Living Together — The Legal Effects of the Sexual Division of Labour in Four Common Law Countries

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INTRODUCTION

Most advanced western countries have expressed a formal commitment to ending discrimination against women. But the sexual division of labour, both within the family and in the paid work force, remains one of the most intractable manifestations of sexual inequality.

Although the right to seek redress for a husband's failure to maintain was always qualified and often unenforceable in practice,[1] the terms of the traditional marriage contract contemplated that wives would be financially supported in exchange for sexual services, companionship and the provision of domestic labour.[2] Wide-ranging changes in family law over the past 20 years, including the extension of the obligation of support to both spouses in many jurisdictions, and a huge increase in the numbers of married women entering the paid work force, have had little impact on the gendered division of unpaid work in the home. Women living with men in heterosexual relationships continue to take major responsibility for domestic tasks such as cooking, cleaning, laundering, shopping and child-rearing, even when they also work outside the home.[3] While some men may now assume greater re-

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1 At common law the husband's duty to support the wife could not be enforced directly but a wife could pledge her husband's credit for necessaries: see IJ Hardingham, 'A Married Woman's Capacity to Pledge Her Husbands Credit for Necessaries' (1980) 54 *Australian Law Journal* 661. Despite the maintenance legislation in force in most jurisdictions women have historically had great difficulty in enforcing orders for the support of themselves and their children. A child support scheme is now in force in Australia see *Child Support (Assessment) Act* 1989 (Cth.); *Child Support (Registration and Collection) Act* 1988 (Cth).

2 C Pateman, *The Sexual Contract* (1988), Ch 5; L Weitzman, 'Legal Regulation of Marriage: Tradition and Change' (1974) 62 *Cal Law Review* 1169, 1180ff; C Delphy, *Close to Home, A Materialist Analysis of Women's Oppression* (1984). This is the basis of the husband's action for loss of consortium.

3 For a discussion of 'women's work', see A. Oakley, *The Sociology of Housework* (1974), 92–94; M Barrett and M McIntosh, *The Anti-Social Family* (1982), 59–65; H Hartmann, 'The Family as the Locus of Gender, Class and Political Struggle: The Example of Housework' (1981) 6 *Signs* 388; J K Antill and S Cotton, 'Factors Affecting the Division of Labour in Households' (1988) 18 *Sex Roles* 531; P G Koopman — Boyden and M Abbott, 'Expectations for Household Task Allocation and Actual Task Allocation: A New Zealand Study' (1985) 47 *Journal of Marriage and the Family*, 43; L Bryson, 'Thirty years of Research on the Division of Labour in Australian Families' (1983) 4 *Australian Journal of Sex, Marriage and the Family*, 125. The New Zealand Study (Koopman-Boyden and Abbott) refers to earlier New Zealand work showing that women in paid work of 20 or more hours per week had an average working week of 64.72 hours, compared to their husbands total hours of 56.85 hours and the 53.71 hours of women not in paid work. A pilot study undertaken by the Australian Bureau of Statistics showed that, on average, women spent 66 hours per fortnight on unpaid domestic activities, while

sponsibility for domestic labour, all men are advantaged[4] by the familial ideology which regards housework and child-care as 'a labour of love' performed by women.

The characterization of such tasks as 'women's work' is also reflected in the paid work force where sexual segmentation[5] persists despite equal pay and anti-discrimination legislation. Women tend to be concentrated in lower paid[6] service and 'caring' occupations, and in part-time or casual work, with little opportunity for promotion or employment security. The sexual division of labour in the home and the sexual segmentation of the paid work force are inter-related. Because of their domestic responsibilities, women often take casual or part-time work. Women whose main work experience has been in the home are not perceived as having skills which are relevant in paid employment. Interruptions to work history caused by child-rearing disadvantage women seeking to re-enter employment or to obtain promotion.

The sexual division of labour in the home and the sexual segmentation of the paid work force reflect and re-inforce women's inequality. This remains largely invisible when women are married or cohabiting with male partners and can share in their resources, but is revealed when marriage or co-habitation comes to an end.[7] The over-representation of women, (particularly single women supporting dependent children), in poverty statistics,[8] reflects the economic impact of the sexual division of labour and the failure of legal and political systems to accord value to socially essential household labour and child-rearing. For many women who are separated or divorced from their

men spent 30.9 hours (There were significant differences between married and unmarried people and between employed and unemployed people which are not reflected in these figures). Married women who were employed in paid work spent 69.3 hours while married men employed in paid work spent 31.2 hours. See Australian Bureau of Statistics, *Measuring Unpaid Household Work: Issue and Experimental Estimates* (1990) Cat No 5236.0. Table 1

4 H Charlesworth and R Ingleby, 'The Sexual Division of Labour and Family Property Law' (1988) 6 *Law in Context* 29.

5 For an overview of the theoretical explanations for sexual stratification of the labour market, see A Curthoys, 'The Sexual Division of Labour: Theoretical Arguments' in N Grieve and A Burns, *Australian Women New Feminist Perspectives* (1986), 319.

6 This pattern is apparent in all the jurisdictions examined in this article. In Australia as at 15 February 1991, the average weekly total earnings of full time female employees was $511.90, whilst those of men were $642.50 (ie, women working full-time earned about 80% of the amount earned by men.)

7 C Delphy, *Close to Home: A Materialist Analysis of Women's Oppression* (1984), 99.

8 In 1985 in England 90 per cent of single-parent families had incomes below 80 per cent of average income: Central Statistical Office, *Social Trends 19* (1989) HMSO, 99. In Australia in 1986, 61% of single parent family incomes were below the average income of $21,500. Women headed 95% of all single parent families. Of these families, 65% had an income of less than $15,000: Australian Bureau of Statistics, 1986 Census. See L Bryson, 'Women as Welfare Recipients: Women, Poverty and the State' in C Baldock and B Cass (eds), in *Women, Social Welfare and The State in Australia* (1983), 133; National Women's Advisory Council, *Paying the Price for Sugar and Spice* (1985); S B Kamerman, 'Women, Children and Poverty: Public Policies and Female-Headed Families in Industrialized Countries' (1984) 10 *Signs* 249. There is an entire bibliography dealing with the feminization of property in the United States. Contemporary Social Issues. Bibliographic Series No 6 *The Feminization of Poverty* (The Left Index).

partners the only practical means of escaping poverty is to enter into a new relationship with another man.

Feminist political scientists and economists have become increasingly interested in the ideological significance of women's work and its economic function within patriarchy and capitalism.[9] There has been less discussion of the role which the law plays in institutionalising the sexual division of labour, perhaps because feminist lawyers have directed much of their efforts towards ending discrimination in paid employment. Understanding the role of the law in constructing and maintaining the ideology which identifies women with domestic responsibility would require an analysis of a number of legal areas including labour law and the social security and taxation systems, but, so far, the main examination of the issue has occurred within the field of family law. Debate among feminists has largely focussed on the means by which the practical effects of women's assumption of responsibility for domestic work can be alleviated without entrenching existing gender roles. Recent matrimonial property reforms in a number of jurisdictions have attempted to give greater recognition to the value of domestic labour in the division of property after the breakdown of marriage. Few jurisdictions have made similar changes to the laws affecting division of property after separation of couples who have lived together outside marriage. The common law and equitable rules which are applied in resolving such property disputes do not reflect, even at a symbolic level, any recognition of the value of such domestic labour to the other partner.

The nineteenth century enactment of the *Married Women's Property Act* freed women from the shackles of the doctrine of matrimonial unity, extending the benefits previously enjoyed by women in wealthy families to middle-class and working class women.[10] But the liberal individualism inherent in the notion that the freedom of men and women was achieved by giving them an equal capacity to earn income and to acquire property contrasted sharply with the practical effects of the division of labour within traditional marriage. In the words of Sir Otto Kahn-Freund

[9] An early Marxist-feminist analysis can be found in S Rowbotham, *Women's Consciousness, Man's World* (1973). For the Marxist 'domestic labour' debate, see W. Seecombe, 'The Housewife and her Labour Under Capitalism' (1974) 83 *New Left Review* 3, M Dalla Costa (eds), *The Power of Women and the Subversion of the Community*, (1973) 31; M Luxton, *More Than a Labour of Love* (1980), Ch 1. For a brief critical discussion of the relationship between housework, and the production process, see T Fee, 'Domestic Labour: An Analysis of Housework and its Relation to the Production Process (1976) 8 *Review of Radical Political Economics*, 1. For an excellent critique from a number of writers within a socialist-feminist framework, see R Hamilton and M Barrett, (eds) *The Politics of Diversity* (1987), 139–255.

[10] Property settled by wealthy fathers on their daughters could be protected from the depredations of the daughters' husbands by the equitable device of the married women's separate use. Sir O Kahn-Freund, 'Matrimonial Property Law in England' in W Friedmann (ed) *Matrimonial Property Law* (1955), 174ff. Kahn-Freund comments that 'equity lawyers ... were convinced of the need for protecting the married woman and above all the fortunes of her next-of-kin from what was supposed to be the weakness of her sex', 275.

'to treat as equal that which is unequal may . . . be a very odious form of discrimination.'[11]

Recognition of this inconsistency between the rhetoric of sexual equality and the actual outcome of property division on the economic position of women prompted the English Court of Appeal (more particularly Lord Denning), to introduce the notion of the deserted wives equity[12] and to develop the constructive trust as a device for achieving a 'fair' distribution of property between both married and unmarried couples on the breakdown of their relationships.[13] Neither of these lines of authority were accepted in Canada,[14] New Zealand[15] or Australia,[16] but eventually matrimonial property reforms were enacted in all four jurisdictions.

Such reforms have ranged from the adoption of a 'deferred community' system under which spouses hold property separately during marriage but some or all of their property is divided equally on divorce,[17] (with provision for departure from equal sharing in specified circumstances)[18] to legislation conferring a discretion on the court to re-allocate property interests on divorce having regard to enumerated factors.[19] The Australian Law Reform

[11] O Kahn-Freund, 'Matrimonial Property and Equality Before The Law: Some Sceptical Reflections', (1971) 4 *Revue Des Droits de L'Homme: Human Rights Journal* 493, 510. Although note that Kahn-Freund argues that the wife's contribution is unequal to the husband's and that discrimination in favour of the wife is necessary to overcome the inequality he regards as 'created by . . . nature', 504.

[12] For the high water mark of this doctrine, which was based on s17 of the English *Married Women's Property Act*, see *Hine* v *Hine* [1962] 1 WLR 1124, 1127–8. For a discussion of its historical background see O Kahn-Freund, 'Matrimonial Property Law in England' in W Friedmann (ed) *Matrimonial Property Law* (1955), 299.

[13] See, for example, *Hazell* v *Hazell* [1972] 1 WLR 301, where the couple were married and *Cooke* v *Head* [1972] 1 WLR 518; *Eves* v *Eves* [1975] 1 WLR 1338, dealing with unmarried co-habitants.

[14] *Thompson* v *Thompson* (1961) 26 DLR (2d) 1; *Murdoch* v *Murdoch* [1974] 41 DLR (3d) 367.

[15] *Barrow* v *Barrow* [1964] NZLR 438; *Masters* v *Masters* [1954] NZLR 82.

[16] *Wirth* v *Wirth* (1956) 98 CLR 228, at 231–2, per Dixon CJ

[17] Canadian Provinces have generally adopted this 'deferred community' model. The legislation adopts a variety of approaches in specifying the property subject to equal division. See CCH, *Canadian Family Law Guide*, Volumes 2 and 3. In Ontario, for example, the *Family Law Reform Act* 1978 distinguished between family and other assets, but this distinction was largely abandoned in the *Family Law Act*, SO 1986, c4, s4. The New Zealand *Matrimonial Property Act* 1976, ss8,9, classifies property into three categories. The home, family chattels and certain other 'family property' are divided equally, subject to certain very limited exceptions, while 'separate property' is exempt from equal sharing except in specified circumstances. See Australian Law Reform Commission, *Matrimonial Property* (Report No 39, 1987), Chapter 7.

[18] In Canada, provincial legislation varies quite widely in specifying the circumstances justifying departure from equal sharing; see CCH, *Canadian Family Law Guide*, Volumes 2 and 3 (Looseleaf service).

[19] Cf *Matrimonial Causes* Act 1985 (Eng). This is also the model adopted in Australia, where the Family Court is empowered to vary interests in property as between the parties to a marriage. In exercising this discretion, the Court is required to take a number of criteria into account. Broadly, these criteria relate to the contributions which each spouse has made to the acquisition, conservation and improvement of property and the welfare of the family, and the financial needs of the applicant, compared to those of the respondent. See *Family Law Act* 1975 (Cth), s79 and I J Hardingham and M A Neave, *Australian Family Property Law* (1984), Chapter 13. The Australian Law Reform Commission has proposed some changes to the current Australian system. The major

Commission has noted that matrimonial property regimes, whether originally based on ideas of separate or community property, are tending to converge 'towards a type of system which combines extensive and equal powers of independent management during marriage with more or less extensive equal sharing of the property or its value on the breakdown of the marriage'.[20] Although there are considerable differences of detail between jurisdictions, this trend indicates greater acceptance of an ideology of marriage in which both partners are regarded as contributing equally to the economic resources of the family, whether their contributions are financial or take the form of domestic labour.[21]

Unfortunately such laws have had limited practical impact. Weitzman's pioneering work in the United States demonstrated that equal division of matrimonial property does not produce equality of outcome because its fails to compensate for interruptions to paid work force experience and the effect of child care responsibilities on the earning capacity of women.[22] Even in jurisdictions where the legislation reflects some recognition of these factors by explicitly requiring courts to take domestic and child care contributions into account in re-allocating property rights[23] matrimonial property division has not necessarily improved women's position. A study of the effects of the *Family Law Act* 1975 conducted by the Australian Institute of Family Studies showed that women were much more economically disadvantaged by divorce than men, a disadvantage which was largely caused by: 'disruptions caused to a woman's workforce participation by the bearing and rearing of the children of the marriage'.[24] In an examination of the effect of section 79(4)(c) of the *Family Law Act*, Charlesworth concluded that:

> 'Legislative reform has not touched the economic inequality between the sexes on marriage breakdown ... The recognition of the relevance of the homemaking and parental role in property distribution in the FLA appears

proposals are that the discretion of the court should be more structured, and that a rule of equal sharing should be introduced as a starting point for the determination of shares in all property owned by the parties. A number of factors, including the post-separation economic circumstances of the parties, are to be taken into account in determining whether departure from equal sharing is justified; see Australian Law Reform Commission, *Matrimonial Property* (Report No 39, 1987), xxix–xxxiv For an empirical analysis of the application of the legislation and its effects on the economic position of men and women after divorce, see Australian Law Reform Commission *Matrimonial Property* (Report No 39, 1987), Chapters 5 and 6 and R Weston, 'Changes in Household Income Circumstances' in P McDonald (ed) *Settling Up: Property and Income Distribution on Divorce in Australia* (1986), 100.

20 Australian Law Reform Commission, *Matrimonial Property* (Report No 39, 1987), 109–10, quoting from the Scottish Law Commission, *Report on Aliment and Financial Provision* (Report No 67, 1981) 51.

21 For a more detailed discussion of the notion of marriage as an economic partnership, see K J Gray, *Re-allocation of Property in Divorce* (1977), 28ff. An explicit legislative statement of this principle can be found in *Family Law Reform Act* 1978 (Ont) s4(5).

22 L Weitzmann, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1985).

23 For example, the *Family Law Act* 1975, (Cth), s79(4)(c) requires the court to take 'homemaker and parent' contributions into account in exercising its discretion to re-allocate property rights. See also, *Matrimonial Property Act* 1976, (NZ) s18(1).

24 P McDonald (ed) *Settling Up: Property and Income Distribution on Divorce in Australia* (1986) 309.

to have little impact on Family Court decisions because it is phrased too generally. It is given content by a judiciary who implicitly accept that work given economic value in the marketplace contributes more to family property than work with no public economic recognition . . . The economic loss sustained by those who leave the workforce is uncompensated.'[25]

The situation is even worse for women who live with men outside marriage, where common law rules continue to regulate property disputes after the breakdown of the relationship. Despite the substantial increase in such relationships which has occurred throughout the western world over the past 20 years[26] few jurisdictions have enacted legislation permitting courts to re-allocate property disputes between co-habitees, or to take into account the value of unpaid services.[27] Failure to enact such provisions is curious, given the increasing tendency of legislatures to extend other benefits, including the right to make a claim on the estate of a deceased partner, to co-habitees.[28] In the absence of law reform, as was the case for property disputes between married couples prior to changes to matrimonial property laws, courts have manipulated and extended the principles of constructive trusts to take account of indirect financial contributions to the acquisition of property in certain circumstances.[29] But, in general, courts have been reluctant to recognize the value of the unpaid work which unmarried women do in the home or to treat it as casually or legally relevant to the acquisition of property by the other partner.

