FAMILY LAW AND PERCEPTIONS OF UNFAIRNESS

A PAPER PREPARED FOR THE OPENING ADDRESS, FAMILY LAW DAY, COLLEGE OF LAW, 24 FEBRUARY 2001

Richard Chisholm[1]

Introduction

Quite rightly, the topics for today's seminar deal with recent or impending changes in family law. The rate of change in family law is fast and shows no signs of slowing. Practitioners must have a hard time keeping up. The changes covered today include the new regime for enforcing property orders, changes to child support laws, the new provisions for financial agreements, current issues in children's cases, a view from the (new) federal magistracy and, inevitably, superannuation.

Looking at these topics, I wondered whether there might be some common theme I could identify and consider in these opening remarks. I did not see any such theme, apart from the fact of change itself.

And so, by way of contrast, I thought it might be useful to reflect on a topic that is strikingly different, namely perceptions of unfairness in family law. One finds in the media considerable agitation about family law. Typically, the view is put that it is unfair. Sometimes it is said to be unfair to men, sometimes to women, sometimes to other groups, such as wives of lawyers. These views are often advanced with much feeling. Sometimes, they appear to be based on anecdote and even misunderstanding. Sometimes, the presenters seem to have an axe to grind, a personal agenda. Often, it is not entirely clear whether the criticism is of the performance of individuals in the system, the legal principles themselves, the processes of the law, legal aid, public bodies such as the Child Support Agency, or some combination of these. As someone involved in the family law system, I confess that my instinctive reaction tends to be defensive. But it is important to take these things seriously and, having set aside what is clearly mistaken, try to discern whether there are real grounds for the points being taken.

Two letters

By way of illustration, let me mention two letters I saw in the Sydney Morning Herald on the same

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[1] BA, LLB, BCL; Judge of the Family Court of Australia.

day, as recently as last millennium.[2] They were commenting on a story about the new amendments that will be discussed at this seminar.

The first letter said that the amendments will hopefully assist non residential parents denied regular contact with their children. It went on to argue that the Family Court already has adequate power to achieve this objective, but that "it simply lacks the commitment to enforce orders that may benefit fathers, who are seen as expendable when conflict exists between divorced parents".

The author states or implies a number of things. Firstly, that the Court favours mothers over fathers, who are "seen as expendable". Secondly, that contact orders (I assume the author has these in mind) are not enforced. Thirdly, that the problem lies in the lack of commitment of the Court. The letter gives no evidence for these propositions, but treats them as self-evident.

I do not believe any of the three statements is true. However there are serious problems in the enforcement of parenting orders, and I can see why a person might come to believe these things. I discuss one or two of the issues later.

The second letter takes the opposite view. It starts like this:

> *So, jail sentences or community service are new measures to punish mothers who don't comply with ex-partners' demands to see their children....*

That first sentence contains a fundamental error. The legislation does not deal with compliance with ex-partners' *demands*, but with compliance with *court orders*. A court has made orders for contact, either by consent or after a hearing. The question of punishment arises only where the mother has breached the orders and has not been able to establish that she had a reasonable excuse for doing so.

The letter goes on to say that non-custodial fathers "are given all rights without any obligation to behave like caring and responsible parents". This too, is rather misleading. It ignores child support. More subtly, it overlooks the point that the law does not actually require *anyone* to behave like a responsible parent. Such a thing is beyond the capacity of the law, which in practice can only make orders that deal with simpler matters: with whom a child is to live, who is to pay child support, when the child should be made ready for contact, and so on. There is no legal obligation on residence parents, either, to behave like caring and responsible parents.

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[2] *Sydney Morning Herald*, 30 December 2000, p 27.

The author of the second letter later refers to men who "believe they have a right to have access to their children but without doing their share of the difficult aspects of parenting". Again, this conceals the fact that no question of enforcement or punishment arises unless there is a court order. But the substantive point here, I think, is to the effect that the residence parent bears most of the responsibility for matters of clothing, education, discipline, and the like, while to some extent the contact parent can enjoy the children's company without having to take on many of these responsibilities. This may be the basis of the author's earlier comment, about the law not requiring men to behave like caring and responsible parents.

