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Legal Forms, Family Forms, Gendered Norms: What is a Spouse?

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Abstract — *The limits of the normative nature of law may be illustrated in the current English Canadian context by apparently contradictory phenomena: legal defeats of welfare mothers (e.g. Masse and Falkiner), and the legal victories of lesbian mothers (Re K). Drawing upon Fine, this paper employs the analytic frame of form and content to analyse contradictions within the legal form, notably in respect of the definition of spouse and the regulation of relations of property and poverty, and the struggles of lesbian parents who have applied to the courts to formalize their relationships to their children by way of adoption, and who, in so doing, have challenged the normative content of spousal relations. In analysing law as a gendering strategy, it is necessary to be mindful that law may not be the dominant site through and in which gender relations are constructed, regulated, reconstructed, or resisted. In this paper, the author examines and analyzes the contradictions in the legal form that have been mobilized, the 'stirring up' of the content that has been done, and the constraints and limits that shape the results.*

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Résumé — Dans le contexte anglo-canadien, les limites de la normativité du droit peuvent être illustrées par des phénomènes en apparence contradictoires : des défaites de mères assistées sociales (voir Masse et Falkiner) et des victoires de mères lesbiennes (Re K.), devant les tribunaux. S'appuyant sur Fine, cet article adopte le cadre analytique de forme et contenu pour étudier des contradictions dans la forme légale, notamment dans la définition de conjoint et la régulation des relations de propriété et de la pauvreté, des luttes de parents lesbiennes qui ont demandé aux tribunaux de formaliser par l'adoption leurs relations avec leurs enfants et qui, en le faisant, ont défié le contenu normatif de relations de conjoints. Analyser le droit comme une stratégie «gendrante», c'est aussi tenir compte que le droit n'est peut-être pas la scène dominante sur laquelle des relations de genre sont construites, régulées, reconstruites ou résistées. Dans cet article, l'auteure analyse les contradictions mobilisées dans la forme légale, dans quelle mesure le contenu a été remué et les contraintes et limites qui déterminent les résultats.

Law sets the parameters to what is considered 'normal', for example marriage, sexual relations, the way we care for our children. ... We cannot 'opt out' of these legal parameters by adopting unconventional lifestyles or by avoiding heterosexuality. The law still has something to say about our domestic lives and intimate relations, and we cannot assert its irrelevance by ignoring it.¹

The law is filled with contradictions, and much of the effort to change how lesbians and gay parents are treated in the courts involves mobilizing those contradictions within the legal system itself—stirring them up and rearranging their relations to each other.²

Differences in cohabitation and gender are a reality to be equitably acknowledged, not an indulgence to be economically penalized. There is less to fear from acknowledging conjugal diversity than from tolerating exclusionary prejudice.³

Introduction

Well into the 19th century in England, married women accused of killing their husbands were liable to be indicted not on wilful murder but of the aggravated

1. Carol Smart & Julia Brophy, "Locating Law: A Discussion of the Place of Law in Feminist Politics" in Julia Brophy & Carol Smart, eds., *Women-in-Law: Explorations of Law, Family and Sexuality* (London: Routledge & Kegan Paul, 1985) 1 at 1.
2. Laura Benkov, *Reinventing the Family The Emerging Story of Lesbian and Gay Parents* (New York: Crown Trade Paperbacks, 1994) at 37.
3. *Rosenberg v. Canada (A.G.)*, (1995), 25 O.R. (3d) 612 (Ont. Ct. Gen. Div.) at 589 per Abella, J.A.

offence of petit treason and, until 1790, if convicted, they faced the prospect of being burned at the stake. Husbands who were accused of killing their wives faced an indictment on wilful murder. The punishment of burning at the stake, devised for women convicted of forms of either high or petit treason, was abolished in 1790. After 1828, women who killed their husbands would be indicted of wilful murder, as petit treason ceased to exist as an offence.⁴ Thereafter, for the purposes of domestic homicide under English criminal law, husbands and wives were formally on an equal footing.

