methods of dealing with the problems caused by lack of representation and I would take the opportunity of highlighting two ways in which it has tried - one administrative in character, the other by way of judicial guidance.

³² A Nicholson, 'Legal Aid and Fair Family Law Justice System' (address to Legal Aid Forum Towards 2010, Canberra, 21 April 1999).

Self Represented Litigants Project

Following the release of the research led by Professor Dewar, the court initiated a two year project to develop a national approach to meeting the challenges raised by self represented litigants. In essence, the project will review the court's practices, protocols, procedures, forms and referral systems with the aim of ensuring that they better meet the needs of this growing population of the court's clients.³³

As part of this project, key partnerships are being established with external support agencies such as the legal profession, the Legal Aid community, Governments, community service groups and other organisations and at selected stages there will be workshops on the work in progress.

Jurisprudence

The Full Court of the Family Court has, in a number of judgments, expressed concern about the impact of unrepresented litigants. In some, it has sought to provide guidelines to assist both the Judicial Officer and the parties, most recently in the 1997 reported case of *Johnson*.³⁴ The Full Court there set out 8 guidelines concerning the obligations of trial Judges in children's cases.

In so doing it attempted to preserve the distinction between giving a litigant in person procedural guidance so as to avoid unfairness as opposed to legal advice. However in practice, the observance of the distinction is very difficult to achieve. Consequently, the *Johnson* guidelines have been criticised by commentators, who note that the distinction between information and advice is, in many respects logically and practically unworkable.

Within the context of my topic I must confess to some serious doubt as to how judicial intervention which is sensitive to gendered power imbalances can achieve a 'level playing field' without compromising the appearance of impartiality which is, as a matter of law, so crucial to the exercise of judicial power.

Legal representatives bring the professional skills of legal analysis and advocacy as well as professional objectivity that an unrepresented person lacks, particularly in family law proceedings. It seems to me that the 'level playing field' guideline not only sets the judicial decision-maker an impossible task, but may create unreal expectations on the part of the unrepresented litigant and may generate a false impression of lack of impartiality by the judge to the party who is represented.

I can well imagine how the conduct of a judicial decision-maker could exacerbate the harm of gendered power imbalances. However I find it difficult to see how such a decision-maker can in reality make up for one party lacking legal representation. There are dangers in those responsible for legal aid policies believing that judicial officers can compensate for that imbalance and those risks impact with disproportionate gravity on those who are relatively disempowered in comparison to the other party.

³³ For further information see <<http://www.familycourt.gov.au/litigants>>.

³⁴ *Johnson v Johnson* (1997) FLC 92-764.

As a final point I would like to draw to your attention a foreshadowed area of concern in relation to power imbalances in family law.

Pre Nuptial Agreements

The *Family Law Amendment Act* came into operation in late December 2000. Amongst other changes to the law, it provides for couples to enter into legally binding financial agreements both before and during marriage, as well as upon its demise.³⁵ I want to talk particularly about agreements made before marriage – or ‘pre-nups’ as they are colloquially known. The media are very fond of ‘pre-nups’ and they have been prominent recently because of the brouhaha surrounding the Becker and Tom/Nicole separations. Lawyers also speak positively about them, cynics would say because they have the potential to provide additional work! Due to their recent introduction, our first hand experience with these agreements is nil, but overseas experience suggests that they contain traps for the unwary.

Such agreements may contain provisions relating to the future division of property and financial resources and the quantum of spousal maintenance. A binding agreement prevents a court from dealing with matters which are the subject of agreements. To be effective such documents must be signed by both parties and must contain a statement that each party has received independent legal advice from a legal practitioner as to its effects. There are several relatively narrow grounds which allow them to be set aside. They include fraud (including non-disclosure of a material matter), unconscionable conduct and changed circumstances which make it impracticable for the agreement to be carried out.

Common law jurisdictions which enforce pre nuptial agreements report that they are relatively uncommon, particularly amongst the first time marrieds.³⁶ As would be expected, they are more popular amongst the previously divorced, and where the wealth discrepancy is considerable and there are children of a previous marriage.

Dr Belinda Fehlberg³⁷ has drawn together the (scant) overseas research on the impacts of pre-nuptial agreements and provides a somewhat alarming (but possibly not surprising), picture. Briefly, this is as follows:

- US evidence suggests that women are more commonly disadvantaged than are men by these agreements, because of their weaker economic position;
- This is illustrated by an admittedly small, but nonetheless interesting, study in which 33 of the 39 reported cases involved an economically subordinate wife seeking to overturn pre-nuptial agreements;
- These findings were consistent with those of a much earlier study which showed pre-nuptial agreements being used by older, wealthier men whose second (or

³⁵ See *Family Law Act* Part VIII A.

³⁶ C Murray Earl, ‘The New Zealand Experience with Pre-Nuptial Agreements’ *The Challenge of Change* (1998) (proceedings of the 8th National Family Law Conference) Family Law Section, Law Council of Australia and the Television Education Network at 319 – 329.

³⁷ B Fehlberg and B Smyth, ‘Pre-nuptial agreements for Australia: Why Not?’ (2000) 14 *Australian Journal of Family Law* at 80.

subsequent) wife was considerably younger and from whom he sought to protect his assets.

- Fehlberg's own work on spousal guarantees suggests that women are less likely than men to think in the more objective manner of commercial contracting parties, they tend to avoid asking questions about money that imply a lack of trust in their husband, and merge their relationship commitment with their individual self interest.
- This in turn demonstrates that the requirement of independent legal advice provision may not ensure that that parties will receive appropriate protection³⁸ from the inclusion of unfair provisions. Rather, the experience is that the provision of information by an 'expert' does not necessarily provide a basis upon which choice can be exercised, particularly in the context of personal relationships.

I sincerely hope that in a few years time I will not be speaking at a conference such as this providing the audience with examples indicating that the Australian experience in this area has been similar to that of other jurisdictions in the international arena.

Conclusion

The theme of this conference is Moving Forward in Difficult Times. I would certainly agree – as I have attempted to highlight in this paper – that when it comes to family law issues, times are indeed difficult and possibly becoming more so. I would also suggest that there is growing uncertainty about the extent to which all those involved in the family law system are moving forward, or at least moving in the same direction. In an obviously difficult and politically unpopular area of the law there are many critics, but few who can offer anything realistic in the way of solutions to the problems posed.

I assure you that, (although we may not have got the template completely right yet), the Family Court is doing a great deal to reach out to its more vulnerable clients and make the system less stressful at a particularly difficult time of their lives. We provide and encourage judges and staff to attend training programs in ethnic and indigenous issues and on issues of violence. We have since 1992 had in place a comprehensive family violence policy which is continually monitored and assessed. As mentioned earlier, we are examining how best to deal with our many self represented litigants. We also encourage genuine external research into our processes and outcomes, and I believe we are open minded enough to accept those which may contain criticisms – particularly where they are accompanied by recommendations capable of implementation.

³⁸ Note that the Bill originally allowed for either legal or financial advice.