Overcoming the disadvantageous effects of the sexual division of labour would require radical change in a number of areas. Whether or not a woman who has separated from her partner slides into poverty depends upon whether or not she is caring for children, the extent of her skills and work force experience, whether paid work is available and whether she can obtain mainten-

[25] H Charlesworth 'Domestic Contributions to Matrimonial Property' (1989) 3 *Australian Journal of Family Law* 147, 155. See also H Charlesworth and R Ingleby, 'The Sexual Division of Labour and Family Property Law' (1988) *Law in Context* 29.

[26] In Australia a minimum estimate based on analysis of census data showed that approximately 131,876 people or 2.2 per cent of all couples were couples living together without marrying. Fifty per cent of these couples had children living in the household though these were not all children of the relationship. New South Wales Law Reform Commission, *Report on De Facto Relationships*, (1983), 41–45ff. Similar trends are reported in the United Kingdom, see M Freeman and C M Lyon, *Co-habitation Without Marriage* (1983), 56 and the United States, see United States Department of Commerce, 'Marital Status and Living Arrangements March 1986', Current Population Reports Series p 20, No 418, 5. The trend towards co-habitation does not necessarily indicate a wide-spread societal movement away from marriage. Although marriages are being postponed, marriage rates remain high. Those who live together often marry later, although not always the same partner.

[27] See however *De Facto Relationships Act* 1984 (NSW); *Property Law Amendment Act* 1987 (Vic). Proposals have been made for reform in New Zealand, *Report of the Working Group on Matrimonial Property Protection* (Oct 1988).

[28] For an overview of such legislation see C Bruch, 'Co-habitation in the Common Law Countries a Decade after Marvin: Settled in or Moving Ahead' [1989] 22 *University of California, Davis School of Law Review*, 717.

[29] The 'common intention' constructive trust and the doctrine of proprietary estoppel have both been used for this purpose.

ance[30] and/or social security. It is recognised that changes in laws affecting the resolution of property disputes can only assist women in relationships in which there is some property in which an interest can be asserted. Nevertheless this article deals with one aspect of the problem faced by women on the breakdown of de facto relationships, by arguing for a new approach in resolving property disputes, which will take into account the value of unpaid work in the home. The article examines and compares the approaches which courts in New Zealand, Australia, England and Canada have taken to the performance of housework and child care in resolving such disputes. It will be suggested that the principles which the courts have traditionally applied in this area reflect assumptions about the role of women and the relationship between property ownership and the private sphere of the family which are so deeply embedded in the law as to be almost invisible. As will be seen below, striking changes to equitable doctrines occurring in Canada, and to a lesser extent in Australia and New Zealand, may be challenging some of these assumptions.

TWO ASSUMPTIONS

At least until recently, the legal and equitable principles used to resolve property disputes between co-habiting couples and spouses (prior to matrimonial property reform) have rested on two main assumptions.[31]

1 Arms-length Principles

The first assumption, derived from the principle of separation of property, is that the legal and equitable rules governing property rights must apply impartially to co-habiting couples (and married couples prior to divorce) and to commercial disputes between parties acting at arms length. The law is paraphrased in the well-known words of Dixon CJ:

> 'The [same] law of property governs the ascertainment of the proprietary rights and interests of those who marry [live together] and those who do not.'[32]

The starting point for the resolution of property disputes between both strangers and family members is that each individual is entitled to the property in which he or she has legal title, unless the other party can claim an equitable interest in that property by virtue of the principles of resulting, implied or constructive trusts. Traditional equitable principles required direct financial contributions to the acquisition of property ('the solid tug of

[30] The author acknowledges the assistance she received from an unpublished manuscript by K Farquhar, on *Co-habitation and Support Obligations in the Common Law Jurisdiction of Canada.*

[31] Cf C Bruch, 'Property Rights of De Facto Spouses Including Some Reflections on the Value of Homemakers' Services' (1976) 10 *Family Law Quarterly* 101, 109.

[32] *Wirth* v *Wirth* (1956) 98 CLR 228, 231 Cf *Thompson* v *Thompson* (1961) 26 DLR (2d) 1.

money')[33] before a resulting trust could be imposed in favour of the partner claiming an equitable interest.

The requirement that property disputes between family members and between strangers must be dealt with by the same principles has prevented the development of relationship-specific rules for the allocation of property rights between heterosexual couples which recognise the effect of the sexual division of labour. Although the requirement of a direct financial contribution is superficially gender-neutral, its practical effect is to favour men and disadvantage women. Once it is recognized that much of the contribution which women make to family resources takes the form of unpaid work and that existing legal and equitable rules disregard the value of this work, it can be seen that the 'arms length' principle operates as a form of systemic discrimination against women.

In the case of marriage the explanation for this approach is historical. A rule conferring formal equality on spouses to own property was a predictable reaction to the doctrine of matrimonial unity. But today the principle is often justified as necessary to protect creditors and other third parties claiming through one of the partners.[34] Those taking this view refer to the need for certainty in the area of property law, arguing that recognition by the courts of special rules governing the ascertainment of property rights between married couples and cohabitants would make it difficult for those advancing money or purchasing property to establish the state of title. This is not a relevant reason for failing to develop relationship-specified principles for the resolution of disputes *between* the parties when third parties are not involved.[34a] Nor would it prevent the recognition by the courts of a personal right to compensation for the provision of domestic services. Moreover, in disputes involving third parties where title to land is concerned, purchasers or mortgagees who register their title without fraud are generally protected by indefeasibility provisions contained in Torrens legislation. Third parties may also protect themselves by obtaining the consent of any person who may have an interest in the property to transfer of title. Conflicts arising on bankruptcy could be dealt with by the enactment or extension of legislation setting aside intra-family dispositions of title if this were felt to be appropriate. The argument that disputes between people living together must be resolved by commercial principles in order to protect third parties reflects a value judgment that it is more important to protect the ease with which commercial and conveyancing transactions can be conducted, than to protect the interests of women within marriage or cohabitation.[35] The hidden cost of this approach is to force women and children into dependence on the State.

This approach is not inevitable, even in a system which emphasizes the importance of certainty and ease of transferability of property interests. His-

[33] *Hofman* v *Hofman* [1965] NZLR 795, 800 per Woodhouse J.

[34] Cf *National Provincial Bank Ltd* v *Ainsworth* [1965] AC 1175, 1247–8 per Lord Wilberforce (this is the case which extinguished the ill-fated 'deserted wife's equity').

[34a] Cf Deane J in *Muschinski* v *Dodds* (1985) 60 ALJR 52.

[35] This was perceived by the House of Lords in *Williams and Glyn's Bank Ltd* v *Boland* [1980] 2 All ER 408.

torically the common law placed greater emphasis on protecting the rights of spouses. In the days when land was the major form of wealth and the doctrine of matrimonial unity applied, wives were protected, at least theoretically, by their rights to dower in the land which their deceased husbands had owned at any period during their life-time.[36] (Obviously division of property on divorce was irrelevant at that time.) The wife's right of dower was enforceable against a transferee or mortgagee, although the efficacy of this right was gradually eroded by a variety of conveyancing devices.[37] Ironically, even under the doctrine of matrimonial unity there may have been greater scope for recognition of the interests of wives (and husbands) in their partner's property, than under the current common law, which places its major emphasis on protecting the rights of third parties.

Even if it is accepted that the same principles should apply to both commercial and family property disputes, it is not inevitable that this should have resulted in courts ignoring the value of contributions taking the form of unpaid work in the home. Courts could, if they had wished, have adapted the presumption of resulting trust, to recognize contributions of labour which assist in the acquisition of property. The presumption of resulting trust originally developed by analogy to common law principles existing prior to the *Statute of Uses*, but was later rationalized as an application of the maxim that equity presumes bargains, not gifts.[38] Modern courts have justified its continuing application as reflecting the likely intention of a person providing the consideration for the property in which the interest is claimed.[39] The requirement of a *direct* contribution to the purchase price seems to have been based on the need to show a causal relationship between the provision of consideration and the acquisition of the property. Because child care and housekeeping were not recognised as work, this causal relationship was not perceived by the courts.

Once it is recognized that the performance of such unpaid work frees men to participate in the paid labour force there seems no reason why the acceptance of domestic services could not raise a presumption of resulting trust. One objection[40] to this approach is that in most of the jurisdictions discussed in

[36] I J Hardingham and M A Neave, *Australian Family Property Law* (1984), 5. Note that a husband was entitled to curtesy, see 4.

[37] Dower was not abolished until comparatively recently in some Canadian Provinces.

[38] W Holdsworth, *A History of English Law* (1923) Volume IV 424, (1966 Rennint) Volume VI, 644. See for example, *Lord Grey* v *Lady Grey* (1677) 2 Swans 594; 36 ER 742; *Gascoigne* v *Thwing* (1685) 1 Vern 366; 23 ER 526; *Dyer* v *Dyer* (1788) 2 Cox 92; 30 ER 42. None of these early cases explicitly confine the presumption to cases of direct contributions. Nor did the point arise in any of them. For the effect of assumption of liability under the mortgage, see *Ingram* v *Ingram* [1941] VLR 95.

[39] *Pettitt* v *Pettitt* [1970] AC 777, 793 per Lord Reid speaking of the presumption of advancement, 815–6, per Lord Upjohn.

[40] See I J Hardingham and M A Neave, *Australian Family Property Law* (1984), 84ff. For an analysis which attempts to overcome this problem, see *Cowcher* v *Cowcher* [1972] 1 WLR 425, 432. This reasoning seems to be supported by *Gray* v *Guirauton* (1985) DFC 95–012, 75, 178 per McLelland J. Another way to avoid it would be to argue that contributions after acquisition of the property, which *increase* an existing equitable interest come within the exception related to 'resulting, implied and constructive' trusts. *Statute of Frauds*, s9, is contained in *Law of Property Act* 1925 (Eng), s53(1)(c). The equivalent

this article, legislation equivalent to section 9 of the *Statute of Frauds* requires any assignment of an existing interest to be in writing. This creates a difficulty for a woman who wishes to argue that a resulting trust has arisen in her favour because of services performed *after* the property was purchased, since it assumes that her interest can increase from time to time without complying with statutory requirements. However this argument has not prevented English courts from holding that contributions to mortgage repayments made after the property has been transferred to the legal title holder may give rise to a resulting trust or may increase the extent of the equitable interest which resulted to the contributor at the time of the purchase.[41]

Both the English House of Lords, and some members of the Canadian Supreme Court have flirted with the notion of extending the presumption of resulting trust to cover indirect contributions to household expenditure, albeit in terms which are confusing because they tend to conflate resulting and constructive trusts.[42] An extension to include contributions made in the form of services comes within the spirit of the original principle. The real difficulty which courts have had in accepting that household services may give rise to equitable interests arises from a reluctance to accept a connection between such labour and the acquisition of property. They have also been influenced by the view that such services are provided as gifts. This view is criticized below.

2 The Value of Housework

A second assumption underlying the common law and equitable principles used to resolve family property disputes is that value cannot be attributed to domestic labour performed in the context of close family relationships. Though this assumption has been modified by legislation in the case of marriage, it continues to apply to labour performed by unmarried co-habitants. Both practical and philosophical reasons have been advanced in its support. One line of argument alludes to the difficulty of valuing housework and child care and points out that there would be problems in quantifying equitable interests based on such services. This is an argument for developing more

Australian provisions are as follows: *Conveyancing Act* 1919 (NSW), s23C; *Property Law Act* 1958 (Vic), s53; *Property Law Act* (Qld), 1974–1988, s11; *Law of Property Act* 1936 (SA), s29; *Property Law Act* 1969 (WA), s34; *Conveyancing and Law of Property Act* 1884 (Tas), s60.

41 *Gissing* v *Gissing*, [1971] AC 886. *Williams and Glyn's Bank Ltd* v *Boland*, [1979] 2 All ER 697, 706 per Lord Denning, MR, 711 per Ormrod LJ; *Williams and Glyn's Bank Ltd Boland* [1980] 2 All ER 408, 415 per Lord Wilberforce; *Bloch* v *Bloch* (1981) 55 ALJR 701. But see the comments of Brennan J. at 705–6 which raise the question whether the share can be increased by subsequent contributions. Cf *Calverley* v *Green* (1985) 59 ALJR 111, 114 per Gibbs CJ, 118 per Mason and Brennan JJ, suggesting that the equitable interest must be determined at the date of acquisition and *Gray* v *Guirauton* (1985) DFC 95–012. Australian courts seems to have taken a more purist approach on this issue.

42 See, for example, Dickson JA in *Rathwell* v *Rathwell* (1978) 83 D.L.R. (3d) 289, 304; the origin of this conflation may have been the statement of Lord Diplock in *Gissing* v *Gissing* [1971] AC 886, 908–9. This approach has been taken in some United States cases: see *Hayworth* v *Williams* (1909) 116 SW 43, 45–6 and see C Bruch, 'Property Rights of De Facto Spouses' (1976) 10 *Family Law Quarterly* 101, 123.

precise valuation principles, rather than for treating housework as valueless. Courts have previously been required to attribute a value to household services for the purposes of actions for loss of consortium brought by husbands and could develop analogous principles for resolving property claims between the parties.[43] Possible bases for valuation could include the cost of replacing services at market value or the cost of the woman's lost opportunity to engage in paid work because of her assumption of responsibility for unpaid work in the home.[44] Where the case involves a third party, problems of uncertainty in quantifying the extent of an interest based on the provision of services could be overcome by awarding the homemaker a personal right to compensation, rather than a proprietary remedy.

Those who see difficulties in extending traste principle to enable oppose recognition of the value of domestic labour within co-habitation also suggest there is an insufficient nexus between household work and the acquisition of property by the other partner.[45] This viewpoint is based on a refusal to recognise that cooking, cleaning, shopping, and child care are real, albeit unwaged, work, and that the performance of such services frees the other partner from the need to purchase or perform them and enables him to earn income and acquire assets. In part this denial of value is based on a fear that women will 'rip-off' their partners by making 'unjustified' claims on their assets. Of course, such claims are only regarded as 'unjustified' because domestic work is characterised as undemanding and pleasant for those who perform it and valueless to those who secure its benefits. The attitudes of many men are revealed in Professor Hayton's comments in an article dealing with division of property between co-habitees:

> 'Many women . . . risk co-habiting with a man in the hope that marriage will follow, while many men take advantage of this by deferring marriage for as long as they can. The majority of such women surely make a gift of their housewifely services or perform them in return for board and lodging, holidays and a good time.'[46]

[43] The action for loss of consortium still exists in some of the jurisdictions under consideration. In England it was abolished by the *Administration of Justice Act* 1982, s2. For a discussion of the Australian law, see A C Risely, 'Sex, Housework and the Law' (1981) 7 *Adelaide Law Review* 421. The action has been extended to wives in South Australia: *Wrongs Act* 1936, s33. For a discussion of the law in Canada, see MD Popescul, 'Action per quod consortium amisit' (1979) 43 *Saskatchewan Law Review* 27. The action has been abolished in British Columbia, Prince Edward Island and Saskatchewan: *Family Relations Act* RSBC 1979, c121, s75; *Family Law Reform Act* RSPEI 1974, cF-2.1, s61.3; *Equality of Status of Married Persons Act* SS 1984–5, cE–10.3, s6. In Ontario, other family members may now bring relational claims; *Family Law Act* 1986, SO 1986, c4, s61.

[44] For an excellent discussion of possible bases for valuation of household services see KD Cooper-Stephenson and I B Saunders, *Personal Injury Damages in Canada* (1981), 217 ff.

[45] See for example *G and G* [1984] FLC 91–582 at 79, 693–4 per Nygh LJ. The *Family Law Act* 1977 was further amended in 1983. See now s79(4)(c).

[46] D Hayton, 'Constructive Trusts: Is the Remedying of Unjust Enrichment a Satisfactory Approach', in T Youdan (ed), *Equity, Fiduciaries and Trusts* (1989), 205, 207. But Hayton may since have changed his position see D Hayton, 'Remedial Constructive Trusts of Homes; an Overseas View' [1988] *Conv* 259.

Recognition that domestic work has a value is occurring in a variety of areas. While neither neo-classical nor Marxist economic theory categorized housework as productive labour, some commentators are questioning the exclusion of domestic labour from national account figures[47] and in recent times there has been greater recognition of the close inter-relationship between unpaid labour in the home and the consumption of goods and services in the market economy. Attempts have been made to measure the value of domestic work to facilitate a more detailed analysis of the interaction between the market and the household. As one economist has commented:

> 'An economic sector, the household, consuming approximately one half of the work effort even in industrialized societies, deserves more attention and research than it has been given until now. If meaningful decisions are to be made in the economic, social and manpower fields, the economic and social value of unpaid household work has to be taken into account.'[48]

On a less theoretical level, changes to laws affecting distribution of property on divorce reflect at least a symbolic community acceptance of the view that there is a nexus between housework and child care and the enhancement of the earning capacity of the husband who is freed from those responsibilities. It seems unconvincing to concede that the domestic labour of *wives* contributes to the resources of their husbands, but that unmarried women who take a responsibility for such work do not make a similar contribution.