In 1885 in England, all forms of sexual intimacy between consenting adult men became criminalized with the introduction of a new statutory crime: gross indecency. From that year until 1967, all male homosexual acts, public or private, were the subject of criminal sanction.⁵ In Canada, gross indecency between male persons was an indictable offence, for which only (homosexual) men were liable to be convicted, until the *Canadian Criminal Code* was amended in 1953–1954⁶ to extend the crime to “any person.” Lesbian sexual activity *per se* has never been criminalized in England, and only after 1954 were lesbians in Canada (and also incidently heterosexual men and women) liable to be convicted of the unspecified offence of gross indecency. In 1968 in Canada private gay sexual activity between two consenting adults over the age of 21 became legally permissible.⁷

Homosexuality no longer exists as a discrete matrimonial offence in Canadian divorce law to ground the divorce petition of an infuriated spouse against a lesbian wife or gay husband. Lesbian (social) parents have standing to apply for custody, access and child support⁸; lesbian couples are now able as couples to adopt children with the blessing of the Ontario courts.⁹ Indeed, a lesbian may be a (common law) spouse of another lesbian, with legally enforceable support obligations flowing from their relationship.¹⁰

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4. Ruth Campbell, “Sentence of Death by Burning for Women” (1984) 5:1 *Journal of Legal History* 44; Shelley A. M. Gavigan, “Petit Treason in Eighteenth Century England: Women’s Inequality Before the Law (1989-1990) *CJWL* 3:2 335 [hereinafter “Petit Treason”].
 5. See Jeffrey Weeks, *Coming Out: Homosexual Politics in Britain, From the Nineteenth Century to the Present* (London: Quartet, 1977) at 1–22.
 6. S.C. 1953-54, C. 51, s. 149.
 7. S.C. 1968-69, C. 38, s.7
 8. *Buist v. Greaves*, [1997] O.J. No. 2646 (Ont. Ct. Gen. Div.).
 9. *Re K.* (1995), 23 O.R. (3d) 679 (Ont. Ct. Prov. Div.) [hereinafter *Re K.*].
 10. *M. v. H.* [1999] S.C.J. No. 23, aff’d (1997), 25 *R.F.L.(4th)* 116; 31 *O.R.(3d)* 417 (Ont. C.A.), aff’d (1996), 27 O.R. (3d) 593 (Ont. Ct. Gen. Div.) The decision of the Supreme Court of Canada in this case was released on the day that final revisions to this paper were being done. It has not been possible to address the Supreme Court’s judgment in this article, other than to note that the decisions of the lower

The legal shifts cited ought to alert one to both the mesmerizing appeal of changes in the legal form and the potential neglect of analysis of social relations that remain unchanged, even less visible. For instance, whether the criminal law defines sexual violence as gender specific 'rape' or gender neutral 'sexual assault', women, more so than men, still experience this form of male brutality. Gender neutrality as a law reform strategy has contributed to the assumption that the formal equality of gender neutral "spouses" now means that patriarchal relations and patriarchal principles have been eliminated. And, while I am of the view that the move to the language of "spouses" has inhibited some of the worst linguistic excesses of patriarchy and produced contradictory results (not least of which is its facilitation of the lesbian and gay relationship recognition legal challenges), the (patriarchal and gendered) content of familial relations has been rendered less visible. Analysis of *law* requires attention to its form(s) (often assumed), its levels and institutional sites, its functions and its many contradictions, as well as its content (again, often assumed), context and relationship with other social forms and relations.¹¹

In this article, I make use of analytic distinctions between form, function and content of law¹² because I find it a helpful way to think about the significance of gender neutrality (as a legal form) and its contribution to (the content and construction of) gender relations. In particular, I consider the nature of the legal experiences of women whose lives do not resemble socially prescribed gender norms and familial forms: lesbian parents and sole support mothers on social assistance. To illustrate the significance, elasticity and contradictory nature of the legal form, I examine "spouse" as a legal form,

courts were upheld, and the discriminatory restriction to the definition of "spouse" in the Ontario *Family Law Act*, R.S.O. 1990, s. 29, was struck down.