Next, the second letter asks rhetorically what types of punishments will be dealt fathers who don't adhere to access times. This is an interesting point. Is it a breach of a contact order for the contact parent to fail to adhere to contact times? In principle, the answer would seem to be yes. If a contact order says that a child is to have contact with a father at particular times, that order creates an obligation on the mother to make the child available.[3] The point is, I assume, that unless she does so, the court's order, intended to benefit the child, will be frustrated. But if the father fails to take the child on contact, or does not adhere to the times of the orders, the order will also be frustrated to varying degrees. So I can see no reason in principle why the order should not equally imply an obligation on the contact parent to participate. The legislative history of the Family Law Amendment Act 2000 - the explanatory memoranda, and so on – also seems to support this view, and the actual words of the new provisions leave little doubt that this is correct.

The important point for present purposes is that I am not aware of applications to punish contact parents for breach of contact orders, or decisions on the point. In this area, unlike the area of child support, it would be necessary for the mother to bring an application to punish the father for breach of the orders. It is my impression that residence parents do this very rarely, if ever.

Finally, the second letter also has something to say about relocation cases:

> *Is the Government going to create support networks for women who are denied the right to move closer to their extended families or advance their careers, because their ex-partners must exercise their legal rights to access?*

I will say something about relocation cases below.

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[3] *Marriage of Stavros* (1984) 9 Fam LR 1025, 1030.

There are striking contrasts between such media discussions and the sort of well informed and specific presentations you will hear today. One contrast, illustrated by the letters I have quoted, is that the media accounts rarely have the accuracy or depth of knowledge you will hear today.

But there is another contrast I want to dwell on. The media discussions are very much concerned with what is fair and unfair, what is right and wrong. Most presentations at seminars like these, quite rightly, are primarily concerned to expound the law and discuss its application.

By contrast, there seems to me to be quite a relative lack of what I might call moral or ethical criticism of modern family law in Australia. I suspect that there are many reasons for this. Much informed writing for practitioners, as I have said, is about the operation of the law rather than its moral rightness. Some academic writing is like this, too. The more theoretical academic writing is also, I think, more focused on illuminating the nature of the law, or its practice, than moral evaluation. Indeed, the whole question of moral evaluation is seen as problematic these days. Even those who do not identify as postmodernists would hesitate to write in a way that presumes or asserts some moral basis for a critique of the law. Some writing, including some scholarly writing, is more or less partisan, focusing on the impact of the law on women, and arguing about whether the law better serves the interests of women or men.

In these remarks, I want to look at some key areas of modern Australian family law and inquire whether they might have the potential to generate a sense of unfairness because they may not conform to what many people think is right.

Property adjustment

This is a complex and interesting area, but I want to deal with it briefly here. In our system, property adjustment is dealt with on a highly individualised basis. The legislation in essence tells the court to make whatever adjustment is "proper", or "just and equitable", and provides a long list of matters that should be taken into account. These matters, broadly speaking, involve looking to the past to see what contribution each party has made, and looking to the future to see what their respective needs and resources are.

Different legal systems tackle the problem in different ways. Some, for example, have rules for distributing property. Those rules usually require property to be categorised in particular ways. For example, if the rules are that "matrimonial property" should be shared but that each should retain his or her separate property, there need to be definitions to determine into which category particular

items fall. Because marriage often involves some combining of resources, those rules and categories can be complex.

I do not want to debate the merits of the various systems. I only make the point that our system has opted for a highly individualised approach. It requires each case to be considered "on its merits". The result is based on an overall assessment - judicial discretion - rather than the application of specific rules. That discretion is a guided one, not an absolute one. The legislation sets out the matters to be taken into account. And a body of case law exists that provides a degree of guidance about the appropriate outcomes.

There is some material on what people think of the system. That research, such as it is, tends to indicate that people have rather widely differing views on what principles should govern the distribution of property. But in a major survey in the 1980s about 80% of women and 66% of men opted for a discretionary system.[4]

It may be, then, that a lot of people would prefer a system that attends to the particular circumstances of each case than a system that is based on rules that produce results for categories of cases. On the other hand, because it is a discretionary system, litigants who do not like the result are more likely to blame the decision-maker than they are in other systems. In other systems, they may perhaps consider the rules are unfair, but in ours litigants will be aware that even thought there are legislative guidelines and reported cases, the actual outcome does represent a decision by the particular judicial officer about what is the right result in that case. So if they are going to be cross about the result, they might be expected to blame the judge, rather than the law. And, I suppose, it is easier to get angry with a person you have seen in court than with an institution such as the legislature, consisting of a large number of people you have never met and who have had nothing to do with your case.