A further argument against attributing legal relevance to unpaid labour is that this would require a distasteful intrusion of the law into the sanctuary of the family. It is suggested that women who assume the responsibility of housework and childcare do so because of their love and emotional commitment to other family members. The law should not 'cheapen' such a commitment by placing a value on services provided without thought of reward. Nor is it fair for those who received such services, believing they were rendered out of affection, to be required to meet their cost at a later stage. This has been the major basis for rejection of claims for monetary compensation for the performance of housework and child care. In the words of O'Bryan J, of the Supreme Court of Victoria in a case in which he was considering a

[47] M Waring, *If Women Counted* (1988) The Australian Bureau of Statistics has recently attempted to measure the value of housework, for the purpose of its inclusion within the Gross Domestic Product. Valuation of housework on an individual function replacement cost basis meant that it was worth 57% of GDP. Valuation on an *opportunity* cost basis gave it a value of 66% of GDP. Australian Bureau of Statistics, *Measuring Unpaid Household Work: Issues and Experimental Estimates* Cat No 5236.0. See also D Ironmonger (ed), *Households Work* (1989)

[48] L Goldschmidt-Clermont, *Unpaid Work in the Household* (1982), 1–2. See also K J Gray, *Re-Allocation of Property Upon Divorce* (1977), 37–8. K Walker and W Gauger, 'The Dollar Value of Household Work' (1973) Cornell University Social Sciences, Consumer Economics and Public Policy No 5, *Information Bulletin* 60. For a useful summary of economic views, see K Cooper-Stephenson and I Saunders, *Personal Injury Damages in Canada* (1981), 219 and the literature discussed therein. For a discussion of a possible approaches to valuation of household labour see J L Knetsch, 'Notes on Some Implications of Matrimonial Property Rules' *Law and Economics Workshop Series*' (1981) University of Toronto 15.

quantum meruit claim by a woman who had rendered services for a man and their family over 25 years:

> 'Whilst an intimate relationship existed between them no question arose that the defendant should reward the plaintiff for her services. She performed her household and other services extremely well, but she did so, not in any expectation of financial reward, but out of love and affection which she had for her children and the defendant.'[49]

McLeod makes a similar argument in his annotation to *Herman* v *Smith*,[50] a case in which the Alberta Queens Bench upheld a quantum meruit claim (although not a claim for an interest in property) by a woman who had lived with the defendant and done domestic and labouring work on his property for six and a half years. McLeod argues that the notion that housekeeping services are not provided as gifts, but in expectation of return:

> 'represents a change in legal philosophy which should be tested against the expectations of people in these situations. The conclusions of the law should reflect the views of those it is attempting to service.'

The difficulty with this comment is that it gives effect to the expectations of men while ignoring those of women. While men expect to have domestic services provided gratuitously, women traditionally have assumed these responsibilities in the expectation that they will be provided with financial security in return. This expectation is reinforced by the patriarchal ideology which treats men as 'breadwinners' and women as wives and mothers. Privatizing domestic services because they are performed within the intimacy of the family masks the extent to which the failure of the law to intrude reinforces inequality by upholding the expectations of men. In the words of Katherine O'Donovan:

> 'It can be argued that non-intervention by law may result in the state leaving the power with the husband and father whose authority it legitimates indirectly through public law support for him as breadwinner and household head. A deliberate policy of non-intervention does not necessarily mean that this area of behaviour is uncontrolled.'[51]

By refusing to recognize the value of the unwaged work of women and by ignoring the connection between unpaid services and the man's ability to acquire property, the legal system upholds the economic power of men. The assumption that domestic services are gifts reflects a view of family relationships which should be abandoned. Domestic services are only regarded as gifts because the law attributes no value to them, thus allowing 'many men [to] take advantage'.[52]

There are, however, more troubling arguments which must be confronted in considering whether the law should give greater recognition to the value of

[49] *Hohol* v *Hohol* (1980) FLC 90, 824, 75, 212.
[50] (1984) 42 RFL 154 2d.
[51] K O'Donovan, *Sexual Divisions in Law* (1985), 7–8.
[52] D Hayton, 'Constructive Trusts: Is the Remedying of Unjust Enrichment a Satisfactory Approach?' in T Youdan (ed) *Equity, Fiduciaries and Trusts* (1989), 205, 207.

domestic labour. Laws which temporarily improve the position of women outside the paid workforce may reinforce the existing gendered basis of the division of labour by symbolically asserting that housework and child care are 'women's work', making it easier for employers to justify labour force segmentation. Principles which require courts to value unwaged work could involve judgments about whether a particular woman is a 'good' or 'bad' housekeeper, an approach which is likely to entrench traditional male assumptions about the role of women. Further, such an approach may protect women who work mainly in the home by giving them a larger share of property owned by the other partner, without improving the position of those who work a 'double day' in the paid work force and as housekeepers and child carers.

The dilemma is reminiscent of the problem faced by feminists arguing for matrimonial property reforms. Feminists concerned with the symbolic effects of matrimonial property reforms supported gender neutrality and argued against provisions designed to recognise the weaker economic position of women on the ground that differential treatment would reinforce existing inequality.[53] Others taking a more instrumental approach argued against equal division of matrimonial property on the ground that it would inevitably create an inequality of outcome, because of gender based differences in earning capacity and the fact that women usually remain responsible for child care.[54] At least in the short term, the latter prediction has proven accurate.[55] It is not clear whether the effect of laws recognizing the value of domestic labour would reinforce the dependence of women. On balance, my tentative view is that the law should recognize the current reality of the sexual division of labour within co-habitation by recognizing the value of unpaid work in the home.

The material which follows discusses the extent to which courts have grappled with these issues, within the framework of existing equitable principles. Four different approaches are examined, to uncover the assumptions on which they are based, and to assess their potential for recognising the value of unpaid work in the home. The article is primarily concerned with recognition of the value of labour through the grant of proprietary relief, but some reference is made to quantum meruit claims as the basis for a remedy. It is argued that a reconceptualization of the problem, based on the notion of unjust enrichment, along the lines of the principles being developed by the Canadian courts, provides the greatest scope for recognition of the value of

[53] Cf R Deech, 'The Case Against Legal Recognition of Co-habitation', in J M Eekelaar and S M Katz, *Marriage and Co-habitation in Contemporary Society* (1980) 300, 304. See also R Landau, 'A Feminist Dilemma' (1983) 3 *Feminist Issues*, 71.

[54] For a discussion of the conflict between 'instrumental' and 'symbolic' law reform in the context of matrimonial property, see M L Fineman, 'Implementing Equality: Ideology, Contradiction and Social Change', [1983] 2 *Wisconsin Law Review* 789. Fineman argues that 'result equality' should be the focus of a divorce law reform.

[55] L Weitzman, 'The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards' (1981) 28 *University of California at Los Angeles Law Review* 1181.

unpaid work in the home, whilst at the same time other policies should be developed to assist women to attain economic independence.

FOUR APPROACHES TO RESOLVING PROPERTY DISPUTES — INTENTION, UNCONSCIONABILITY, UNJUST ENRICHMENT AND RELATIONSHIP

1 Intention

Until recently, the major means of approaching the resolution of property disputes between unmarried partners was through the notion of intention. Current law assumes that the holder of the legal title does not intend to confer an interest on his or her partner, unless the contrary is shown. The principle that property disputes between family members must be resolved by the same principles which apply to strangers made it inevitable that courts should make this assumption, since the creation and transfer of interests in property normally depends on the intentional act of the legal title holder, or, in the case of a specifically enforceable contract to transfer an interest, on the intention of both the parties to be legally bound.

The genesis of the line of authority requiring an examination of the intention of the parties is the famous statement of Lord Diplock in *Gissing* v *Gissing*:

> 'A resulting, implied or constructive trust — and it is unnecessary for present purposes to distinguish between these three classes of trust — is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land acquired. . . .
>
> This is why it has been repeatedly said in the context of disputes between spouses as to their respective beneficial interests in the matrimonial home, that if at the time of its acquisition and transfer of the legal estate into the name of one or other of them an express agreement has been made between them as to the way in which the beneficial interest shall be held, the court will give effect to it — notwithstanding the absence of any written declaration of trust. Strictly speaking this states the principle too widely, for if the agreement did not provide for anything to be done by the spouse in whom the legal estate was not to be vested, it would be a merely voluntary declaration of trust and enforceable for want of writing. But in the express oral agreements contemplated by these dicta it has been assumed sub silentio that they provide for the spouse in whom the legal estate in the matrimonial home is not vested to do something to facilitate its acquisition, by contributing to the purchase price or to the deposit or the mortgage instalments when it is purchased upon mortgage or to make some other material sacrifice by way of contribution to or economy in the general family expenditure. What the court gives effect to is the trust resulting or implied from

the common intention expressed in the oral agreement between the spouses that if each acts in the manner provided for in the agreement the beneficial interests in the matrimonial home shall be held as they have agreed.

An express agreement between spouses as to their respective beneficial interests in land conveyed into the name of one of them obviates the need for showing that the conduct of the spouse into whose name the land was conveyed was intended to induce the other spouse to act to his or her detriment upon the faith of the promise of a specified beneficial interest in the land and that the other spouse so acted with the intention of acquiring that beneficial interest. The agreement itself discloses the common intention required to create a resulting, implied or constructive trust.'[56]

The principle, subsequently explained and refined, has been the basis for the so-called 'common intention' constructive trust in Australia, New Zealand and England, though developments in the first two countries (which are discussed below) indicate increasing dissatisfaction with the common intention requirement.

Lord Diplock's explanation indicates that a court will not impose a constructive trust simply to give effect to the parties' intention. If the interest in land claimed by the contributor is based on an alleged declaration of trust by the legal title holder the *Statute of Frauds* requires the trust to be manifested and proved in writing. If the arrangement is said to be an executory contract under which the contributor will receive an interest in land in return for certain acts, the contract will need to be evidenced in writing. But in both of these situations (which were not clearly differentiated by Lord Diplock) equity will intervene despite non-compliance with statutory formalities, to prevent the legal owner from unconscientiously asserting title where the claimant has acted to his or her detriment in reliance on the intention.

The basis for equitable intervention is related to the old principle that equity will not permit the statute to be used as an 'instrument of fraud'[57] but is not limited to cases where the legal title holder expressed an immediate intention to confer an interest on the claimant (an imperfect gift or a declaration of trust not evidenced in writing). The principle also covers cases where a legal title holder who accepts a contribution based on an understanding that the contributor will receive an interest in the property at some time in the future and then seeks to resile from that position. Equity will intervene to give effect to such an understanding even where it does not amount to a contract, or where the contract is not specifically enforceable because of absence of writing.[58]

It will be noted that contributions based on a belief that the contributor has been or will be given an interest in property could also give rise to an equity under the doctrine of proprietary estoppel which applies where a person spends money or otherwise acts prejudicially on the basis of that belief and the legal title holder encourages or acquiesces in the detrimental conduct of the contributor. In some cases involving property disputes between co-habitants

[56] [1971] AC 886, 905.
[57] *Rochefoucauld* v *Boustead* [1897] 1 Ch 196; *Allen* v *Snyder* [1977] 2 NSWLR 685.
[58] See for example *Oglivie* v *Ryan* [1976] 2 NSWLR 504.

the courts have used proprietary estoppel analysis to hold that an equity arises in favour of the contributor.[59] More frequently courts have used constructive trust reasoning, obscuring the differences between purported gifts, declarations of trust and statements of future intention, by referring to the 'common intention' of the parties.[60]

Because title to property is more likely to be in the partner who was financially responsible for the purchase, and because the intention of that partner is a necessary (but not sufficient) requirement for the creation of an equitable interest, the principle (like the doctrine of separation of property) is inherently weighted against those who make domestic rather than financial contributions.[61] Since the law resolves property conflicts between co-habitees by searching for the intentions of specific individuals, rather than by considering the effect on all women of the performance of unpaid work, this systemic discrimination is invisible. Moreover both the adjective 'common' and the notion that the court is concerned with the real intention of the parties, are fundamentally misleading. The description 'common intention' suggests that the intentions and expectations of the legal holder and of the contributor are equally relevant. If the analysis is that the owner of the property purported to make a gift of an equitable interest, and that the other party was induced to make contributions on that basis, it is primarily the intention of the legal title holder (usually the principal wage-earner) which is taken into account. The test of intention is not entirely subjective, so that unexpressed mental reservations will not prevail over a common intention which can reasonably be inferred from the legal owner's conduct. But if the title holder tells his partner that he has no intention of transferring an interest in return for her contribution, it appears that his intention will be decisive and the court will not impose a constructive trust.

Use of the expression 'common intention' is superficially more accurate when the basis for the imposition of a constructive trust is some kind of informal agreement between the parties that an interest will be conferred in return for contributions. But the sexual division of labour means that this notion of consensus is often a legal fiction. Precisely because it is normal for women to assume major responsibility for home and child care, they are unlikely to bargain for a share of property in return. Even in the rare cases where couples discuss the issue, a woman who is reliant on her partner to support herself and the children has little or no bargaining power. Thus it is misleading to regard the common intention doctrine as a means of giving effect to the *shared* expectations of the partners, rather than the intention of the legal title holder.

The search for a 'common intention' also contrasts with the assumption

[59] See for example *Pascoe* v *Turner* [1979] 1 WLR 431. The remedy is apparently more flexible if this analysis is adopted.

[60] Note the attempt of Mustill LJ to sort out these distinctions in *Grant* v *Edwards* [1986] Ch 638, 652 and the comments of Sir Nicolas Browne-Wilkinson V-C at p656–7 on the overlap between proprietary estoppel and constructive trusts.

[61] This is not to deny that the principle will occasionally benefit women. See for example *Gray* v *Guirauton* (1985) DFC 95-012.

that family members do not normally intend to bind themselves legally, a principle which has been used in other contexts to prevent the intrusion of commercial values into the intimacies of family life. This is the basis for the decision in *Balfour* v *Balfour*[62] where the English Court of Appeal held that a wife could not enforce a promise made by her husband that he would pay her $300 a month for maintenance. The parties had no intention of separating when the agreement was made and the Court held that normal domestic arrangements between husband and wife should not be held to be contracts unless it was clearly shown that they intended to enter into legal relationships.[63]

Although it is possible to reconcile the *Balfour* principle with the requirement of a common intention before a constructive trust will be imposed, the principles seem to conflict ideologically. *Balfour*[64] protects the privacy of family arrangements by excluding the law except where it is very clear that the parties wished to enter into a legally binding transaction. By contrast, where the transfer of property interests is concerned, it is assumed that married and co-habiting couples behave as if they are strangers, spelling out their intentions in clear terms. The characterization of intra-family agreements as *prima facie* 'private' and of intra-family property transfers as *prima facie* 'public' transactions has usually worked to the disadvantage of women. Once the couple have separated, and the inequality between earner and non-earner becomes apparent, it is most unlikely that the partner with legal title will admit he intended to confer an interest in his property.[65] Thus courts are required to examine the past conduct of the parties in search of a fictional intention to determine whether an intention can be inferred from their conduct. Dickson CJ of the Supreme Court of Canada has described the process of inferring an intention from the conduct of the parties as 'a meaningless ritual in searching for a phantom intent'.[66]

English and Australian courts have held that they cannot overcome lack of an actual common intention by imputing an intention based on what would have been intended by a reasonable couple in the circumstances of the plaintiff and defendant.[67] But the process of inferring intention from conduct is equally fictional. Sympathetic courts may infer a common intention from indirect financial contributions or vague words uttered many years previously. For example in *Hohol* v *Hohol*,[68] one of the few Australian cases in which a plaintiff has succeeded although her contributions were largely dom-

[62] [1919] 2 KB 571. Note that Lord Reid in *Pettitt* v *Pettitt* [1970] AC 777, 796 seems to have seen this inconsistency.

[63] The presumption against an intention to enter into legal relations may also apply to other close family relationships. See *Cohen* v *Cohen* (1929) 42 CLR 91 and I J Hardingham and M A Neave, *Australian Family Property Law* (1984) 47ff; *Lazarenko* v *Borowsky* [1966] SCR 556.

[64] [1919] 2 KB 571. See also *Hagenfelds* v *Saffron* (1986) DFC 95–025, 75, 322.

[65] See a striking example of the injustice which can arise as the result of failure to spell out such an intention see *Babula* v *Public Trustee* (1985) DFC 95–007.

[66] *Rathwell* v *Rathwell* (1978) 83 DLR (3d) 289, 297.

[67] *Pettitt* v *Pettitt* [1970] AC 777, *Gissing* v *Gissing* [1971] AC 886; *Burns* v *Burns* [1984] Ch 317; *Grant* v *Edwards* [1986] Ch 638.