11. See also Alan Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (London: Routledge, 1993) at 225 [hereinafter *Explorations in Law and Society*].
12. See e.g. Evgeny Pashukanis, *Law and Marxism.*, introduction by Chris Arthur (London: Ink Links, 1978); Bob Fine, "Law and Class" in Bob Fine *et al.*, ed., *Capitalism and the Rule of Law* (London: Hutchinson, 1979) 29; Bob Fine, *Democracy and the Rule of Law* (London: Pluto, 1984); Sol Picciotto, "The Theory of the State, Class Struggle and the Rule of Law" in Fine *et al.*, *ibid.* 164; Sol Picciotto, "The Theory of the State, Class Struggle and the Rule of Law" in Piers Beirne & Richard Quinney, eds., *Marxism and Law* (New York: John Wiley & Sons, 1982) 169 [hereinafter "The Theory of the State"]; Philip Corrigan & Derek Sayer, "How the Law Rules" in Bob Fryer *et al.*, ed., *Law, State and Society* (London: Croom Helm, 1981) 21; "Petit Treason", *supra* note 4; Shelley A. M. Gavigan, "Beyond Morgentaler" in Janine Brodie, Shelley A.M. Gavigan & Jane Jenson, eds., *The Politics of Abortion* (Toronto: Oxford University Press, 1992) 117.

specifically the unique (legal) form of spouse devised for low-income mothers on social assistance in the province of Ontario. To illustrate the strength and capacity of the legal form of spouse to accommodate, yet impose itself upon, new relational content, I examine the efforts by lesbian couples in the province of Ontario who must bring themselves within the definition of "spouse" in the governing legislation in order to jointly adopt the children they are parenting.

Without in any way suggesting that these areas are exhaustive of the kinds of legal contexts in which lesbian parents or welfare mothers may find themselves, I argue that socially dominant understandings of "family," "spouse," and "parent" are revealed in legal cases where the parties bear no resemblance to the conventionally prescribed nuclear family, and indeed, even when the conventional images give way.¹³ Dominant and socially shared understandings of biological and social reproduction and the relations expressed by the terms "parent" and "spouse" in law are thus simultaneously challenged and reinforced by the experiences of welfare mothers and lesbian parents. In other words, "spouse" as a legal form simultaneously protects and threatens patriarchal relations; to understand the place of spouse as a legal form, one must appreciate its contradictory nature, one must think dialectically.

Legal Form, Legal Discourse

Benkov's¹⁴ view of the contradictory nature of law has been shared by many scholars.¹⁵ The insistence that law is a complex and quintessentially social form, neither unidimensional nor monolithic, is one of the great contributions made by socio-legal scholars to the understanding of the place of law in a given social formation. As Sol Picciotto observed in an early contribution to Marxist rethinking of the place of law in a capitalist social formation: "Form analysis

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13. See also Shelley A. M. Gavigan, "A Parent(ly) Knot: Can Heather Have Two Mommies?" in Didi Herman & Carl Stychin, eds., *Legal Inversions: Lesbians, Gay Men and the Politics of Law* (Philadelphia: Temple University Press, 1995) 102.
 14. Benkov, *supra* note 2.
 15. See e.g. Victoria Greenwood & Jock Young, *Abortion in Demand* (London: Pluto, 1976); E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act*. (London: Allen Lane, 1975); Douglas Hay, "Property, Authority and Criminal Law" in Douglas Hay, et al., eds., *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (London: Pantheon, 1975) 17; Fine, *supra* note 12; Dorothy E. Chunn, & Shelley A. M. Gavigan, "Social Control: Analytical Tool or Analytical Quagmire" (1988) 12 *Contemporary Crises* 107; "Beyond Morgentaler," *supra* note 12; *Explorations in Law and Society*, *supra* note 11; Laureen Snider, "Feminism, Punishment and the Potential of Empowerment" (1994) 9:1 *CJLS* 75.

emphasizes that legal relations must be grasped as *part* of social relations as a totality, and their historical development theorized as part of the changes of social relations of production resulting from the unfolding contradictions and underlying tendencies of the dominant mode of production.”¹⁶

Form theorists,¹⁷ influenced by Pashukanis’ adaptation of Marx’ commodity form theory, argued against Marxists who collapsed law’s form and content and reified law as first lieutenant to capital and the state. Attention to contradiction and distinctiveness displaced instrumentalist and social control theorists who were inclined to see coercion behind legislative initiative of the welfare state. But, the Marxist legal form theorists similarly distanced themselves from traditional legal formalists who emphasized the neutral, virtually asocial nature of law and who regarded law as an ‘out of (social) body’ experience across a range of social formations.