Property outcomes might be seen as unfair for another reason, too. People may perceive the law as unfair if they have particular views of marriage. If a spouse feels that each should retain his or her own property and income, and that the court has no business making any adjustment, that spouse may well feel that the law is unfair. The survey I referred to shows how people's views are affected by their experience. Asked whether business assets should be available for division, more men than

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[4] Australian Law Reform Commission, *Matrimonial Property* (ALRC 39) 1987, paragraph 242.

women said no, and those who had operated a business or farm were more likely to say no than those who had not.[5]

One particular matter that might give rise to perceptions of unfairness is the question of misconduct. The list of factors does not expressly include such a category as "the conduct of the parties". There is a body of case law on the extent to which misconduct should be taken into account.[6] One clear case where it is not taken into account is responsibility for the breakdown of the marriage. Even after *Kennon*, it seems to be clear law that a party cannot say

> *"It was your fault that the marriage broke down. As a result, we now have to live apart and this has caused financial disadvantage. It is only fair that because the whole thing is your fault, you should bear the greater burden of that disadvantage" (or, alternatively, that "the court should make orders that put me in the position I would have been in had you not brought the marriage to an end").*

Many litigants, perhaps, accept that it is not desirable or practicable for the court to make a determination of who destroyed the marriage. But it is possible that some litigants see the irrelevance of misconduct (in the sense of responsibility for the marriage breakdown) as unfair.[7] It is common to find at least a few references to grievances of this kind even in otherwise well-crafted affidavits. They are often objected to successfully on the ground of irrrelevance. But their persistence suggests to me that the clients wanted them in, even, perhaps, having been told they would probably be struck out.

There are other kinds of misconduct that can be taken into account - a larger category, it would seem, since *Kennon*. The Family Law Council is currently wrestling with the question whether to recommend that the Act be amended to refer specifically to violence as one of the matters that can be taken into account. To the extent that misconduct is not taken into account, no doubt there will be some who think the law is unfair in that regard. If there were to be some reference to violence inserted into the property provisions, those who are accused of violence may feel it would be unfair not to allow them to lead evidence about other forms of misconduct.

Children: parenting orders

Proceedings for parenting orders are also, of course, highly individualised: there are no rules, for

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5 Paragraph 216.

6 See generally the commentary to s 79 in the Butterworths *Australian Family Law* (loose leaf and CD Rom). The leading case is *In the Marriage of Kennon* (1997) 22 Fam LR 1; FLC 92–757; 139 FLR 118.

7 The Law Reform Commission received some submissions along these lines (as well as some to the contrary): see ALRC 39 paragraph 80.

example that the children should go with the mother, or the father, or with the parent who was previously most involved in their care. The principle is that the court should treat the children's best interests as the paramount consideration, and in doing so should have regard to a specified list of matters.

Could this be seen as unfair? Of course, it could be seen as unfair if a litigant feels that the court was biased, or that the trial went awry in some reason: *process*, again. But could the rules themselves be seen as unfair?

Some litigants may think them so.[8] One reason for thinking them unfair is that they do not involve formal equality. That is, there is no principle that the children's time should be equally shared between the parents. Perhaps stimulated by a misreading of the 1995 amendments,[9] or by something they have heard or read about "joint custody", some litigants may feel that the absence of such a principle makes the law inherently unfair. Such views have been expressed by men's groups.[10] Their perception of unfairness may also be influenced by the fact that most children go with their mothers, not their fathers, when marriages end: something like 80% in agreed outcomes, and something like 60% in litigated outcomes.[11]

On the other side, some feminist commentators appear to have argued that children should go with the parent who was mainly responsible for them before the separation, not only because this is a factor that might indicate that this would be best for the children, but for the separate additional reason that this would appropriately reward that parent (usually the mother).[12] If one takes the view that residence with the children is in part to be based on a notion of reward for looking after the children in the past, then one might feel that the present law, which focuses essentially on the best interests of the children, is unfair in cases where the court finds that the children would be better with the other parent.

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8 What follows is highly speculative, since it is difficult to say to what extent submissions and publications, including those purporting to be on behalf of or representing the views of men or women, actually reflect the views of the majority of litigants, as distinct from members of groups.

9 Especially s 60B.

10 See generally Miranda Kaye and Julia Tolmie, "Fathers' Rights Groups in Australia and their Engagement with Issues in Family Law" (1998) 12 *Aust. J Fam Law* 19.