[68] (1980) FLC 90–824; see also *Green* v *Green* (1989) DFC 95–075.

estic, O'Bryan J of the Victorian Supreme Court inferred an intention that a woman should obtain an interest in land from the fact that the defendant had said 'It's for all of us, its for you and me' when the land was purchased. But there are also cases on the other side of the line where courts have refused to infer an intention that the claimant should have an interest from statements that the defendant would look after or provide a home for the plaintiff.[69] More oddly still, courts have sometimes inferred an intention to confer a beneficial interest in the contributor, from the fact that the legal title holder has made an excuse for his failure to make the other partner a co-owner, or told her that this was illegal because the parties were unmarried.[70]

The problems of searching for a mythical common intention led the New Zealand Court of Appeal to resurrect the notion of the imputed (as opposed to implied) intention which was firmly rejected by the House of Lords in *Pettitt* v *Pettitt*[71] and *Gissing* v *Gissing*[72] and to experiment with the concepts of unjust enrichment and unconscionability which are discussed in more detail below. In *Hayward* v *Giordani*[73] both Cooke and McMullin JJ expressed support for the dissenting views of Lord Reid and Diplock in *Pettitt*[74] and *Gissing*.[75] Rather than searching for an actual 'common intention', which obscures the fact that the parties may be motivated by different expectations about the legal consequences of their behaviour, in the cases of *Pasi* v *Kamana*,[76] *Oliver* v *Bradley*[77] and *Gillies* v *Keogh*[78] the New Zealand Court of Appeal moved towards an examination of the 'reasonable expectations' of the parties. In *Gillies* v *Keogh*, for example, the President, Sir Robin Cooke suggested that the court should consider the reasonable expectations of the legal title holder and the contributor to determine whether a reasonable defendant would expect to have conceded a benefit in light of the contributor's behaviour. Such a consideration should take into account the duration of the relationship, the degree of sacrifice made by the claimant and the value of the claimant's contributions, in comparison with the value of benefits he or she had received.[79] Similarly, Richardson J asked whether:

> 'there [had] been a direct or indirect contribution by the claimant in relation to the property in circumstances such that it should be inferred that

[69] *Murray* v *Heggs* (1980) 6 Fam LR 781; *Burns* v *Burns* [1984] Ch 317.
[70] *Eves* v *Eves* [1975] 1 WLR 1338; *Grant* v *Edwards* [1986] Ch 638.
[71] [1970] AC 777.
[72] [1971] AC 886.
[73] [1983] NZLR 140. Note that the same judges also expressed some sympathy for the Canadian unjust enrichment approach.
[74] [1970] AC 777, 795 per Lord Reid; 823 per Lord Diplock.
[75] [1971] AC 886, 897 per Lord Reid; Lord Diplock at 904 accepted that the majority view in *Pettitt* v *Pettitt* [1970] AC 777 precluded him from imputing an intention.
[76] [1986] 1 NZLR 603.
[77] [1987] 1 NZLR 586.
[78] [1989] 2 NZLR 327. This line of authority has been applied in a number of unreported decisions. See, for example, *Malitte* v *Woodford* High Court 1 March 1990, per Ellin J. The New Zealand cases were compared with those in other jurisdictions in N Pearl, 'A Comparative View of Property Rights in De Facto Relationships: Are We All Driving in The Same Direction' (1989) 7 *Otago Law Review* 100. See also D Harvey, 'The Property Rights of De Facto Partners' [1989] *New Zealand Law Journal* 167.
[79] [1989] 2 NZLR, 327, 331, 334.

the claimant would have understood that those efforts would naturally result in an interest in the property?'[80]

This approach has the advantage of directing the attention of the court away from the intention of the legal title holder, towards the question of whether it is fair that the contributor should receive a property interest. But it is not yet clear whether New Zealand courts would be prepared to take the view that a woman whose contributions are purely domestic has a 'reasonable expectation' of obtaining an interest in her partner's property. In *Pasi* v *Kamana* the Court of Appeal disregarded the domestic contributions made by the plaintiff during a relationship lasting almost 10 years. This may be explained by the fact that the house in which she claimed an interest was purchased solely from the proceeds of the defendants' personal injury claim. In *Oliver* v *Bradley* Sir Robin Cooke commented that 'contributions may include housekeeping or looking after children, if the other party has thereby been enabled to earn income or acquire assets'.[81] This comment may have related to the requirement that the claimant shows that she has suffered some detriment, or to the issue of quantification of the interest of the claimant, rather than to the circumstances in which the court will be prepared to find a reasonable expectation of benefit.[82]

In *Gillies* v *Keogh* the effort to be attributed to domestic contributions was not in issue, but the President commented favourably[83] on the Canadian case of *Everson* v *Rich*[84] in which the Saskatchewan Court of Appeal endorsed the proposition 'no one should expect, in general, spousal services for free'. Richardson J also recognised that:

> 'domestic services may be as significant or more significant than any financial contribution. In many cases, if not in the ordinary course, they are likely to have been induced by reasonable expectations of security of the family environment and of sharing the family assets on which the de facto relationship is based'.[85]

However, *Gillies* v *Keogh* also illustrates an important limitation on approaches based on the 'expectations' of the parties. In that case it was held that a man who contributed his labour is improving the woman's property was not entitled to an interest in it. In the words of the President:

> 'A claimant cannot succeed if a reasonable person in his or her shoes would have understood that throughout the relationship the other party had positively declined to acquiesce in any property sharing or other right.'[86]

[80] [1989] 2 NZLR 327, 344. Bisson J did not dissent from this analysis. Casey J was content to apply these remarks to the particular case, while expressing some reservations about their general applicability.
[81] [1987] 1 NZLR 586, 590.
[82] It is arguable that this comment was limited to proceedings under the Domestic Actions Act 1975.
[83] [1989] 2 NZLR 327, 332
[84] (1988) 53 DLR (4th) 470.
[85] [1989] 2 NZLR 327, 346. The other members of the Court expressed no view on this issue.
[86] [1989] 2 NZLR 327, 334.

This could prevent many women claiming an interest based on their domestic contributions. It may be hypothesized that men with traditional views about the domestic responsibilities of women are very likely to express an intention excluding their partners from an interest in the property. An approach which resolves property disputes between de facto partners by focussing on the intentions of individual men and women cannot rectify the disadvantages which all women experience as the result of the sexual division of labour.

Although the common intention approach is being abandoned in New Zealand, even in that jurisdiction it is not yet clear whether domestic contributions alone will give rise to an interest in property. In England, where such disputes are still often resolved by reference to 'common intention' courts have not been prepared to infer such an intention from the fact that the woman has assumed major responsibility for unpaid domestic work, although this is the *major reason* why women are most likely to rely on future provision from the property accumulated during the course of the relationship. Couples dividing responsibility for contributing to the resources of the family along traditional lines intend that the woman will receive financial support and security in return for caring for home and family. But the existence of a sexual division of labour is regarded as irrelevant by the courts in determining whether the parties intended that the woman should share in the financial resources of the other party. Fox LJ in *Burns* v *Burns*[87] commented that:

> 'the mere fact that parties live together and do the ordinary domestic tasks [note the assumption that such tasks are shared equally] is, in my view, no indication at all that they thereby intended to alter the existing property rights of either of them'.

As John Eekelaar puts it:

> 'The very activity which deprives a woman of her independent means of acquiring security and saving capital is excluded when deciding whether an alternative form of security was intended'.[88]

The detriment requirement also causes difficulties for women whose claims rest mainly or solely on the performance of household services.[89] Because running a household and caring for children have traditionally been tasks performed by women, they are not perceived as real work by men.[90] Nor is it recognised that such work has an economic, as opposed to a sentimental,

[87] [1984] Ch 317, 331. See also *Grant* v *Edwards* (1986) Ch 638, 657.

[88] J Eekelaar, 'A Woman's Place — A Conflict Between Law and Social Values [1987] *Conv* 93; see also *Coombes* v *Smith* [1986] 1 WLR 808.

[89] Doubts were expressed about the existence of the detriment requirement by Fullager J in *Thwaites* v *Ryan* [1984] VR 65, 95, who saw these cases as an example of the special favour shown by the law to marriages and, possibly, co-habitation. They were repeated by Nicholson J in *Vedjes* v *Public Trustee* [1985] VR 569, 573 and see *Puie* v *The Public Trustee of Queensland* (1986) DFC 95–026. However the Full Court of the Victorian Supreme Court restated the detriment requirement in *Higgins* v *Wingfield* [1987] VR 689.

[90] This is why the expression 'working mother' refers to a woman in the paid work force, rather than one who labours at home: M Luxton, *More Than a Labour of Love* (1980), 12.

value. Consequently courts have often simply ignored the performance of domestic work in determining whether the claimant has suffered any detriment.[91] Even where there is a clearly expressed intention to confer an interest on the claimant, it is not clear whether the acceptance of household services is sufficient to give rise to a constructive trust. The very fact that housework has been uncomplainingly accepted as 'women's lot' in the past may prevent courts from regarding such work as detrimental to the claimant, so that it is regarded as unconscionable for the legal title holder to deny the claimant an interest.[92] *Hohol* v *Hohol*,[93] and *Ogilvie* v *Ryan*[94] give some support to the view that household services may be regarded as detrimental, but in the former case the wife lived in primitive conditions and worked on the man's farm and in the later case the woman nursed the man until his death. When the claimant argues that her detriment consists of labour and services, courts have often required conduct which is exceptional, such as the wielding of a 14 pound sledge hammer in *Eves* v *Eves*.[95] It is hard to avoid the conclusion that in that case the female plaintiff was rewarded for undertaking a stereotypically male task, whereas if she had assumed the more typical female role of ministering to the male property owner while he reconstructed the garden, it would not have been regarded as unconscionable for him to deny her an interest.[96]

Even in cases where the common intention and detriment barriers are surmounted by a woman claiming an interest on the basis of domestic services, there is uncertainty about the link which must be shown to exist between the intention and her detrimental acts. One view is that her contributions must be required, or at least contemplated by the common intention, so that the arrangement between the parties closely resembles a contract. Since it is unlikely that many male property owners will bargain for the performance of services which they expect will be provided by their partners as a matter of course, this approach would severely restrict the usefulness of the 'common intention' constructive trust. Another suggested approach is that the acts must be caused by the common intention or at least performed in direct reliance on it. In *Grant* v *Edwards* Nourse LJ suggested that the conduct of the claimant must be:

> 'conduct on which the woman could not be reasonably have been expected to embark unless she was to have an interest in the house'.[97]

Again the normal sexual division of labour means that this test would offer

[91] See for example *Higgins* v *Wingfield* [1987] VR 689.

[92] *Grant* v *Edwards* [1986] Ch 638, 648 per Nourse LJ, although on his analysis that case concerned an express common intention; *Coombes* v *Smith* [1986] 1 WLR 808, although there a real property owner did not live with the claimant but provided a house for her and their child; *Midland Bank Ltd* v *Dobson* [1986] FLR 171; *Maks* v *Maks* (1986) DFC 95-036, 75, 409-10.

[93] (1980) FLC 93, 824.

[94] [1976] 2 NSWLR 504.

[95] [1975] 1 WLR 1338, and *Miller* v *Sutherland* (1991) DFC 95-102.

[96] See for example *Grant* v *Edwards* [1986] Ch 638, 647-8 per Nourse LJ.

[97] [1986] Ch 638, 648, but cf the more generous approach of Sir Nicolas Browne-Wilkinson VC at 656-7. In his view :'Any act done by her to her detriment relating to the joint lives of the parties' would be sufficient.

little support to a claim based on domestic services. By contrast the more generous test proposed by O'Bryan J in *Hohol* v *Hohol*[98] placed little emphasis on the link between the common intention and the detrimental acts of the claimant, but simply required proof of a common intention, proof that the contributor had been detrimentally affected and satisfaction of the requirement that it would be a fraud on the claimant for the legal title holder to assert the claimant had no interest in the property. Similarly, some English cases have suggested that if detriment is established, reliance on the common intention will be presumed, in the absence of express evidence to the contrary. Thus, for example, in *Maharaj* v *Chand*[99] the Privy Council was prepared to infer that the claimant acted in the belief that she would have an interest in the defendant's property and not merely out of love and affection.[100] Despite this slightly more generous approach, it seems unlikely that the common intention constructive trust will enable a distribution of property which recognises the value of domestic services provided by unmarried women in co-habitation arrangements.

2 Unconscionability

The principle of unconscionability underlies the doctrines of common intention, constructive trust and proprietary estoppel. Equity intervenes to prevent a legal title holder unconscionably refusing an interest to a person who has made a contribution in reliance on a common intention or a belief encouraged by the owner that the contributor will obtain an interest in the property.[101] In its recent decisions in *Muschinski* v *Dodds*[102] and *Baumgartner* v *Baumgartner*[103] the High Court of Australia has expanded the concept of unconscionability beyond the boundaries of these doctrines.[104] Since these cases have been analysed elsewhere in detail[105] this article focusses on the potential of this wider notion of unconscionability to recognise contributions in the form of housekeeping and domestic services.

In *Muschinski* v *Dodds*,[106] Mrs Muschinski had paid the purchase price of land but had arranged for an undivided half-share as tenant in common to be

[98] (1980) FLC 90, 284, 75, 208. Cf *Puie* v *The Public Trustee of Queensland* (1986) DFC 95–026 and see also *Green* v *Green* (1989) DFC 95–075

[99] [1986] 3 WLR 44.

[100] [1986] 3 WLR 440, 445–6. See also Sir Nicolas Browne-Wilkinson VC in *Grant* v *Edwards* [1986] Ch 638, 656. Cf *Greasley* v *Cooke* [1980] WLR 1306.

[101] For a discussion of the case law see I J Hardingham and M A Neave, *Australian Family Property Law* (1984), Chapter 6 and J Dodds, 'The New Constructive Trust: An Analysis of Its Nature and Scope' (1988) 16 MULR 482.

[102] (1986) 160 CLR 583.

[103] (1987) 62 ALJR 29.

[104] See also *Nichols* v *Nichols* (1987) DFC 95–042; *Hibberson* v *George* (1989) DFC 95–064; *Re Culek* (1989) DFC 95–077; *Green* v *Green* (1989) DFC 95–075; *Lipman* v *Lipman* (1989) DFC 95–068.

[105] See for example M A Neave, 'Three Approaches to Family Property Disputes — Intention Belief, Unjust Enrichment and Unconscionability' in T Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 247, 266–71; M Evans, 'De Facto Property Disputes: The Drama Continues' (1986–87) 1 *Aust J Fam L* 234; D Hayton, 'Remedial Constructive Trusts of Homes' [1988] *Conv* 259.

[106] *Muschinski* v *Dodds* (1985) 160 CLR 583.

transferred to Dodds, with whom she was living. Dodds was to restore a cottage and pay for building a house on the land from the proceeds of his divorce settlement and a loan he would raise and repay from his earnings. The couple intended to live in the house, run a business in the cottage, and subdivide the land and sell part of it. There were difficulties in obtaining planning permission for the subdivision and the erection of a pre-fabricated house and the couple eventually separated without the house being built. After the separation Mrs Muschinski claimed that Dodds held his undivided half share in trust for her as beneficial owner.

Because Mrs Muschinski has clearly intended to give Dodds a half interest in the property, both the trial judge and the New South Wales Court of Appeal held that the presumption of resulting trust arising from her payment of the purchase price had been rebutted and that no constructive trust could be imposed to remedy the unfairness caused by Mr Dodds' retention of a half share in the property on the breakdown of their relationship. The majority of the High Courts (Gibbs CJ, Deane and Mason JJ with Brennan and Dawson JJ dissenting) upheld Mrs Muschinski's appeal, although the reasoning of Gibbs CJ differed from that of the other majority judges. The result was that the actual financial contribution made by each party was to be ordered to be repaid, and the residue divided equally. All members of the High Court rejected the view that a constructive trust could be used as a means of achieving 'idiosyncratic notions of fairness and justice'[107] and both Gibbs CJ and Deane J commented unfavourably on the approach of imputing a common intention suggested by Cooke J (as he then was) in *Hayward* v *Giordani*.[108]

The development of the doctrine of unconscionability relied upon by Deane J as the basis for his decision has the greatest potential for extension to cover contributions of child care and domestic labour. Deane J refused to recognise any general doctrine of unjust enrichment as the basis for imposition of a constructive trust, making specific reference to the Canadian decision of *Pettkus* v *Becker*,[109] (which is discussed below) although he recognised that the extension of the law on a case basis might ultimately lead to identification of unjust enrichment as an established principle underlying the grant of relief. Nevertheless he recognised that constructive trusts were not to be confined to traditional categories, but could be moulded and adjusted to provide equitable relief in novel situations. Interestingly, he recognised that a declaration of constructive trust by way of remedy could be framed to operate from the date of court order, rather than retrospectively. While rejecting a simple 'fairness' rationale as the basis for providing equitable relief, Deane J emphasised that fairness and justice were expressed through the notion of unconscionability which provided the conceptual underpinning for equitable doctrines giving rise to remedies within established categories.

Searching for a principle which could serve as the basis for granting equitable relief to Mrs Muschinski, Deane J found an analogy in the equitable rules

[107] (1985) 160 CLR 583, 615 per Deane J.
[108] [1983] NZLR 140.
[109] (1980) 117 DLR (3d) 257.

covering failed partnerships[110] and joint ventures. Under these rules, where money was paid or property transferred on the basis of a relationship which later failed through no fault of either of the parties and where the consequences of failure had not been regulated by agreement, equity could intervene to ensure that the joint venturers received a proportionate repayment of their contributions. The underlying principle behind such cases was that equity would provide a remedy to prevent a person from asserting or retaining the legal right to property where this was unconscionable.