Picciotto, for instance, argued that the law—state relation required analysis which moved beyond the “mere combination of the contradictory ideas of coercion and consent” in order to understand “what form of coercion is involved [and] how consent is obtained.”¹⁸ Social relations are mediated: they take place through forms, which result in “partial and contradictory relationships.”¹⁹

Similarly, Bob Fine²⁰ argued that the form, function and content of law required identification and explication, not least because, as he argued, “[t]he normative form of law is compatible with—indeed it will engender—an incongruity between rights of private property and normative standards, between ‘natural rights’ and positive law.”²¹ The form of law in fact has forms of functions, again which require identification and explication beyond the simple legitimation-coercion axis. Law mediates and regulates social relations. With respect to law’s mediation role,²² Fine explained: “The specific character of law as a mediation between individuals is that individuals relate to each other exclusively in terms of property they own and the rights they thereby possess and *are indifferent to all other aspects of people.*”²³ And, the resulting triumph:

16. “The Theory of the State,” *supra* note 12 at 174.

17. E.g. Chris Arthur, “Editor’s Introduction” in Eugeny Pashukanis, *Law and Marxism* (London: Ink Links, 1978) 9; “Law and Class,” *supra* note 12; *Democracy and the Rule of Law*, *supra* note 12; “The Theory of the State,” *supra* note 12. For a more recent contribution, see Judy Fudge, “Legal Forms and Social Norms: Class, Gender, and the Legal Regulation of Women’s Work in Canada from 187– to 1920” in Elizabeth Comack, ed., *Locating Law: Race/Class/Gender Connections* (Halifax: Fernwood, 1999) 160.

18. “The Theory of the State,” *ibid.* at 170.

19. *Ibid.* at 174.

20. “Law and Class,” *supra* note 12; *Democracy and the Rule of Law*, *supra* note 12.

21. *Democracy and the Rule of Law*, *ibid.* at 141.

22. See also Pashukanis, *supra* note 12; Thompson, *supra* note 15.

23. *Democracy and the Rule of Law*, *supra* note 12 at 142 [emphasis in original].

“[T]he juridic illusion under which one’s formal existence appears as one’s real existence, while one’s real existence appears as a formality.”²⁴

But, in this framework, law does more than mediate social relations, it also regulates social relations:

In its function as regulator of social relations the law needs to exercise real force over individuals, but force appears in a wholly mystified shape. Relations of domination and subordination between people appear in a fetishised form of a relation between reason and unreason. ... So, it appears that law is on the side of reason, that reason is on the side of law, and thus subordination to the law is subordination to one’s own rational being.”²⁵

And, importantly here again, “the language of law is indifferent to everything about people and their acts except the categories ... into which they are forced to fit”²⁶—forced by the lawyers whose role it is “to work *on the law*, to interpret it, to seek loopholes in it, *to make the law fit the facts* of the client’s activities and interests. Lawyers are not just translators but transformers and transcendents of law.”²⁷

This language of “totality,” “real,” and “mode of production,” “mystification,” and “illusion” seems awkward, possibly even anachronistic, in a theoretical milieu which has been constructed (and paradoxically dominated) by the language of discourse and the insights of postmodernist scholars. Yet, nonetheless, I return without apology to these theoretical roots and concepts to attempt to understand the phenomena of “family” and “spouse” as sites or terrains of struggle—in particular, the spousal claims (and victories) of lesbian and gay communities and the spousal resistance (and defeats) of welfare mothers. Insistence upon attention to the legal form facilitates analyses which are attentive not only to *form* but also to forms and levels of law and legal institutions, and importantly the role of legal subjects and legal actors.²⁸

24. *Ibid.* at 144.

25. *Ibid.* at 145.

26. *Ibid.*

27. Doreen McBarnet, “Law and Capital: The Role of Legal Form and Legal Actors” [1984] 12:3 *International Journal of the Sociology of Law* 231 at 233 [emphasis in original] [hereinafter “Law and Capital”].

28. Maureen Cain, “The Symbol Traders” in Maureen Cain & Christine B. Harrington, eds., *Lawyers in a Post-Modern World: Translation and Transgression*. (New York: New York University Press, 1994) 15; Doreen McBarnet, “Legal Form and Legal Mystification: An Analytical Postscript on the Scottish Criminal Justice Act, the Royal Commission on Criminal Procedure and the Politics of Law and Order” (1982) 10:4 *International Journal of the Sociology of Law* 409; “Law and Capital,” *ibid.*

However, I do not return to 'Marxist legal form' theory untouched by more than a decade of feminist and post-Marxist critiques. The insights of scholars who have argued that the law needs to be de-centred in feminist legal scholarship²⁹ and that neither the law nor the state hold a monopoly on power and domination³⁰ continue to be persuasive.³¹ I do continue to hold to the view that the legal form is a *social* form,³² socially constructed in historically specific social formations, replete with contradiction, and limited in its embrace of and contribution to social justice and social change. As a social form, it nonetheless abstracts, indeed parses, social relations into forms of legal relations.