11 See F Horwill and S Bordow, The Outcome of Defended Custody Cases in the Family Court of Australia (FCA, Research Report No 4, 1983) and S Bordow, "Defended Custody Cases in the Family Court of Australia: Factors Influencing the Outcome" (1994) 8 Aust J Fam Law 252. The table at p 255 of the latter shows custody to mother in about 60%, to the father in about 31%, and the rest of the cases - about 9% - being split custody or joint custody, or other.

12 See the discussion in Parker, Parkinson and Behrens, *Australian Family Law in Context*, Second ed., 128-9,

A somewhat similar tension between notions of justice between the parties and a commitment to the interests of children can be seen in arguments to the effect that in determining residence the law should disregard any advantage one parent may have over the other in terms of resources.[13]

Again, viewed from some cultural perspectives, the law could be seen as unfair. I understand that in some cultures a baby might be given to some other member of the extended family in some circumstances, on the basis that the person's need for a child might be greater than the need of the parents (they might have several other children, and the other person might be infertile). From such a viewpoint, it might be seen as unfair, or cruel, that all the children in a family should go to live with one parent. Yet from the point of view of people in other parts of the community, that might seem the obvious result.

When one turns from residence to contact, a more common issue arises: the connection between contact and financial support of children. The law is crystal clear: contact must be determined according to the child's interests, and a non-resident parent does not acquire a right to see the child by paying child support, nor lose it by failing to pay child support. But I believe that many people take the view that from a moral point of view there *should* be a connection between the two things.[14] Why should a parent pay for the upkeep of the children if he - as it usually is - is not allowed to see the children? And conversely, should not a parent who does pay child support thereby be entitled to see the children (subject, no doubt, to some qualification)?

Underpinning these views, I think, is an assumption that the moral basis for child support, or at least part of it, is the satisfaction of sharing in the children's development. To the extent that people do take this view, they may well see injustice in a situation where a person who does not pay child support has contact with the children.

The sense of injustice can be strong where, for example, the mother remarries. The non-custodial father might see it as unjust that he should be paying child support when he cannot see the children, and another man, not their father, has to opportunity to share in their lives as they grow up.

I should make it plain that in this I am exploring possible senses of injustice. I do not wish to express a view on whether that sense is justified: that would require a more fully developed moral

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referring to the work of Mary Becker and Martha Fineman.

13 An issue discussed by A Hasche, "Sex Discrimination in Child Custody Determinations"(1983) 3 *Aust J Fam Law*, 218, extracted in Parker et al., cited above, at 847ff.

14 For example, this is a theme pursued by some men's groups: see eg Kaye and Tolmie, above, at 39.

position that is beyond this paper. As an example of a contrary view, I note what Kaye and Tolmie have written about the sort of views I have tried to articulate:[15]

> *Some of these comments betray an atittude of commodification towards children – a sense of children as possessions of their parents and an absence of the sense that children are dependent people with needs that are separate to and that must at all times take priority over those of their parents. There is a lack of recognition, for example, that responsible and adult parenting sometimes means sacrificing one's own immediate interests as an individual, including one's sense of fairness, to ensure that the needs of one's children do not go unfulfilled.*

Relocation cases provide a further potential clash between views about what is right and legal principle. Assume the residence parent wants to move interstate or to another country with the children, who have a good relationship with the contact parent. The move might effectively terminate that relationship, or severely damage it. But the residence parent wants to go: perhaps to take up a job, or to start a new relationship. If the contact parent asks the court to stop the residence parent from departing with the children, what principles apply?

The law on this is tricky. I think there are two main reasons why it is. Firstly, the interests of the children are typically meshed with those of the residence parent. If she - I take the most common case - is unhappy, or in poverty, this may effect them adversely: if her life improves, perhaps theirs will too. Similarly, if the residence parent and the children know their proposed move has been prevented by the contact parent, and are upset by this, how might this knowledge affect their relationship with the contact parent? So while one can in theory say that the court should take into account only the children's interests, doing so can be very difficult.

Whether the law *does* actually say that is not entirely clear. There is a formidable bunch of recent authorities.[16] One reading of them is that the courts should give some significance to the need or right of the residence parent to move, *as a factor in its own right*, as well as having regard to the children's interests.

These cases are, in my limited experience, among the most bitter of all family law cases, and pose some of the most agonising decisions for the judges. And, most relevantly to the present topic, they have the potential to be seen as unfair. The residence parent, forbidden to take the children, may feel unfairly denied her freedom of movement. The contact parent, deprived of regular contact with

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15 Kaye and Tolmie, above, at 39.