Muschinski's payment of the purchase price was made on the basis of a joint venture which contemplated that Dodds would contribute in money and labour to development of the land. This venture had failed without blame attributable to either of the parties, leaving Dodds with a benefit which it would be unconscionable for him to retain at Mrs Muschinski's expense. Hence the court should intervene by imposing a constructive trust under which the parties held their half interests as tenants in common subject to an obligation requiring proportionate repayment of contributions. Deane J held that, in the circumstances of the case, it was not unconscionable for Dodds to share in any increase which had occurred in the value of the property, subject to an appropriate contribution to the amount of the purchase price.

In *Muschinski* v *Dodds* Mrs Muschinski's contributions were financial and the arrangements between the parties had both a commercial and a domestic element, making it easier for Deane J to treat the parties as having engaged in a joint venture which had failed. His judgment did not suggest that the court can intervene whenever it characterises behaviour as unconscionable, for this would be simply re-introducing the notion of fairness in another guise. Deane J took the view that extension of existing categories of equitable intervention could only occur when 'warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation for such principles'.[111] Because the underlying justification of preventing unconscionable conduct is expressed through existing categories of relief it may be difficult to extend it to cover contributions of household labour.

However, Deane J's judgment discussed the approach which he might have taken if Muschinski and Dodds had continued to live together after their plans to subdivide the property and build the house had failed to come to fruition:

> 'If the personal relationship had survived for years after the collapse of the commercial venture and the property had been unmistakenly devoted to serve solely as a mutual home, any assessment of what would and would not constitute unconsciouable conduct would obviously be greatly influenced by the special considerations applicable to a case where a husband and wife

[110] Note that some earlier American cases also relied on the partnership analogy: C Bruch, 'Property Rights of De Facto Spouses Including Thoughts on the Value of Homemaker's Services' (1976) 10 *Family Law Quarterly* 101, 119 and see *Estate of Thornton* (1972) 499 P 2d 864.

[111] (1985) 160 CLR 583, 615.

> or persons living in a 'de facto' situation contribute, financially and in a variety of other ways, over a lengthy period to the establishment of a joint home. In the forefront of these special considerations there commonly lies a need to take account of a practical equation between direct contributions in money or labour and indirect contributions in other forms such as support, home-making and family care.'[112]

In the above statement Deane J may be suggesting that it would not be unconscionable for a woman who has been given a legal interest in the home in which the couple lived to *retain* her interest after the breakdown of the relationship because of her indirect contribution to her partner's resources.[113] This would not assist a woman who is *claiming* an interest because of her domestic contributions.

The approach of Deane J in *Muschinski* v *Dodds* raises a number of important issues. Is the joint venture analysis confined to relationships involving some commercial element or can it extend to co-habitants who planned to buy property solely for domestic purposes? In what circumstances will it be regarded as unconscionable for a co-habitee to retain a benefit conferred by the other partner after the relationship comes to an end? Can the principle be applied to contributions of labour which benefit the other partner as well as to indirect contributions to the purchase price of property? Will the courts find that a link exists between contributions of labour and the acquisition or improvement of particular property, enabling the imposition of a constructive trust relating to that property to prevent an unconscientious assertion of benefit?

The decision of the High Court of Australia in *Baumgartner* v *Baumgartner*[114] throws further light on those questions. In that case the man and woman had lived together for four years. Throughout the time they were living together, except for three months after the birth of their son, the woman worked full-time outside the home and handed the man her pay-packet. From their pooled earnings the man paid living expenses and reduced the mortgage loan on the home unit which the man had purchased before they began living together. Because of the woman's contributions the man was able to make 'double repayments' of his mortgage loan on four occasions. After the couple had been living together for about a year and while the woman was pregnant with their child the man purchased land with the intention of building a house on it and providing a home for himself, his partner and their child. Although he refused to put the property in the couples' joint names he told the woman that he was banking their pay to ensure that they would meet their commitments 'so that we can enjoy our life later on when we have got more time together'.[115] The purchase price of the land was partly met from the proceeds of sale of the man's home unit. The woman sought a declaration that the man

[112] (1985) 160 CLR 583, 621–2.
[113] Note that in Australia it has been held that the presumption of advancement does not apply to a transfer of property from a male co-habitee to his partner: *Calverley* v *Green* (1985) 59 ALJR 111.
[114] (1987) 62 ALJR 29.
[115] (1987) 62 ALJR 29, 30.

held his legal interest in the land and a house built on it on trust for himself and the woman as tenants in common in equal shares.

In the New South Wales Court of Appeal, the majority (Mahoney J dissenting) held that a common intention that the woman should have an interest in the property proportionate to her contributions could be inferred from the parties' conduct. Equity would intervene to prevent the man from denying her an interest after having benefited from the financial contributions she had made on the basis of the common intention. The man appealed to the High Court, which disagreed with the New South Wales Court of Appeal's inference of the requisite common intention in light of the findings of the trial judge, but nevertheless managed to find in favour of the respondent.

Gaudron J held in favour of the woman respondent on the grounds that it would be unconscionable for the appellant to assert ownership of an asset purchased from a fund constituted by contribution from both parties. Although no resulting trust arose in favour of the woman because she had not contributed directly to the purchase price of the land the court would give the respondent a remedy by imposing a constructive trust. Normally the shares of the parties would reflect their respective financial contributions to the acquisition of the asset, even where these contributions were made indirectly, but other factors might also affect the quantification of the respondent's interest:

> '. . . in the context of domestic relationships it is relevant to inquire whether the asset was acquired for the purposes of the relationship, and whether non-financial contributions should be taken into account.'[116]

Gaudron J went on to refer to the judgment of Deane J in *Muschinski* v *Dodds*,[117] holding that the constructive trust should reflect the contributions of the parties to the joint fund, rather than their contributions to the 'equity' in the land and that the respondent's share should be increased by reference to the amount she would have contributed but for her absence from work because of the birth of their child.[118]

Mason CJ and Wilson and Deane JJ also invoked the concept of unconscionability to justify the imposition of a constructive trust, relying on Deane J's reasoning in *Muschinski* v *Dodds*.[119] The parties had contributed their earnings to a common pool for the purposes of their joint relationship and for their mutual security and benefit. The pooled funds contributed to their future security of accommodation and it would be unrealistic to regard the respondent as having made a gift of her earnings to the appellant. Given that the appellant's contributions had been made for the purposes of the relationship, which had later failed, it would be unconscionable for the appellant to retain the benefit of the respondent's contributions while seeking to exclude her from an interest in the property. Hence a constructive trust could be imposed entitling the respondent to an equitable interest in the property.

[116] (1987) 62 ALJR 29, 37.
[117] (1985) 160 CLR 583.
[118] (1987) 62 ALJR 29, 38.
[119] (1985) 160 CLR 583.

Mason CJ, Wilson and Deane JJ went on to consider the shares of the parties, commenting that:

> 'Equity favours equality and, in circumstances where the parties have lived together for years and have pooled their resources and their efforts to create a joint home, there is much to be said for the view that they should share the beneficial ownership equally as tenants in common.'[120]

In the circumstances of the case they held that the disparity between the parties' contributions meant the respondent should be awarded a 45% share in the property subject to certain adjustments which are irrelevant here. Like Gaudron J, they were prepared to credit the respondent with a hypothetical income of $3000 which the woman would have been able to earn if she had not had to take time off work when her son was born. Thus the case could be regarded as supporting the valuation of child rearing on an opportunity cost basis, at least where there is clear evidence of the woman's earnings prior to her assumption of child rearing responsibilities.

Toohey J also held in favour of the respondent on the basis of the unconscionable conduct of the appellant. However, unlike Mason, Wilson and Deane JJ, he was more attracted to the principle of unjust enrichment accepted by the Canadian courts and discussed below. In his judgment he suggested that the same result in the case could have been achieved by applying unjust enrichment principles, expressing the doubt whether 'the imposition of a constructive trust as a remedy for unconscionable conduct [was] any more 'principled' than the imposition of such a trust in order to prevent unjust enrichment.'[121] The comment acknowledges the scope for judicial choice in this area, contrasting sharply with Deane J's more traditional approach to the relationship between law and social policy.

The importance of *Baumgartner* is that it indicates that the analogy of the failed joint venture relied upon by Deane J in *Muschinski* v *Dodds*[122] is not confined to arrangements between co-habitants which have a commercial element, but may be extended to arrangements which couples make to save money and purchase property for the purpose of the relationship. It is not yet clear whether the fact of co-habitation combined with some merging of the parties' resources is sufficient to justify the imposition of a constructive trust to prevent one partner from retaining the benefit of the other parties' contributions or whether some more specific plan for pooling earnings and expenditure is necessary. A later court wishing to narrow the application of the unconscionability principle could regard the parties pooling of earnings in *Baumgartner* as the essential feature which made it possible to regard the situation as analogous to a failed joint venture. Despite Deane J's attempts to confine the doctrine by reference to existing categories, to some extent what is 'unconscionable' lies in the eye of the beholder. Because men have traditionally benefited from the sexual division of labour without giving their women of partners a share in their assets it may be difficult for courts to 'see' this

[120] (1987) 62 ALJR 29, 34.
[121] (1987) 62 ALJR 29, 36.
[122] (1985) 160 CLR 583.

conduct as unconscionable.[123] But courts wishing to expand the operation of the unconscionability doctrine could regard most co-habitating couples who had lived together for a reasonable period as engaging in a joint venture to share their lives and their resources. Although the contributions made by the woman respondent in *Baumgartner* were largely financial, the court also took non-financial contributions into account, albeit through the device of crediting her with hypothetical earnings. Similarly in the recent case of *Lipman* v *Lipman*[124] the court took into account both financial and domestic contributions to family resources in determining the share of the plaintiff. It would seem illogical to include contributions in the form of labour only when they are 'parasitical' on financial contributions. *Baumgartner* leaves open the possibility that development of the concept of unconscionability on an incremental case by case basis could ultimately lead it to play a similar role to the doctrine of unjust enrichment in Canada, which is discussed below.[125] This would give women some basis for obtaining recognition of the value of their household labour in Australia.

Finally it should be noted that the imposition of a constructive trust to provide the unconscientious retention of benefits provides the plaintiff with a proprietary rather than a personal remedy although there is some suggestion that the property interest may not arise until it is declared by the court. So far Australian courts have not yet considered the award of monetary compensation to women for domestic services performed while they are living with men. As will be seen below, a different approach has been taken in Canada. In the recent case of *Gillies* v *Keogh*, Sir Robin Cooke also suggested that the provision of monetary compensation could be considered by New Zealand courts.[126]

3 Unjust Enrichment

Until the decision of the Canadian Supreme Court in *Pettkus* v *Becker*[127] Canadian courts had followed the English line of authorities beginning with *Pettitt* v *Pettitt*[128] and *Gissing* v *Gissing*.[129] Three members of the Supreme Court of Canada in *Pettkus* v *Becker* based their decision in favour of the

[123] See for example the dissenting judgment of Mahoney J in *Green* v *Green* (1989) DFC 95–075. It is noteworthy that more 'masculine' forms of labour have now been regarded as sufficient to justify the imposition of a constructive trust. See *Miller* v *Sutherland* (1991) DFC 95–102.

[124] (1989) DFC 95–068, 75, 807.

[125] Cf *Muschinski* v *Dodds* (1985) 160 CLR 583.

[126] [1989] 2 NZLR 327, 332.

[127] (1980) 117 DLR (3d) 257. For discussion of the case see A J McClean, 'Constructive and Resulting Trusts — Unjust Enrichment in A Common Law Relationship — *Pettkus* v *Becker*' *(1982) 16 UBC Law Rev* 155; J L Dewar, 'The Development of the Remedial Constructive Trust' (1982) 60 *Canadian Bar Review* 265.

[128] [1970] AC 777.

[129] *Gissing* v *Gissing* [1971] AC 886. See for example *Murdoch* v *Murdoch* (1973) 41 DLR (3d) 367.

plaintiff on a 'common intention' giving rise to a resulting trust,[130] but Dickson J's judgment[131] recognised the artificiality of the common intention requirement and jettisoned it in favour of the concept of unjust enrichment as the basis for equitable intervention by the imposition of a remedial constructive trust. In so doing he relied on the earlier dissenting judgment of Laskin J in *Murdoch* v *Murdoch*[132] and the judgments of himself, Laskin CJC and Spence J in *Rathwell* v *Rathwell*.[133]

In his earlier judgment in *Rathwell* v *Rathwell* and in *Pettkus* v *Becker* Dickson J explained the basis for the imposition of a constructive trust as the principle 'the Court will not allow any man [sic] unjustly to appropriate to himself the value earned by the labours of another'.[134] The Court would intervene to prevent unjust retention of a benefit where there was 'an enrichment, a corresponding deprivation, and the absence of any juristic reason — such as a contract or disposition of law — for the enrichment'.[135] In relation to the requirement of absence of juristic reason for the enrichment. Dickson J commented that

> '... where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it'.[136]

Further, 'For the unjust enrichment principle to apply it is obvious that some connection must be shown between the acquisition of property and corresponding deprivation' of the claimant.[137]

In *Pettkus*, where Ms Becker had contributed financially to household expenses, as well as working in the couples' bee-keeping business, this causal connection was established and she was held to be entitled to a half interest in the assets of the defendant.

The principles articulated by Dickson J in *Pettkus* v *Becker* were later developed by the Supreme Court of Canada in *Sorochan* v *Sorochan*,[138] where the plaintiff claimed an interest in the defendant's farm on the basis of the domestic work, child care and very onerous farm labour undertaken during their 42 years co-habitation. The Supreme Court held that Alex Sorochan had

[130] Martland, Beetz and Ritchie JJ. The first two judges explicitly disagreed with Dickson J's constructive trust reasoning, while Ritchie J found that constructive trust principles were inapplicable in the circumstances.

[131] Laskin CJC, Estey, McIntyre, Chouinard and Lamer JJ concurred.

[132] (1973) 41 DLR (3d) 367.

[133] *Rathwell* v *Rathwell* (1978) 83 DLR (3d) 289. Martland, Judson, Beetz and de Grandpré JJ rejected the notion of a constructive trust imposed to prevent unjust enrichment. Ritchie and Pigeon JJ held it was unnecessary to determine whether the doctrine of unjust enrichment was applicable.

[134] *Rathwell* v *Rathwell* (1978) 83 DLR (3d) 289, 306.

[135] *Rathwell* v *Rathwell* (1978) 83 DLR (3d) 287, 306; *Pettkus* v *Becker* (1980) 117 DLR (3d) 257, 274

[136] (1980) 117 DLR (3d) 257, 274.

[137] (1980) 117 DLR (3d) 257, 277.

[138] (1986) 29 DLR (4th) 1.

derived a benefit in the form of valuable savings from the essential farm work and domestic labour; that this had contributed to the maintenance and preservation of the property; that Mary Sorochan had suffered a corresponding deprivation from working without reward and that there was no juristic reason for this enrichment as Mary Sorochan had been under no obligation to do the work and had had a reasonable expectation of some benefit in return for her 42 years of labour.

Having decided that the basic requirements for an unjust enrichment were satisfied, Dickson CJC, delivering the judgment of the Court, went on to consider whether proprietary relief, as opposed to monetary compensation was appropriate. He held that a substantial and direct connection existed between Mary Sorochan's work and the maintenance and preservation of Alex Sorochan's property. For a proprietary remedy to be available it was unnecessary to show that Mary's work had enabled Alex to buy the farm, or had increased its value.[139] In justifying the imposition of a constructive trust requiring Alex to hold a third of the farm on trust for Mary, Dickson CJC referred to the lengthy duration of the relationship, and Mary's reasonable expectation that she would obtain an interest in the land, although it is not entirely clear whether a reasonable expectation of benefit was regarded as an alternative to the causal connection requirement for attracting a proprietary remedy. The Supreme Court of Canada also upheld the trial judge's order that Alex pay Mary a lump sum as additional monetary compensation.

In *Pettkus* v *Becker* most of the discussion was concerned with the law of trusts and the possibility of awarding Ms Becker monetary compensation rather than a proprietary remedy was not considered. In *Sorochan*[140] Dickson J treated the constructive trust as a remedial device, leaving open the possibility[141] that a court may order compensation where the claim is based on provision of domestic labour which has unjustly enriched the defendant. This represents a departure from traditional principles. Claimants seeking recovery for personal services not provided under a contract have usually been required to satisfy the elements of an action in quantum meruit, which permits recovery for the value of services requested or voluntarily accepted by a recipient who knew or ought to known that the services were not being rendered gratuitously.[142] In the past courts have not been prepared to infer that a recipient knew he was expected to pay for domestic services provided by a wife or unmarried partner, since women are regarded as providing such services out of love and affection rather than with any expectation of reward.