I am interested in identifying the elasticity and flexibility of the legal form: how much new content can it accommodate? How far can it be stretched? What are its limits? Under what circumstances and conditions can the law be used to ameliorate and inhibit experiences and relations of inequality? It is my argument that the lesbian adoption cases, for instance, discussed below offer a clear illustration of the elasticity of the legal form, its ability to accommodate new relational content, the structural limits, and simultaneously, both the contradictory nature of the power and weakness of the legal form.

There is no simple application that can be deployed in the familial and welfare law contexts. One difficulty with attempting to apply (commodity) form theory to welfare law is that the formal equality of formally equal legal subjects does not fit squarely with the substantively unequal legal and social position of the legal subjects of welfare law: legal subjects who are applicants and recipients. There are no commodity producers exchanging goods and services on a formally equal footing, indeed there appears to be no direct exchange at all. The formal equality of worker and employer in labour law, buyer and seller in contract law, is far removed from the formal regime governing welfare recipients, and there is no pretence that welfare recipients and the state are legal actors or legal subjects who enjoy the same formal footing at law.³³ Coupled

29. Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989).

30. Mariana Valverde, *The Age of Soap and Water: Moral Reform in Canada* (Toronto: McClelland & Stewart, 1991).

31. The insight that law and the state are not the centre of a centrifugal universe is, for different reasons, shared by at least one member of the judiciary. See O'Driscoll J., *infra* note 33.

32. See also *Explorations in Law and Society*, *supra* note 11 at 224.

33. In 1996, two pieces of litigation were undertaken in Ontario on behalf of social assistance recipients challenging in one case the newly elected Conservative government's decision by order in council to change the welfare regulations by reducing social assistance benefits by 22% (*Masse v. Ontario (Ministry of Community and Social Services)* (1996), 134 D.L.R. (4th) 20 (Ont. Ct. Gen., Div. Ct.)). The second case, discussed *infra*, challenged the amended definition of spouse in the welfare regulations: *Falkiner v. Ontario (Attorney General)* (1996),

with the gendered and familial dimensions of welfare law, and in particular for this paper, state concern with sole support parents who are not living with a "spouse," the fit becomes even less comfortable, given the relatively recent provenance of the achievement of formal equality and gender neutrality in family law legislation.

And yet, paradoxically, it is within the realm of welfare law that one may witness the emergence of a truly gender neutral legal form of spouse, even as the state attempts to circumscribe the living arrangements of people on welfare. Indeed, the formal definition of spouse within welfare law arguably illuminates the elasticity, contradictions and materiality of the legal form.

It is also incumbent upon those of us situated in law to identify and analyse ways in which law is implicated in the construction, regulation, reproduction, and even inhibition, of patriarchal relations and the dominant notion of family, whilst remaining alert to the extent that law may not be the dominant site of these processes. For instance, there is no legal requirement to marry, no longer a legal concept of illegitimacy (in Ontario),³⁴ no legal requirement that women assume the husband's surname on marriage,³⁵ no legal requirement that children bear the surname of their father.³⁶ Despite the absence of a legal obligation to marry in order to produce legitimate children, many people marry. Despite the absence of a legal obligation to give children the father's name, many women, including unmarried women, give their children the surnames of the father, rather than their own. And, many women still take their husband's surname upon marriage. Here, it is worth recalling Alan Hunt's argument for the development of a "relational theory of law," one that does not

artificially separate legal from other forms of social relations ... [but rather] facilitates the recognition and exploration of the degree and forms in which legal relations penetrate other forms of social relations. ... It also

94 O.A.C. 109 (Ont. Ct. Gen., Div. Ct.). The applicants lost in both cases. In *Masse*, Mr. Justice O'Driscoll observed:

In this case, the applicants complain of poverty and government inaction in so far as the amount of GWAA and FBA payments are "not enough". However, in the absence of the reduced social assistance payments, the applicants would face an even greater burden brought about by the cost of rent and food, non-governmental activity' (at 41) [emphasis added].