16 The leading cases are *AIF v AMS* (1999) 163 ALR 501; 24 Fam LR 756; FLC 92–852 (HC); *Re B and B; Family Law Reform Act* (1997) 22 Fam LR 676; FLC 92–755; *A v A; Relocation Approach* (2000) FLC 93–

the children by the permitted departure of the relocating residence parent, may feel unfairly denied his contact with the children. And each may feel that an adverse decision would involve an infringement of the children's rights.

Child support

Child support is a complex and highly technical topic. As you know, the child support legislation made two big changes to what was previously the law on child maintenance.

The first change was all about *enforcement*. Formerly, child maintenance orders had to be enforced by the payee, most commonly the mother, much as other court orders have to be enforced by the person in whose favour they are made. Generally, there is no public person or body that has the task of enforcing orders. Now, the obligation is to pay the Commonwealth, and there is a public body - a department within the Tax office - that enforces payment. Methods include garnishing wages, or tax refunds.

The second change was to base the obligation to pay on a statutory *formula*, rather than on a case-by-case determination. The formula involves the payer's taxable income, with set percentages depending on the number of the children and the amount of time the children spend with the payer. It also involves components designed to provide for the reasonable needs of each parent. Such a formula is capable at best of working rough justice - getting results which are about right for most cases.

But in many situations any formula will have inappropriate results. The simplest example is where a wealthy person is able to organise his or her affairs so there is a very small taxable income. To deal with such cases, there is an escape-route: either parent can apply to have the amount payable set on a case-by-case (individualised) basis, either by a child support assessor or the Family Court or by a federal magistrate.

What I want to focus on, however, is that the sole basis for liability to pay child support is biological parenthood.[17] The circumstances are irrelevant. This was illustrated vividly by a case I had some years ago. The father, as I recall, gave evidence to the effect that when he and his wife were discussing marriage, he said that he would only marry if there were to be no children. I forget what his reason was, but it was a serious one - he doubted his suitability as a parent, or he was worried

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17 This key feature of the Act has attracted some criticism both from men's groups and some feminist authors: see Kaye and Tolmie, 45–46.

about inherited diseases, or something like that. He said that the wife assured him that this was impossible, because she had had a hysterectomy. So they married. And she got pregnant. The husband's evidence was that she had deceived him - she had not had a hysterectomy at all.

When I looked at the law, I came to the conclusion that *even if the husband's evidence was absolutely true*, he would nevertheless have to pay child support. There is simply nothing in the Act that would relieve him of the obligation, even in those extreme circumstances. Assuming this conclusion is right, this seems to me a clear case where some people might feel that the law is unfair.[18]

I suppose the same sense of unfairness could arise where there was a view within a cultural group that someone other than the father should support the child. Suppose, for example, that within a group in the community, where parents separated and repartnered, it was taken as normal for the mother's new partner, not the biological father, to support the children. In such a community, to require the biological father to support the child might be perceived as unfair and inappropriate.

Process

Of course, there is no end to the discussion that could be made about the processes of the law. I want to make only three brief observations.

The first is a general one. Whenever you have individualised determinations, and the exercise of discretion, the process is of great importance. It is particularly important that the hearing is fair, that proper reasons for the decision are given, and so on. Highly individualised determinations always run the risk of being perceived as leading to justice according to the whim of the decision-maker, rather than a decision according to law. There is, of course, a great debate about the merits and demerits of legislation that leaves the decision to the court's discretion. My point here is a limited one: that especially in a discretionary system, any hint of procedural unfairness would add enormously to a litigant's sense that the result is unfair.

The second point is that the increased proportion of litigants in person puts the system under considerable strain. It makes life difficult for everyone: the litigant in person, the other litigant, and the decision-maker. It makes life particularly difficult for the other party's lawyer, where the other party is represented. That lawyer sees the judge taking precious time (for which the represented

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[18] Perhaps, if the husband could prove that the wife had indeed deliberately deceived him, he might have some claim against her, or, if there were property proceedings, perhaps this could be the basis for some adjustment. However none of these possibilities arose in the particular case (in which, I recall, the husband was

client is paying) explaining things to the litigant in person. The lawyer may have a difficult task satisfying the client that what the judge was doing was fair to both parties. Decisions made where one or both parties are unrepresented have, I think, an increased chance of the system being seen as unfair.

Finally, I have already noted that a distinctive feature of the child support laws is that they are enforceable by a public body. This is a great improvement from the point of view of the payee. Under the previous system, she (as it usually was) had to go back to court to enforce payment. This was difficult and/or costly, and, at best, would get her the money *then* owing. If payments stopped again, she would have to do it all over again. There is no doubt that under the child support system obligations to pay are complied with to a much greater extent than they were under the old system.