The movement towards treating unjust enrichment as a cause of action in itself, rather than as a principle underlying other causes of action such as quantum meruit, makes it possible to challenge the assumption that domestic

[139] This implicitly overrruled some cases decided after *Pettkus* v *Becker* (1980) 117 DLR (3d) 257. The cases are discussed in K Farquhar, 'Causal Connection in Constructive Trust' (1986) 8 *Estates and Trusts Quarterly* 161.

[140] (1986) 29 DLR (4th) 1.

[141] This approach is consistent with the suggestion made by J H L Fridman and J G McLeod, *Restitution* (Toronto, Carswell, 1982), 568 and J McLeod's annotation to *Murray* v *Roty* (1983) 34 RFL (2d) 404 (Ont CA).

[142] Fridman and McLeod, op. cit. 413–22.

services are provided gratuitously, since it has led the court to focus on the extent to which the defendant has received a benefit at the expense of the plaintiff, in cases where the defendant's behaviour has prejudiced the plaintiff.[143]

The possibility of awarding monetary compensation in Canada contrasts with the approach of courts in England and Australia, which have refused to consider monetary remedies for unpaid work in the home because it is presumed that services performed within an intimate domestic context are performed gratuitously.[144]

The Sorochans had lived together for forty-two years and the burden borne by Mary Sorochan was quite exceptional. It is possible that courts may subsequently refuse to impose a constructive trust or order monetary relief where the claimant has done more 'normal' domestic work over a shorter period. Nevertheless *Sorochan* provides a basis on which it can be argued that the assumption of domestic responsibilities by the woman has enabled her partner to earn income and purchase assets. The difference between Mary Sorochan's work and that done by other women is one of degree not kind. Both save the other partner money he may expend on acquiring assets or improving their value. It does not seem logical to recognise exceptional contributions while ignoring lesser ones. Nor is it logical to take into account the value of domestic labour when a claimant contributes *both* financially and non-financially but to ignore it when domestic contributions are not 'parasitical' on financial contributions.

Sorochan v *Sorochan*[145] has been followed in a number of cases where the owner of property has been unjustly enriched by indirect financial contributions to the resources of the other partner (for example payment of house-

[143] Ibid 422; J G McLeod's annotation to *Murray* v *Roty* (1983) 34 RFL (2d) 404 (Ont CA).

[144] *Hohol Hohol* (1980) FLC 90–824, 75, 212 and see I J Hardingham and M A Neave, *Australian Family Property Law* (Sydney, Law Book Co, 1984), 255–60.

[145] (1986) 29 DLR (4th) 1. *Sorochan* has been followed in the cases listed below. Only decisions in which the major contribution made by the claimant consisted of homemaking and domestic labour are discussed in the text. *Seed* v *Seed* (1986) 5 RFL (3d) 120 (Ont HC) [Use of joint funds to purchase machinery and equipment to set up a business held to have unjustly enriched the husband.] *Prentice* v *Lang* (1987) 10 RFL (3d) 364 (BC SC) [Women not unjustly enriched by man helping to build a cabin on land owned by woman's son, as man had not expected to receive more than the right to live in the cabin with the woman while the relationship continued. Man had not suffered a deprivation as his contribution was not at expense of other income.] *Wilson* v *Wilson* (1988) 14 RFL (3d) 98 (Ont HC) [Constructive trust applicable to home in name of wife arising from husband's financial contributions and labour in repairing and renovating the home]; *Garvey* v *Garvey Estate* [1988] 2 WWR 195 (Sask QB). [Wife's financial contributions in landscaping land and renovating property held to amount to an unjust enrichment of the husband, who took by survivorship.] See also *Strang* v *Inkpen* (1989) 20 RFL (3d) 393 (Nfld TD); *Duncan* v *Duncan* (1987) 6 RFL (3d) 206 (Alta QB); *Guzzo* v *Cocoroch, Catlin Estate (Scarcelli) and Scarcelli* (1989) 38 BCLR (BC) 41.
Note that in some Provinces the issue of unjust enrichment may become relevant between married couples despite matrimonial property legislation; see *Leslie* v *Leslie* (1987) 9 RFL (3d) 82 (Ont HC); *Trenchie* v *Trenchie* (1987) 12 RFL (3d) 357 (Alta QB); *Saifer* v *Koulack* (1987) 10 RFL (3d) 307 (Man QB); *Wilson* v *Wilson* (1988) 14 RFL (3d) 98 (Ont HC); *McDonald* v *McDonald* (1988) 11 RFL (3d) 321 (Ont HC); in *Berdette* v *Berdette* (1988) 14 RFL (3d) 398 (Ont HC).

keeping expenses) or by indirect financial contributions coupled with domestic contributions. Some cases decided after *Pettkus*[146] and/or *Sorochan* have also provided a remedy for unjust enrichment where the contributions of the claimant consisted solely or mainly of domestic services and or child care.

There are a number of cases in which courts have recognised the effect of the sexual division of labour by finding that the performance of housework and child care is sufficiently connected to the acquisition, conservation or improvement of property to justify the imposition of a constructive trust. In other cases, courts have refused to recognise the existence of this nexus. Alternatively, the reasonable expectation of the contributor has been held to give rise to a proprietary remedy, even where no causal connection has been found between the claimant's contribution and the acquisition, maintenance or preservation of the defendant's property. Where a proprietary remedy could not be granted because of failure to satisfy these requirements courts have also sometimes been prepared to grant monetary compensation.

The 1982 case of *Lawrence* v *Lindsey*[147] and the 1984 case of *Herman* v *Smith*[148] both preceded *Sorochan* but provided a remedy for a woman whose contributions consisted solely or mainly of household services.[149] In the former case the couple had lived together for 24 years and had children, whereas in the latter case the relationship lasted only six and a half years and the claimant was not responsible for child-rearing. In both cases the contributions were almost entirely domestic, although in *Lawrence* the woman also did some farm work and made very minor financial contributions from her earnings as a piece-worker. In both these cases the Court held that the three prerequisites for unjust enrichment has been satisfied. In *Lawrence* v *Lindsey* for example, Stratton J found there was no juristic reason for the enrichment, as the plaintiff had prejudiced herself in the reasonable expectation of acquiring the interest in the property and the defendant had freely accepted the benefits of her labour. Similarly, in *Herman* v *Smith* Waite J commented:

> '. . . during the course of the six or seven-year relationship the defendant, in fact and in substance, received, for all practical purposes, the full benefits of

[146] (1980) 117 DLR (3d) 257.
[147] (1982) 28 RFL (2d) 356 (Alta QB).
[148] (1984) 42 RFL (2d) 154 (Alta QB).
[149] See also *Schupbach* v *Rambo* (1981) 26 BCLR 154, where contributions of labour in building a sailboat, renovating a house and performing household duties over 11 years were held to justify the court imposing a constructive trust on the house and sailboat; *Alford* v *Wendell* (1984) 56 BCLR 52 where the plaintiff and defendant lived together for 4 1/2 years and the plaintiff also contributed financially to household expenses as well as assisting in renovating a boat and doing housework and the court imposed a constructive trust in favour of the claimant; *Schumacher* v *Schumacher* (1984) 56 BCLR 381 where a constructive trust was imposed in favour of a wife who assisted in remodelling the family home, contributed to family expenses and, by her housekeeping skills and frugality enabled the husband to spend money in improving the home; and *Murray* v *Roty* (1983) 147 DLR (3d) 438 where the couple lived together for eight years, the woman worked in the man's business for less than the minimum wage, paid some housekeeping expenses and worked on the defendant's farm and did all the housework and the court imposed a constructive trust in favour of the claimant.

a good, sound and healthy marriage without in the end result facing or having to suffer any of the obligations arising from that relationship.'[150]

In *Lawrence* v *Lindsey*[151] the court held that there was a sufficient causal connection between the claimants' labour and the preservation, maintenance and improvement of the property to justify the imposition of a constructive trust,[152] although the remedy was denied because of the claimant's laches. The case was approved by Dickson J in *Sorochan*.

In *Herman* v *Smith*[153] the court granted compensation calculated by reference to average annual earnings for female housekeepers. The amount of compensation was reduced to take account the value of accommodation received by the claimant. Proprietary relief does not seem to have been considered by the court, a factor which is apparently attributable to the court's refusal to find a causal connection between the claimant's contributions and the defendant's property.

Three Canadian cases decided after *Sorochan* have also recognised that a property owner may be unjustly enriched by receiving household services. In the first of these cases, *Everson* v *Rich*,[154] the woman had given up her job to follow the man to Saskatchewan, the couple had lived together for seven years, and the woman's contribution consisted mainly of domestic services although she had also made some financial contributions to household expenses. In *Crisp* v *Banton*[155] the relationship lasted 13 years, during which the couple had a family and agreed that the woman should stay at home to care for the children, so that the woman's contributions were almost entirely domestic. In *Jolicoeur* v *Le Vasseur*[156] the couple had lived together for about 24 years during which the plaintiff worked as an unpaid receptionist and janitor in the defendant's business, provided the usual housekeeping services and raised two children. In each of these three cases it was held that the three requirements for unjust enrichment had been satisfied. In one of these cases, *Crisp*,[157] there was little discussion of the causal connection requirement but a constructive trust was imposed, giving the woman a 40% interest in the home owned by the man. The report of the case does not explain how her interest was quantified. In *Jolicoeur* Halvorson J appears to have taken the view that it was necessary for the plaintiff to show *both* a causal connection between the deprivation and the defendant's property *and* a reasonable expectation of an interest in that property before a constructive trust could be imposed. He held that the causal connection requirement had been satisfied.

'Her assistance in the denturist business contributed to the acquisition,

150 (1984) 42 RFL (2d) 154, 160 (Alta QB).
151 (1982) 28 RFL (2d) 356 (Alta QB).
152 K Farquhar, 'Causal Connection in Constructive Trust' (1986) 8 *Estates & Trusts Quarterly* 161, 173. Farquhar has argued that it would be more accurate to regard the proprietary remedy as based on the claimant's expectation that she would obtain an interest.
153 (1984) 42 RFL (2d) 154 (Alta).
154 (1988) 16 RFL (3d) 337 (Sask CA).
155 (1988) 18 RFL (3d) 24 (Ont HC).
156 (1987) 10 RFL (3d) 136 (Sask QB).
157 (1988) 18 RFL (3d) 24 (Ont HC).

preservation, maintenance and improvement of the clinic. Less directly, by providing free domestic services, she enabled the defendant to save expenses which made it easier for him to enhance the business, contribute to a registered retirement savings plan and acquire a cottage and other assets.'[158]

However, the plaintiff's failure to prove a reasonable expectation that she would obtain an interest in the particular property meant that she was only entitled to monetary relief. The basis on which her entitlement was calculated is somewhat unclear. The plaintiff had been registered as joint tenant of the couple's house and the court regarded this as 'more than adequate benefit for household services' although at another point in the judgment the transfer of a joint interest to the plaintiff was characterised as a gift.[159]

In *Everson* it was also held that no causal connection existed between the domestic work of the woman and the acquisition of assets by the male and the court refused to impose a constructive trust. Somewhat inconsistently, Sherstobitoff J went on to calculate the damages by reference to the increase in value of the assets of the male partner who had been unjustly enriched.[160]

On the other side of the line there are a number of cases in which the claimant has been unsuccessful in obtaining a remedy for contributions taking the form of household services. Perhaps the most striking example of a refusal to recognise the contribution made by a home-maker to the resources of the other partner is *Connors* v *Connors*,[161] where the couple had lived together for 34 years. In that case Noel J commented that the woman 'did all that could be expected of her as a spouse but she did no more' suggesting that exceptional efforts of the kind made by Ms Becker were necessary to support a claim for unjust enrichment. Similarly, in *Heppner* v *Heppner*[162] a remedy was denied to a woman who had lived with her partner for almost thirty years where her contributions consisted almost solely of housework and care of the couple's child.[163] These cases were decided before *Sorochan*, and might be decided differently today.

However there have also been post-*Sorochan* decisions where women claiming unjust enrichment on the basis of unpaid domestic work have been unsuccessful. In *Kshywieski* v *Kunka*[164] the woman seems to have moved in

[158] (1987) 10 RFL (3d) 136, 140 (Sask QB).

[159] (1987) 10 RFL (3d) 136, 142. See also *Davidson* v *Worthing* (1986) 9 BCLR (2d) 202 where the relationship lasted for 8 years and the plaintiff contributed money, worked part-time for the defendant's company and did housekeeping. Here an unjust enrichment was found to have occurred, but no constructive trust was imposed because of lack of causal connection between the plaintiff's contributions and the log home in which she had claimed an interest. The issue of damages was not discussed.

[160] (1988) 16 RFL (3d) 337

[161] (1986) 1 RFL (3d) 94 (Nfld SC).

[162] (1986) 1 RFL (3d) 77 (Ont Div C).

[163] The court regarded the case as distinguishable from *Murray* v *Roty* (1983) 34 RFL (2d) 404 (Ont CA), where the claim was not based solely on domestic services. See also *MacKenzie* v *Scoretz* (1982) 42 BCLR 109, where the couple had lived together for ten years and the claimant had performed household services, and the court held no unjust enrichment had occurred, and *Becker* v *Green* (1985) 36 ACNS (2d) 60 where a remedy was also denied.

[164] [1986] 3 WWR 472 (Man).

with the man because of the unsuitability of her own accommodation. The man originally intended to marry her, but later changed his mind, and their relationship was terminated by his death three years later. The court held that the woman's housework, and some unpaid labour on the farm had not unjustly enriched the deceased, suggesting that the decision in *Herman* v *Smith*[165] had gone too far in allowing a woman recovery for housework done during a six and a half year relationship. Similarly, in *Reeves* v *LaRose*[166] where the woman claimed unjust enrichment on the basis of six years household services provided while she was married to the defendant, the court refused to impose a constructive trust. These cases indicate continuing judicial reluctance to recognise the link between performance of domestic services and the enhancement of the earning capacity of the other partner. They may be explicable on the ground that the services provided were relatively minor and/or the relationships were short-lived, so that the claimant could not have been said to have had the reasonable expectation of benefit required to show a 'lack of juristic reason' for the enrichment.

In *Sharpe* v *Sharpe*[167] however, the relationship had lasted for over 40 years. Although he found that the wife's unpaid work as homemaker had 'undoubtedly contributed to the acquisition of assets registered in the defendants name',[168] Drost LJSC refused to impose constructive trust because the wife was not 'in need' and the husband was prepared to meet her expenses and make a will in her favour. This meant that it was not unjust for the husband to retain the assets accumulated partly as a result of her efforts. The issue of need is entirely irrelevant to the question of whether an unjust enrichment has occurred and the case seems to be wrongly decided. Farquhar has argued that the court could simply have refused to grant a remedy in the exercise of its equitable discretion.[169] Undoubtedly the fact that the wife was mentally ill and confined to an institution influenced the decision.

The above analysis of cases decided since *Pettkus* indicates considerable doctrinal confusion. Although Mary Sorochan's household services and farm labour were regarded as unjustly enriching Alex, it is not yet clear whether the performance of domestic work and child care responsibilities will normally be regarded as unjustly enriching the other partner. Some cases have suggested that unless the services are in some way unusual or exceptional they will not attract the *Sorochan* principle.[170] Courts seem to be moving away from this approach although domestic work may still be characterised as inconsequential where the relationship is of short duration. Nor is it clear when courts will be prepared to find a causal connection between the contribution of the plaintiff and the property of the defendant or whether services in the home can ever be regarded as relevant to the acquisition, preservation or maintenance of

[165] (1984) 42 RFL (2d) 154 (Alta).
[166] (1987) 8 RFL (3d) 87 (BCSC).
[167] (1986) 17 BCLR (2d) 18.
[168] (1986) 17 BCLR (2d) 18, 23.
[169] K Farquhar, 'Causal Connection in Constructive Trust After *Sorochan* v *Sorochan* (1989) 7 *Canadian Journal of Family Law* 337, 341.
[170] Cf *Stefaniuk* v *Stefaniuk* (1987) 41 DLR (4th) 641 (Man) where the husband improved a cottage owned by the wife.

business assets as opposed to assets such as the family home.[171] Certainly, there is not yet a uniform judicial acceptance that the sexual division of labour is necessarily linked with the enhancement of earning capacity and the acquisition of assets by the partner in the paid work force. There is doubt about the importance of the duration of the relationship, though presumably this may throw light on whether the defendant has been enriched and on the question of reasonable expectation. It may be suspected that the more closely the relationship resembles marriage the more willing the court will be to find a remedy.[172]

Even where the court holds unjust enrichment has occurred, there is uncertainty surrounding the nature of the remedy and how it is to be quantified. In *Sorochan* v *Sorochan* Dickson CJC treated the constructive trust as only one of the remedies available for unjust enrichment.