And, at 46-47, O'Driscoll J. concluded his judicial contribution to the welfare recipients' case:

The applicants will appreciate that the court has no jurisdiction or desire to second-guess policy/political decisions. ... The matter cannot be summed up any better than was done by the United States Supreme Court in *Dandridge v. Williams* ... at p. 1162-63: "The intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the business of the court."

34. *Children's Law Reform Act*, R.S.O. 1990, c. C. 12, s.1(4).

35. *Change of Name Act*, R.S.O. 1990, c. C.7, s.3(1).

36. *Vital Statistics Act*, R.S.O. 1990, c. V.4, s. 10(3).

embraces the idea that *the "presence of law" within social relations is not just to be gauged by institutional intervention but also by the presence of legal concepts and ideas within types of social relations that appear to be free of law*.³⁷

Thus, it is my argument that textual analysis of legal discourses alone neither captures the specificity of legal form(s) nor facilitates an examination of broader social dimension without and within law. But, here legal academics confront a dilemma. The allure of legal texts, legislative definitions and judicial decisions and pronouncements is an obvious one for lawyers and legal academics. This may account for the "special significance" that "the focus on textuality" has in contemporary legal scholarship, in particular the appeal of post-modernist literary theory to legal scholars.³⁸ However, those of us who remain committed to a materialist and feminist framework have not escaped the mesmerizing appeal of analysis of the text of judicial decisions, particularly of appellate and supreme courts. For instance, in my first foray into the law and ideology literature, I argued that ideological analysis required that the extent to which judicial decisions are informed by 'common sense' understandings of family and gender relations must be illustrated.³⁹ Susan Boyd's early work⁴⁰ in the area of child custody surely laid to rest any faint notion that mothers seeking custody of their children find themselves dealt with by a gender neutral or sensitive judiciary. Similarly, Marlee Kline⁴¹ demonstrated the extent to which the judges who deal with aboriginal mothers in child welfare cases are informed by an implicit, if not explicit, commitment to a form and standard of mothering that most women, including aboriginal mothers, are hard-pressed to attain. In the area of abortion, I noted the sympathy that many judges express for men in the matter of abortion, even when these same judges find themselves constrained by

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37. *Explorations in Law and Society*, *supra* note 11 at 225 [emphasis added].
 38. Alan Hunt, "Confronting the Big Fear: Law Confronts Postmodernism" (1990) 35:3 McGill Law Journal 507 at 513.
 39. Shelley A. M. Gavigan, "Law, Gender and Ideology" in Anne Bayefsky, ed., *Legal Theory Meets Legal Practice* (Edmonton: Academic, 1988) 283.
 40. Susan B. Boyd, "Child Custody and Working Mothers" in Sheila L. Martin & Kathleen E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 168; Susan B. Boyd, "Child Custody, Ideologies and Employment" (1989) 3:1 CJWL 111; Susan B. Boyd, "Child Custody Law and the Invisibility of Women's Work" (1989) 96:4 Queen's Quarterly 831; Susan B. Boyd, "From Gender Specificity to Gender Neutrality? Ideologies in Canadian Child Custody Law" in Carol Smart & Selma Sevenhuijsen, eds., *Child Custody and the Politics of Gender* (London: Routledge, 1989) 126.
 41. Marlee Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women" (1993) 18:2 Queen's L.J. 306.

the law to rule in favour of women seeking abortions over the objections of their (former) men.⁴²

Canadian feminist socio-legal scholarship has done much to advance and enrich our understanding of the gendered nature and implications of judicial decision-making and the ideological content of legal principles such as “best interest of the child.” Judges frequently legitimate their decisions by uncritical invocation of conventional wisdom and a judicial form of common sense; nowhere does this happen more often than in the context of family law, as some of the cases discussed below will demonstrate. However, identifying this phenomenon is far from the most difficult task confronting us. Doreen McBarnet reminds us:

[J]udges also operate in a context. They do not initiate cases; interested parties do that, and their lawyers shape cases from the start by setting the agenda for decision-making. Again, active subjects and their agents, the legal profession, have to be taken into account as the initiators of case law, and again where access to such services is governed by market forces this entree to lawmaking in practice may be more readily available to corporate capital.⁴³

For McBarnet, “[i]t is the *use* of legal form by active subjects and their lawyers which gives it effect; it is the specific forms of law which permit and legitimize such use.”⁴⁴

Thus, in any work that attempts to explicate and explain law’s contribution to gender and gendered relations via the legal form of spouse, close critical attention needs to be given to the legal victories;⁴⁵ and the near misses.⁴⁶ It also means extending one’s focus to analyse the political realm where legal defeats⁴⁷ may facilitate subsequent community organizing and even subsequent political

42. “Beyond Morgentaler,” *supra* note 12.