But here is the rub. I have mentioned that most residence parents are mothers; conversely, most payers of child support are fathers. Now, typically, each party will have orders providing what they lack because the children are in the control of the mother: the father has orders for contact; the mother has orders for child support.

Now, consider enforcement. If the father defaults in his obligations, a public body will enforce it against him. He may find his salary intercepted, for example. If the mother defaults, however, by not complying with contact orders, it is the father himself who must bring the proceedings to enforce the orders. There is no public body to do it. In addition, enforcing contact orders is inherently more problematical than enforcing money orders. It is difficult to assess reasons for non-compliance, as where the mother says the child is sick, or resists going. And when a breach is proved, what penalty should be imposed? Severe penalties, like imprisonment or substantial fines, may adversely affect the child, for whose sake the order was made in the first place.

In the result, if one looks at enforcement of child support and contact orders from a procedural point of view, one finds that the process for the enforcement of the money obligations is much more satisfactory than the process for enforcement of contact orders. The sting comes, of course, from the fact that the ones who need to enforce contact orders are mainly men, and the ones who need to enforce money orders are women. This structural aspect of our law makes it easy to see why some men feel the system is unfair, and favours women.

But, as always, it is not quite so straightforward. In particular, as the second letter points out, the problems in enforcing parenting orders make it difficult for the mothers to hold the fathers to the

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terms of the contact orders. Rarely if ever do they bring proceedings to punish the fathers for not adhering to the terms of the orders. No doubt there are many reasons for this: a desire not to inflame the relationship, the stress of court proceedings, the costs of legal representation, and so on. Perhaps some do not realise that the contact order creates obligations on the contact parent. Again, denial of contact may well provoke proceedings from the contact parent, because it may undermine or terminate his relationship with the child. Non-adherence to contact times by the contact parent, however, may be unlikely to damage the child's relationship with the custodial parent: it may be more likely to damage the contact parent's own relationship with the child.

Whatever the reasons, the point is that the inherent difficulties of enforcing parenting orders can cut both ways. If it is true that women can sometimes get away with breaching contact orders by refusing to make the children available, it seems also true that men can get away with breaching the orders by returning the children late, or not coming to get them at all on some occasions.

At the risk of being defensive about the Court's performance, I would venture the opinion that what is sometimes presented as a bias against men in the area of enforcement is really, or mainly, a function of the system. The inherent difficulties of enforcement of parenting orders, and the lack of a public agency to bring enforcement proceedings for parenting orders as compared to child support orders, means that money orders can be enforced much more effectively than parenting orders. That consequence may be seen as usually for the "benefit" of women, as in cases where child support is enforced against men but the women manage to frustrate the contact orders. But it will sometimes benefit men, as in cases where the man is the residence parent, and in cases where the men do not adhere to the contact arrangements, and no enforcement action is taken in that regard. In particular cases, however, it is easy to see why a parent might feel that the system is biased against either men or women as the case may be, especially if they are supported in this view by men's or women's groups.

Conclusion

Any systematic or rigorous assessment of the fairness of family law and its processes, I suppose, would have to be based on some sort of moral or ethical standard. The assessor could formulate a moral position from which to criticise the law. Alternatively, the assessor could carry out or refer to research on what people *think* is fair, and assess the extent to which the law conforms with those views.

I have not done any of this. Instead, my main object is to raise the question of the fairness of the law as an issue. I have taken a number of rather mainstream aspects of family law and procedure and tried to identify some ways in which its fairness, or its perceived fairness, might be questioned.

You will note that in each case what I have suggested as possible unfairness, or perceived unfairness, does not arise from any ill-will or incompetence by those practising family law. The perceived unfairness derives from the law itself, and its processes, when seen from particular points of view, and that perceived unfairness would be there even if every person involved in the law behaved impeccably.

I do not mean to imply, of course, that those of us in family law, whether as judges, registrars, practitioners or anyone else, necessarily get things right. I would however say that I am not aware of any persistent bias against women or against men in the system or its personnel, although of course I realise that all of us bring to our work our own preconceptions and human failings.

The question I have sought to raise is whether there are aspects of the law and its structures that involve it working in ways that are unfair, or are perceived as unfair. In this I have at best scratched the surface; but I will be well satisfied if I have stimulated anyone here to think further about the fairness of today's family law in Australia.