> 'The constructive trust constitutes one important judicial means of remedying unjust enrichment. Other remedies, such as monetary damages, may also be available to rectify situations of unjust enrichment.'[173]

He went on to hold that a constructive trust could be imposed where the causal connection trust was satisfied and a 'clear proprietary relationship'[174] existed between the services provided and the property in which an interest was claimed. In some of the later cases courts seem to have taken the view that a proprietary remedy must be provided whenever causal connection is established. The more recent case of *Georg* v *Hassanadi*[175] has re-asserted the discretionary power of the court to determine the appropriate remedy. In that case the couple had lived together after 15 years, during which time the claimant had cared for her male partner, managed an apartment building purchased for $3,300,000, and personally carried out plumbing and electrical repairs. The court held that an unjust enrichment had occurred, and that the claimant's work was causally connected to the property, but that it would be inappropriate to impose a constructive trust, given the nature of the property. Instead the defendant was ordered to pay the plaintiff the sum of $725,000 as compensation for her work and this payment was charged on the property as security for its payment.

The view that the court has a discretion in determining the nature of the remedy for unjust enrichment is confirmed in the recent decision of the Supreme Courty of Canada in *Lac Minerals Ltd* v *International Corona Resources*,[176] In that case La Forest J referred to a

> 'two-step approach. First, the Court determines whether a claim for unjust enrichment is established, and then, secondly, examines whether in the circumstances a constructive trust is the appropriate remedy to redress that unjust enrichment . . . The constructive trust does not lie at the heart of the

[171] Cf *Carafun* v *Carafun* (1982) 42 BCLR 109.
[172] Cf *Mackenzie* v *Scoretz* (1982) 42 BCLR 109.
[173] *Sorochan* v *Sorochan* [1986] 29 DLR (4th) 1,7.
[174] [1986] 29 DLR (4th) 1, 10.
[175] (1989) 18 RFL (3d) 225 (Ont HC).
[176] (1989) 61 DLR (4th) 14.

law of restitution. It is but one remedy, and will only be imposed in appropriate circumstances.'[177]

Further:

'It is not the case that a constructive trust should be reserved for situations in which a right of property is recognised. This would limit the constructive trust to its institutional function, and deny to it the status of a remedy, its more important role. The imposition of a constructive trust can both recognise and create a right of property.'

Thus it appears that there is considerable flexibility in fashioning a remedy for an unjust enrichment, somewhat akin to the remedial discretion which English courts have exercised where the doctrine of proprietary estoppel applies.[178] But there is still some confusion in how the remedy should be quantified. Whether a personal or proprietary remedy is granted it is often hard to escape the conclusion that in cases involving cohabitants the courts have often simply awarded what they believe is fair. Orders have ranged from amounts based on the value of the claimant's labour, assessed by reference to wages paid for equivalent work[179] to amounts which are far larger than could be justified on that basis.[180] Since the basis for equitable intervention is that the legal title holder has been unjustly enriched by the claimant's financial or non-financial contributions, the remedy (whether proprietary or personal) should logically reflect the extent of that enrichment.

Perhaps one reason for lack of clarity in quantification is that in some cases a remedy based on the value of the services provided (leaving aside the question of whether they should be valued on a replacement cost, opportunity cost or some other basis) seems appropriate, whilst in other situations a remedy giving effect to the claimant's expectations seems fairer. In cases where the co-habitation was relatively short-lived and the assets of the earning partner largely accumulated before the couple begin to live together, justice may be achieved by compensating the woman for the value of the services she provided to the defendant while the couple were living together. In longer-term relationships where the couple have behaved as if they were married, it may be more appropriate to give effect to the woman's expectations that she will receive an equal share in the property than to simply qauntify the value of her labour. Since 'expectations' are seen as relevant by the courts in determining whether the enrichment is unjust and (probably) in deciding whether a proprietary remedy is available it seems odd that the quantification of the remedy (whether personal or proprietary) should depend on the extent of the

[177] Transcript 49.

[178] I J Hardingham and M A Neave, *Australian Family Property Law* (Sydney, Law Book Co, 1984), 136.

[179] See for example *Strang* v *Inkpen* (1989) 20 RFL (3d) 393 (Nfld TD) [$6 per hour for work assisting in building a house and domestic labour was set off against other benefits received by the claimant]; *Herman* v *Smith* (1984) 42 RFL (2d) 154 (Alta QB).

[180] As for example the $725,000 awarded in *Georg* v *Hassanadi* (1989) 18 RFL (3d) 225 (Ont HC) which seems to have been based on the deprivation of the plaintiff rather than the enrichment of the defendant.

defendants' enrichment. So far Canadian courts do not appear to have addressed this issue.[181]

Although predicting the outcome of claims based largely on contributions of housework and child care may be difficult until the principles are more firmly established, the trend of the Canadian cases is encouraging. The President of the New Zealand Court of Appeal, Sir Robin Cooke,[182] has suggested that it makes little practical difference whether disputes between cohabitees are resolved by applying notions of unconscionability, unjust enrichment, imputed common intention or estoppel. At least in the context of domestic contributions, this view may be wrong. In Australia, where the unconscionability principle is seen as the basis for intervention, analysis tends to focus on the nature of the parties' relationship and their particular financial arrangements, even when it is extended beyond the common intention constructive trust. By contrast, the notion of unjust enrichment requires the court to examine the connection between the efforts of the claimant and the property which the defendant owns at the end of the relationship (though it also takes reasonable expectation into account). In this way it can focus more precisely on the effects of the sexual division of labour. And, as Watts puts it:

> 'In many of the cases involving failed domestic relationships . . . the substance of the plaintiff's complaint . . . is not merely that the plaintiff has relied or acted to his or her detriment, for both parties may have done that, but that only one of the parties relying on the relationship has ownership at law of the assets (enrichment) derived from the contribution, monetary and non-monetary to the relationship.'[183]

The adoption of unjust enrichment analysis has enabled Canadian courts to abandon fictional notions of 'common intention' which ignore the disparity of economic power which exists between wage-earners and those involved in providing unpaid domestic labour. A re-conceptualisation of the basis for equitable intervention has prompted the recognition that the gendered division of household labour benefits men and disadvantages women, and that the financial resources accumulated by many men reflect, in part, the unpaid work of their female partners. Continuing confusion about the application of the 'causal connection' requirement in Canada suggests that not all judges are yet prepared to accept this nexus.

4 Relationship

The fourth approach which might be taken to the resolution of property disputes between couples who live together would be to develop distinctive

[181] For further discussion see M A Neave, 'Three Approaches to Family Property Disputes — Intention, Belief, Unjust Enrichment and Unconscionability', in T Youdan (ed) *Equity, Fiduciaries and Trusts* Toronto, Law Book Co, (1989), 247, 260–61.

[182] *Gillies* v *Keogh* [1989] 2 NZLR 327, 330, 331. This approach was not accepted by Richardson J (who preferred the 'well settled' principles of estoppel (at 344). Craig J also expressed some reservation (at 348). In *Pasi* v *Kamana* [1986] 1 NZLR 603, 607. McMullin J expressed support for unjust enrichment principles. See P G Watts, 'Restitution' [1989] *NZ Recent Law Review* 386.

[183] P G Watts, 'Restitution' [1989] *NZ Recent Law Review* 386, 387.

principles dealing with indirect financial contributions and contributions of domestic labour made in the context of such relationships. Courts in all four jurisdictions discussed in this article have rejected this principle, asserting that the same rules must apply to property disputes between strangers, family members such as parents and children, homosexual cohabitees, heterosexual cohabitees and (in the absence of legislation) married couples.[184]

Some would argue this approach is still justified. Many feminists reject the ideology which supports the conventional heterosexual family and some believe that the law should cease to favour such families over homosexual cohabitation and communal living arrangements. According to this view it would be inappropriate to develop special rules for resolving property disputes between men and women who live together. Such an approach could lead to unjust anomalies between heterosexual and homosexual cohabitees who made indirect contributions to their partner's resources. The argument is made by Ruth Deech:

> 'Once the clear commitment of marriage is absent there is no logical reason for differentiating between the legal effects of brother and sister partnerships, heterosexual and homosexual unions . . .'[185]

Although it would be unfair to differentiate between homosexual and heterosexual cohabitees where a person claims an interest because of indirect *financial* contributions made to the resources of the other partner, the author's view is that there is a clear reason for such differentiation in the case of contributions of domestic work and child care. This article has argued that the failure of current law to take account of the value of the housework and child care is a form of systemic discrimination against women. The law does not have this effect in the context of homosexual unions (although of course it discriminates against homosexual cohabitees in a variety of other ways). There is no evidence that any socially ordained division of labour[186] exists within homosexual unions. To treat the labour performed in the context of heterosexual cohabitation in the same way as labour performed in other living arrangements (for example homosexual relationships and group households) ignores the effect of the ideology which treats women as having primary responsibility for these tasks. Women providing household and child care services to husbands or male partners are not in the same situation as, for example, homosexual cohabitees, precisely because their partners normally assume they will provide unpaid domestic labour.

Although courts are required to apply the same rules to property disputes between heterosexual cohabitants as those applicable to disputes between

[184] *Allen* v *Snyder* [1977] 2 NSWLR 685, 689 per Glass JA.

[185] Cf R Deech, 'The Case Against Legal Recognition of Cohabitation' in J M Eekelaar and S N Katz, *Marriage and Cohabitation in Contemporary Societies* (Toronto, Butterworths, 1980) 300.

[186] In fact the evidence suggests the contrary. See M Schneider, 'The Relationships of Cohabitating and Lesbian Couples' (1986) 10 *Psychology of Women Quarterly* 234; M Cardell, S Finn and J Maracek, 'Sex-Role Identity, Sex Role Behaviour and Satisfaction in Heterosexual, Lesbian and Gay Male Couples' (1981) 5 *Psychology of Women Quarterly* 488.

strangers, there is a constant tension between this principle and the recognition that it has a discriminatory impact on women. The present law tends to create

> '. . . a privileged (and predominantly male) caste which enjoy[s] immunity from the law on the basis of a sheer technicality [the failure to marry] — a consequence which is, to say the least, incompatible with the principle of sexual equality.'[187]

But close examination of the cases suggests that the nature of the parties' relationship covertly affects the outcome and continues to influence the development of law. In *Gillies* v *Keogh* Cooke P recognised that the reasonable expectations of the parties were affected by the stability and duration of their relationship[188] and Richardson J thought that social attitudes in New Zealand led to an expectation in de facto parties that family assets would normally be shared.[189] In *Pettkus* v *Becker*, Dickson CJC referred to the fact that contributions were made in the context of a relationship which was 'tantamount to spousal' in determining that there was no juristic reason for Ms Becker's enrichment[190] and in *Sorochan* v *Sorochan*[191] he regarded the duration of the cohabitation as a 'compelling factor' in holding that Mary Sorochan was entitled to a proprietary interest in her husband's home.

It is hard to read Canadian discussions without reaching the conclusion that judges are often deciding cases by examining how closely the particular relationships resembles a marriage. In English and Australian cases courts have been more inclined to mask the extent to which they are applying distinctive rules to cohabitees by using technical concepts which ostensibly satisfy traditional trust rules nevertheless Australian courts may be more likely to find a constructive trust based on the 'common intention' of the parties where the relationship resembles marriage in terms of duration and the presence of children.[192] It would be preferable to acknowledge explicitly the significance of the parties' relationship by developing special rules for the resolution of property disputes between cohabitees which recognised the value of domestic labour.

Although the development of equitable principles may provide remedies to cohabitees in the future, it is argued that legislative intervention is desirable. Even in Canada, where the principle of unjust enrichment goes some way towards recognising the value of women's work, there is considerable uncertainty surrounding the application of the principle and the nature and quantification of remedies.0Settlement of disputes between cohabitees and between cohabitees and third parties would be facilitated by clearer legislative guidelines. If legislation was confined to heterosexual cohabitees, general

[187] K J Gray, *Reallocation of Property On Divorce*, (Abingdon, Professorial Books, 1977), 336.
[188] [1989] 2 NZLR 327, 333–4.
[189] [1989] 2 NZLR 327, 347.
[190] (1980) 117 DLR (3d) 257, 274.
[191] (1986) 29 DLR (4th) 1.
[192] J H Wade, 'Trusts, The Matrimonial Home and De Facto Spouses' (1978–80) 6 *University of Tasmania Law Review* 97.

equitable principles could continue to provide a remedy for people living in other relationships where this was appropriate, such as where indirect financial contributions enabled a defendant to accumulate assets.

Legislation could also redress the systemic effects of the sexual division of labour. Notions of reasonable expectation, unjust enrichment or unconscionability may not provide a remedy where a woman works in the home knowing that her partner does not intend her to obtain an interest in it. Some would regard this as appropriate because the woman can withdraw her labour or choose to leave the defendant. But this notion of freedom of choice is based on the fiction that women have the same economic power as men. In reality their choice is often between leaving with the children and subsisting on welfare payments, or remaining with the defendant where they will at least be housed. Legislation which prevents cohabitating couples from entering into unfair agreements may be preferable to equitable principles which reinforce the power of (usually male) property owners. So far this issue has not been directly confronted in Canadian unjust enrichment cases, where courts have often simply ignored the fact that a man has expressly refused to transfer an interest to his contributing partner.

A related argument which must be addressed in proposing relationship-specific rules for allocation of property rights between cohabitees is that such rules impinge on the autonomy of individuals 'to try alternative forms of relationship' which do not attract the same legal consequences as marriage.[193] Some parties may see their relationship as a means of rejecting the sexual division of labour and achieving greater equality between men and women. They may deliberately choose to refrain from marriage and keep their earnings and property separate. Special rules for cohabitees could conceivably disadvantage the minority of women who earn more than their partners, and usually do most of the housework as well. Cynics may suggest that the developing tendency of courts and legislatures to provide remedies for women making domestic contributions is simply a patriarchal strategy.[194] By recognising the trend towards informally constituted unions and treating them more like traditional families, the law may be reinforcing the dependent and subservient role of women in the guise of protecting them. In the area of marriage, there is a tendency towards diminution of the legal rights and responsibilities arising from the status of marriage[195] which is reflected in no-fault divorce laws and qualifications to the obligation to support after the relationship has ended. It would be ironic if, simultaneously with this devel-

[193] R Deech, 'The Case Against Legal Recognition of Cohabitation' in J M Eekelaar and S N Katz, op cit 300.

[194] M Freeman and C Lyon, *Cohabitation Without Marriage* (Aldershot, Gower, 1983), 191, 211.

[195] Sir Henry Maine described the movement of societies 'From Status to Contract', *Ancient Law* (1959), 131. The 'contractual' basis treatment of marriage is not fully developed in all the jurisdictions under consideration. For example, in Australia, married couples cannot enter into a pre-nuptial contract ousting the property jurisdiction of the Family Court, though some changes have been recommended by the Australian Law Reform Commission, *Matrimonial Property* (Report No 34, 1987) Chapter 7.
For a fascinating discussion of 'the new marriage', see M A Glendon, 'The New Marriage and the New Property' in J M Eekelaar and S N Katz, op cit 59.

opment, cohabitation became a new status attracting specialised legal obligations.

Although these arguments highlight some dangers in equating cohabitation with marriage, the 'autonomy' argument ignores the extent to which the current law institutionalises the power of the principal wage earner. While people should be encouraged to enter into cohabitation contracts, the majority of couples will not do so. People who are living together are often unaware of the legal consequences of marriage and even believe that cohabitation for a certain period is equivalent.[196] Couples often begin to live together with the intention of marrying and when it becomes apparent to one partner that the other has changed his or her mind, it may be both emotionally and financially difficult to withdraw from the relationship. Even women who are assaulted by their partners often persist with the relationship, particularly when the couple have children. The notion of autonomous choice in setting the financial terms of the relationship ignores the economic inequality which continues to exist between men and women.

Legislatures need to develop remedies which protect women while at the same time recognising the rights of cohabitants to 'opt out' of marriage-like obligations. Such principles must recognise the reality of the sexual division of labour and its effect on the economic position of women after cohabitation comes to an end.

SOME POLICY ISSUES FOR LEGISLATION

The policy issues which arise when considering proposals for legislative reform have been introduced in the preceding section. If it is accepted that the value of domestic labour should be recognised, what form should this recognition take? Should the legislation operate only between the parties or should it also apply in property disputes involving third parties? How should the balance be maintained between allowing couples to make their own financial arrangements and preventing the economic inequality suffered by women as the result of the sexual division of labour?

The final section of this Paper discusses these issues and examines the strengths and weaknesses of the New South Wales *De Facto Relationships Act* 1984,[197] the first legislation in the common law world to provide for the alteration of the property rights of men and women living together without marrying.[198]

[196] I have spoken to many community groups in Australia about the laws which affect cohabitating couples. I have frequently been asked to define the period of cohabitation which must be satisfied before cohabitation becomes equivalent to marriage. This commonly held view is not suprising, given legislative provisions which treat cohabitants as married for certain purposes.

[197] The expression 'de facto partner' or 'de facto' husband or wife is widely used in Australia to describe heterosexual cohabitants.