43. “Law and Capital,” *supra* note 27 at 231.

44. *Ibid.* at 237–38.

45. *E.g. Leshner v. Ontario (A.G.)*, [1992] Board of Inquiry (O.H.R.C); *Moge v. Moge*, [1993] S.C.R. (S.C.C.); *Re K* (1995), 23 O.R.(3d) 679 (Ont. Ct. Prov. Div.); *M. v. H.*, *supra* note 10; *Kane v. Ontario (Attorney General)*, [1997] O.J. No. 3979; *Rosenberg*, *supra* note 3.

46. *E.g. Egan v. Canada*, [1995] 2 S.C.R. 513 (S.C.C.).

47. *E.g. Andrews v. O.H.I.P.* (1988), 49 D.L.R.(4th) 584 (Ont. H.C.); *Canada (A.G.) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.); *Thibaudeau v. Canada (MNR)*, [1995] 2 S.C.R. 627 (S.C.C.); *Board of Governors of the University of Saskatchewan, University of Saskatchewan, Kirkpatrick and Stinson v. Saskatchewan Human Rights Commission*, [1976] 3 W.W. R. 385 (Sask. Q.B.) [hereinafter *University of Saskatchewan*].

victories, and where political defeats (e.g. *Bill 167* in Ontario)⁴⁸ may give rise to legal challenges and legal victories.⁴⁹ Finally, the contribution of political defeats to regressive legislative changes and ensuing legal defeats needs also to be recognized (as in the cases of the welfare recipients' legal challenges to the Ontario government's welfare cuts and other 'reforms').⁵⁰

Spouse as a Legal Form

The language of gender neutrality now saturates family law so thoroughly that it is easy to forget how until recently the key figures in the legal relations of (nuclear) family law were understood to be only legally married husbands and wives, and their infants. Well into the 1970s, provincial statutes across Canada, like Ontario's *Deserted Wives and Children's Maintenance Act*,⁵¹ disentitled wives "guilty" of desertion, adultery or cruelty to support from their husbands. The precursor to the recently repealed *Family Benefits Act*⁵² in Ontario was the *Mothers' Allowance Act* (under which initially only needy deserving widows who were British subjects with dependant children were eligible for any form of relief).⁵³ Historically, married women, widows, common law wives, deserted wives and single mothers have been dealt with differently at law. The closer one gets to property, the tighter the legal definition of spouse and the heightened significance of legal marriage. This is illustrated no less surely than by the

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48. Susan Ursel, "Bill 167 and Full Human Rights" in Katherine Arnup, ed., *Lesbian Parenting: Living with Pride and Prejudice* (Charlottetown: Gynergy, 1995) 341.
 49. *Re K*, *supra* note 9.
 50. See e.g. *Masse*, *supra* note 33; *Falkiner v. Ontario (Attorney General)* (1996), 94 O.A.C. 109 (Ont. Ct. Gen. Div., Div. Ct.).
 51. R.S.O. 1970, c. 128. Under this legislation, only deserted wives could seek maintenance from their husbands. A deserted wife was defined in s. 2 (2) as one who was living separate and apart from her husband due to his uncondoned adultery, cruelty, or refusal or neglect without sufficient cause to provide her with the necessaries of life. Section 2 (4) provides that no maintenance order was to be made in favour of a wife who had committed adultery. See also Saskatchewan's *Deserted Wives' and Children's Maintenance Act*, R.S.S. 1978, c. D-26, ss 2 (2) and s. 11 (1) for similar definitions and conditions.
 52. R.S.O. 1990, c. F.8.
 53. James Struthers, *The Limits of Affluence: Welfare in Ontario: 1920-1970* (Toronto: University of Toronto, 1994); Margaret Little, "Manhunts and Bingo Blabs: The Moral Regulation of Ontario Single Mothers" (1994) 19:2 *Canadian Journal of Sociology* 233 [hereinafter "Manhunts and Bingo Blabs"]; Margaret Jane Hillyard Little, *No Car, No Radio, No Liquor Permit: The Moral Regulation of Single Mother in Ontario, 1920-1997* (Toronto: University of Toronto Press, 1998).

continued restriction of matrimonial property rights, including the matrimonial home, to legally married spouses.⁵⁴

There are few more staunch defenders of the sanctity of marriage and a traditional notion of family than some members of the bench who have been at pains to vindicate “the fundamental importance of marriage as a social institution.”