[198] The State of Victoria has now conferred power on the court to re-allocate interests in *real* property: *Property Law Amendment Act* 1987, inserting Part IX into the *Property Law Act* 1958. The Victorian reforms are much less far-reaching than those in New South

1 How Should the Value of Domestic Contributions Be Recognised?

Matrimonial property reforms have often sought to improve the economic position of women by treating domestic work as a contribution which must be taken into account when property is divided.[199] Some jurisdictions expressly provide that domestic contributions and financial contributions are to be accorded equal value. Periodic payments of maintenance have also been used to alleviate the affects of the sexual division of labour on the earning capacity of wives. The New South Wales *De Facto Relationships Act* 1984 restricts the rights of cohabitees to claim maintenance from partners, but confers a broad discretion to adjust the property rights of couples who have lived together by reference to their financial and non-financial contributions.[200]

The jurisdiction to alter property rights applies after the couple have lived together 'as husband and wife on a bona fide domestic basis although not married to each other' for two years. Property rights can also be altered if the couple have co-habited for less than two years but have had a child; or the applicant for relief has made substantial contributions for which he/she would not be adequately compensated if an order were not made; or the applicant has the care and control of a child of the respondent and failure to make an order would result in serious injustice to the applicant.[201] The two year cohabitation requirement was intended to discourage claims based on relatively trivial contributions whilst permitting a claim to be considered in special circumstances where the parties had lived together for a shorter period.

The factors which must be taken into account by the court in re-allocating property interests include direct and indirect financial and non-financial contributions made by a partner to 'the acquisition, conservation or improvement of any of the property of the partners or either of them or to the financial resources of the partners or either of them'.[202] The effect of the sexual division of labour is recognised by requiring the court to take into account contributions, including contributions in the capacity of homemaker or parent

> 'made by either of the facto partners to the welfare of the other de facto partner or to the welfare of the family constituted by the partners and one or more of the following, namely:
> (i) a child of the partners;
> (ii) a child accepted by the partners or either of them into the household of the partners, whether or not the child is a child of either of the partners.'[203]

Wales. Reforms have also been recommended in New Zealand and in the Northern Territory. See *Report of the Working Group on Matrimonial Property and Family Protection (Oct 1988)* New Zealand.

199 See for example, *Matrimonial Property Act* 1976 (NZ) s181(1); *Matrimonial and Family Proceedings Act* 1984, (UK) s25(2)(f); *Family Law Act* 1975 (Cth) s79(4)(c). The New Zealand legislation provides that 'There shall be no presumption that a contribution of a monetary nature . . . is of greater value than a contribution of a non-monetary nature' s18(2).

200 *De Facto Relationships Act* 1984 (NSW), s20, 27.

201 *De Facto Relationships Act* 1984 (NSW), ss3, 17.

202 Section 20(1)(a).

203 Section 20(1)(b).

The legislation does not provide any guidance on the weight to be attributed to domestic contributions,[204] and, although such contributions have now been considered in a number of cases[205] there is still considerable uncertainty as to how they will be valued. In *Roy* v *Sturgeon*[206] Powell J rejected the view that direct financial contributions were to be valued more highly than indirect financial contributions or contributions as a homemaker and commented that domestic contributions were to be recognised not in a token but in a substantial way. Nevertheless, the basis on which he valued the domestic contribution of the plaintiff was not clear.

In *D* v *McA*[207] Powell J assessed the value of the plaintiff's domestic contributions on a replacement cost basis, taking into account the amount which would have been payable to a housekeeper for performing the services provided by the plaintiff, and setting off the financial contributions made by the defendant in supporting the plaintiff. Evidence of the costs of replacing domestic services has been heard in a number of other cases, but this evidence seems to have had relatively little impact on the outcome.[208] In the recent decision of Powell J in *Watt* v *Watt*[209] the 'coldly analytical' approach of arriving at valuation of housekeeping services solely by reference to mathematical calculation was rejected[210] in favour of a broader judicial discretion in weighing the value of such contributions.

The proposals of the New South Wales Law Reform Commission which preceded the Act, were directed to overcoming the injustice arising from the failure of equitable principles to recognise indirect financial and domestic contributions in the absence of a 'common intention'.[211] (The Report was delivered prior to the development of the unconscionability principle by the High Court.) The Commission rejected the view that de facto relationships

[204] It has been held that differences between *Family Law Act* provisions and the *De Facto Relationships Act* 1984 prevent the court from applying decisions made under the *Family Law Act* uncritically. However despite these differences, it appears that the reasoning in *Mallet* v *Mallet* (1984) FLC 91–507, would also apply to the interpretation of the judicial discretion conferred by s20 of the *De Facto Relationships Act* 1984 (NSW). Thus the development of guidelines by courts may be regarded as inconsistent with the broad judicial discretion conferred upon them.

[205] See for example *D* v *McA* (1986) DFC 95–030; *Roy* v *Sturgeon* (1986) DFC 95–031; *Reilly* v *Gross* (1986) DFC 95–035; *Wilcock* v *Sain* (1986) DFC 95–040; *Dwyer* v *Kaljo* (1987) DFC 95–053; *Vichidvongsa* v *Cameron* (1987) DFC 95–055; *Myers* v *Myers* (1987) DFC 95–056; *Watt* v *Watt* (1988) DFC 95–060; *Browne* v *Byrne* (1988) DFC 95–061; *Lipman* v *Lipman* (1989) DFC 95–068; *Swan* v *Mearns* (1989) DFC 95–076.

[206] (1986) DFC 95–031, 75,377. Powell J referred to a number of Family Court decisions in support of this conclusion. See for example *Rolfe, In the Marriage of* (1977) 25 ALR 217, 219.

[207] (1986) DFC 95–030, 75, 357. It is not entirely clear whether the amount used as the basis for valuation was the net wage of the housekeeper, or the gross (before tax) amount payable by the defendant.

[208] See, for example, *Dwyer* v *Kaljo* (1987) DFC 95–053.

[209] (1988) DFC 95–060.

[210] The defendant's calculations, based on the replacement costs of a housekeeper, and setting off the financial benefits received by the plaintiff, would have denied the plaintiff any recompense for her domestic contribution.

[211] New South Wales Law Reform Commission, *Report on De Facto Relationships*, No 36 (1983), 99.

should be equated to marriage for all purposes, but regarded the discretionary jurisdiction to re-allocate property rights as a means of overcoming deficiencies in the present law.[212] In some recent cases the statement that the Act was not intended to equate the rights of married couples and de facto parties has been used to justify a restrictive interpretation of its principles. In *Wilcock* v *Sain*[213] for example, Young J held that homemaker contributions could only be made where there was a child of the family. In the same case the Act was seen as having the limited purpose of overcoming the inability of plaintiffs to enforce promises on which reliance had been placed in the context of long-term relationships.[214] This is an inaccurate statement of the purpose of the legislation and completely ignores the clearly expressed legislative requirement that domestic contributions to the acquisition of property must be considered in all applications for adjustment of property rights.

In cases interpreting the New South Wales Act some courts have shown an awareness of the economic effects of the sexual division of labour,[215] but others are still influenced by the view that the provision of such services to men by women is 'normal' and consequently that domestic work is of little value.[216] Charlesworth and Ingleby have argued that 'interpretation of the legislation is grounded in judicial preconceptions as to the value of unwaged contributions to relationships'.[217] The current discretionary provisions provide little help even for judges who have displayed some sympathy for the purposes of the legislation. The uncertainty surrounding the value to be attributed to domestic contributions, will prevent couples from settling their disputes and, because the value of such contributions has always been disregarded, is likely to perpetuate the economic inequality deriving from the sexual division of labour.

How could courts be encouraged to recognise the value of domestic services to the other partner, rather than according such services a nominal value? (Of course this is a problem relevant in the context of marriage, as well as in the context of de facto relationships.) One approach would be for the legislation to set out a basis for the valuation of domestic services, rather than leaving the

[212] Id 98–9, chapter 5.

[213] (1986) DFC 95–040, 75,454.

[214] (1986) DFC 95–040, 75,450. The notion of 'reliance' plays an important part in the decision.

[215] See for example the recognition of the plaintiff's economic disadvantage by Powell J in *D* v *McA* (1986) DFC 95–030, 75,353 and his acid comments about the behaviour of the male defendant in *Lipman* v *Lipman* (1989) DFC 95–068. See also the comments of Hodgson J in *Dwyer* v *Kaljo* (1987) DFC 95–053, 75,601.

[216] See for example *Browne* v *Byrne* (1988) DFC 95–061, where Needham J refused to make an order altering the property rights of the defendant, despite the plaintiff's ten years assumption of domestic responsibilities and *Wilcock* v *Sain* (1986) DFC 95–040. For discussion of a similar range of judicial attitudes in relation to married partners see J H Wade, *Property Division Upon Marriage breakdown* North Ryde, CCH (1984) Ch 6.

[217] H Charlesworth and R Ingleby, 'The Sexual Division of Labour and Family Property Law' (1988) 6 *Law in Context* 29, 43. See also the comments of J H Wade, 'Discretionary Property Scheme for De Facto Spouses — The Experiment in New South Wales' (1987) 2 *Australian Journal of Family Law* 75.

valuation to the exercise of judicial discretion.[218] This would require legislative judgment as to whether such services should be valued on the basis of market cost (adding the market cost of the separate services provided); replacement cost (estimating the total cost of replacing the person responsible for providing housework and child care); opportunity cost (estimating the wages foregone by the person who remains at home or works part-time because of domestic responsibilities) or according to some other formula.[219] A difficulty with this approach is that it could be insufficiently flexible to take account of the varying circumstances of the parties.

An alternative proposal, supported by the Australian Institute of Family Studies in the context of matrimonial property reform, could also be applied to co-habitees.[220] This approach departs from the traditional model which attempts to alleviate the effects of the sexual division of labour by treating domestic work as a 'contribution' to the assets which the other partner has acquired. It seeks instead to compensate women for the economic losses which are concealed while they remain in the relationship but revealed on its breakdown, as the result of the opportunities foregone because of child-rearing responsibilities.

Data is becoming available which may enable the life-time earnings of women with children to be compared with the earnings of women whose careers are not interrupted because of child-rearing. Such data could be used as the basis for court assessment of the loss experienced by particular individuals and as a guide to couples negotiating settlements. Reductions in earnings experienced because of interruption to paid work, could be treated as economic costs to be borne by the relationship, deduced from the joint assets of the parties and paid to the person suffering the loss.[221] Such projects would not be based on the 'need' of the partner in the weaker economic position (although they would alleviate such need) but rather would recognise that one spouse had been economically benefitted and the other disadvantaged because of the way in which productive work (whether or not paid) had been divided within the relationship. Although such an approach would recognise the economic effects of the sexual division of labour and probably give women a larger share (perhaps the majority) of family property, one serious objection is that the assets of the parties may be insufficient to meet the economic loss suffered by the child-rearer. In cases where there is little property to distribute, the woman's claim would have to be satisfied by resort to her partner's future earnings. There would be difficutly in enforcing such orders, particularly where the partner in the stronger economic position had entered into a new relationship. A further difficulty is that the proposal takes

[218] See Australian Law Reform Commission, *Matrimonial Property* (1987) Report No 39, 13ff.

[219] For a discussion of these different bases see M Edwards, 'Household Productive Activities' in D Ironmonger (ed), *Households Work* (Sydney, Allen & Unwin, 1989), 33, 34 ff.

[220] P McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (Sydney, Prentice & Hall, 1986), 98–9, 323–3.

[221] K Funder, 'The Value of Work in Marriage' in Ironmonger op cit 173, 179ff. This article expounds the approach in much more detail.

only losses from child-rearing into account and does not recognize the value of other domestic work. It could also be more advantageous to women who have been full-time homemakers before separation, than to those who have carried a double load, working full-time for wages and in the home as well. Nevertheless this model should be examined by jurisdictions which are considering law reform in this area.

2 Should Provisions Recognising the Value of Domestic Labour Affect Third Parties?

Under the New South Wales *De Facto Relationships Act*, the power of the court to re-allocate property is limited to disputes between the couple.[222] Where a claim to property involves a cohabitee and a third party, such as a creditor or a beneficiary under the will of the deceased partner, the claim must be resolved by normal trusts principles. In the case of claims arising on death, a cohabitee may make a claim on the estate of the deceased partner under testators family maintenance legislation.[223] Confining the operation of the *De Facto Relationships Act* 1984 to disputes *inter partes* is consistent with the notion of separation of property and is based on the view that security of title, and certainty for purchasers of interests must take priority over protection of the interests of family members.

The approach of the *De Facto Relationships Act* was inevitable in Australia. Because of the constitutional limitations which limit the operation of s79 of the *Family Law Act*, disputes between husband and wife,[224] it would have been anomalous to create a more extensive adjustive jurisdiction for people living together. In the absence of such constitutional problems it seems more difficult to argue that the rights of creditors and other third parties should prevail over the interests of women who have contributed to the accumulation of their partner's resources through their domestic labour. Other jurisdictions need to consider whether it is justifiable to take this approach, or whether the ability to adjust the property rights to take domestic contributions into account should be enforceable against third parties. Such legislation could possibly provide some means by which third parties could protect themselves against a prospective claim. In addition the primary right of a contributor would be to enforce a personal right against the other partner.

[222] Except in the case where proceedings have been commenced before the death; see *De Facto Relationships Act* 1984, s20. In Victoria it has also been held that an application under Part IX of the *Property Law Act* 1958 cannot be made after the death of either party to the relationship. *Skene* v *Dale* (1989) DFC 95–073.

[223] *Family Provision Act* 1982 (NSW) s6; *Wills, Probate and Administration (De Facto Relationships) Amendment Act* 1984 (NSW) and see *Weston* v *Public Trustee* (1986) 4 NSWLR 407.

[224] *Family Law Act* 1975 (Cth) s79. Under the *Constitution Act* (Cth) s51 (xxi) and (xxii), the Commonwealth has power to legislate with respect to 'marriage' and 'divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants'. Hence the Commonwealth has restricted power to affect the rights of third parties in the context of matrimonial property disputes. No such constitutional restraints apply to the power of the New South Wales Parliament to legislate with regard to cohabitants.

Third parties would only be vulnerable where this personal right was unenforceable.

3 The Balance Between Autonomy and Protection

Even if equitable doctrines are extended to recognise the value of domestic labour, they may not provide a remedy where a cohabitee has expressed a clear intention that the other partner should not acquire an interest in his or her property. The extent to which married couples can contract out of matrimonial property law varies between jurisdictions.[225] Generally speaking, legislation which permits contracting out provides safeguards to ensure that the parties are fully informed and independently advised before they surrender their legal entitlement.

Because some co-habitees may have deliberately chosen to avoid the financial consequences of marriage, and because the nature of co-habitation may vary even more widely than marriage it seems appropriate that de facto partners should be free to make the financial arrangements which can take into account their particular circumstances. At the same time it is important that such agreements are freely entered into, fully understood and do not lead to injustice because the circumstances of the parties alter.

The New South Wales *De Facto Relationships Act* 1984 contains provisions which attempt to balance the desirability of allowing some autonomy to other partners in making their own financial arrangements against the need to discourage unfair agreements.

The Act differentiates between cohabitation agreements — described as agreements relating to financial matters made in contemplation of living together or while the parties are cohabitating; and separation agreements — described as agreements relating to financial matters made in contemplation of separation. To avoid evasion of the more stringent requirements applicable to cohabitation agreements a separation agreement is treated as a cohabitation agreement if the parties do not in fact separate within three months.[226]

Before a cohabitation or separation agreement is binding on a court in proceedings for alteration of property rights, the agreement must be in writing, signed by the person against which it is sought to be enforced and accompanied by a certificate from solicitors stating that each of the parties was independently advised.[227] If these conditions are satisfied the court may refuse to enforce a cohabitation agreement only if the circumstances of the parties have so changed since the time when the agreement was entered into that its enforcement would lead to serious injustice. A possible example of such a case would be where the couple have made a cohabitation agreement

[225] For example, spouses may contract out, with respect to certain safeguards in New Zealand and see *Matrimonial Property Act 1976 (NZ) s21.* The issue of contracting out is discussed in Australia Law Reform Commission, *Matrimonial Property*, (Report No 39, 1987) 268–9.

[226] *De Facto Relationships Act* (NSW) 1984 s44(2).

[227] *De Facto Relationships Act* (NSW) 1984 s47.

on the assumption that they would not have children and would both continue in paid employment, but the woman later became involved in domestic work and child care on a full-time basis. By contrast, the court has no power to set aside a separation agreement on the ground of changed circumstances, since separating couples have negotiated such agreements in the knowledge that their relationship has come to an end. As yet there is no case law on the interpretation of these provisions and it remains to be seen whether, in practice, they give sufficient protection to women.

CONCLUSION

This article argues that the existing law reinforces patriarchal gender expectations by failing to recognise the value of unpaid work in the home. Although the recent development of notions of unconscionability and unjust enrichment may lead to greater recognition of the value of 'womens work', it is suggested that legislation providing restitution for reduction in earning capacity caused by interruption to paid work may be a better solution.

Analysis of the changes to matrimonial property laws which have occurred over the past two decades produce disappointing conclusions. Redressing the economic inequality of women will require profound structural and ideological changes. The author is aware of the pitfalls of law reform which reinforce the system which is the source of oppression. It is hoped that the negative symbolism involved in recognising that women still retain primary responsibility for housework and child care is outweighed by the instrumental benefits it may bring to some women by giving them greater access to the property of their partners.