Suffice it to say that marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical traditions. But its ultimate *raison d’être* transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.⁵⁵

However, the judges who invoke the “time immemorial” nature of traditional marriage, its “sacrament” status⁵⁶ and its procreative essence recently find themselves writing minority judgments about this “fundamental instrument.” For some, even the legislative and judicial concessions to the “realities” of common law relationships have been a difficult stretch to accept,⁵⁷ even as they (grudgingly) acknowledge that “support of common law relationships with a view to promoting their stability seems well devised.”⁵⁸

In the 1980s, the state began to relax the definition of spouse to encompass some forms of long term ‘common law’ heterosexual relationships; for instance, Ontario’s principal piece of legislation on (nuclear) family law provides this expanded definition of spouse:

“spouse” means a spouse as defined in subsection 1(1), and in addition includes either of a man and woman who are not married to each other and have cohabited, (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.⁵⁹

54. In Ontario, for instance, Parts I (Family Property) and II (Matrimonial Home) of the *Family Law Act* R.S.O. 1990, c. F.3, s. 1(1) operate with a definition of spouse as “either of a man and woman who, (a) are married to each other.”

55. LaForest J. in *Egan*, *supra* note 46 at para. 21.

56. Per Finlayson J.A. in *M. v. H.*, *supra* note 10 at 433.

57. See Gonthier J. in *Miron v. Trudel*, [1995] 2 S.C.R. 418 (S.C.C.).

58. LaForest J. in *Egan*, *supra* note 46 at para. 25.

59. *Supra* note 54, s. 29.

But, even this recognition has been uneven and resulted in litigation by common law spouses⁶⁰ and resistance by at least one “common law” husband.⁶¹ For instance, as recently as 1996, common law heterosexual relationships were not covered by Alberta’s family law legislation; and, then, they were only extended as a result of litigation by a woman who had been “turned out” by her common law husband of thirty years and removed by court order from his home (where they had lived during their relationship.)⁶² She had to litigate in order to obtain an order for support from him, and in so doing she had to undertake a Charter Challenge of the legislative definition of spouse.⁶³ Needless to say, she was not a spouse for the purpose of property; she was a spouse only for the purpose of entitlement to support (in other words, she was entitled to a share of his income, but not his wealth).

As I have argued elsewhere, even the most cursory examination of the legislation and case law in the area of pensions, insurance, and survivor’s benefits reveals that there is no one definition of common law spouse, and no single legislative approach regarding it.⁶⁴ In some federal legislation, for instance, there is often a requirement that the spouses have publicly represented themselves as spouses, as in the *Old Age Security Act*: “‘spouse’, in relation to any person, includes a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife.”⁶⁵ In other, but not all, pieces of federal legislation, involving retirement pension benefits, a spouse must be a person of the opposite sex to the contributor, have resided with the contributor for not less than one year, and the *contributor* must have publicly represented the relationship as spousal.⁶⁶

60. *E. g. Miron, supra note 57; Taylor v. Rossu*, [1996] A.J. No. 918 (Alta. Q.B.).

61. *Rossu v. Taylor* [1998] A.J. No. 648 (Alta.C.A.), reversing in part, affirming in part *Taylor v. Rossu, ibid.*

62. *Taylor v. Rossu, ibid.*

63. Mr. Rossu appealed to the Alberta Court of Appeal, and his appeal was allowed in part (but the extension of the definition of spouse to common law spouses for the purpose of spousal support was upheld). *Rossu v. Taylor, supra note 61.*

64. Shelley A. M. Gavigan, “Paradise Lost, Paradox Revisited: The Implications of Feminist, Lesbian and Gay Engagement to Law” (1993) 31:3 Osgoode Hall L.J. 589 at 615. See *Family Allowances Act*, R.S.C. 1985, c. F-1, s. 2(1); *Immigration Act*, R.S.C. 1985, c. I-2, s. 2(1); *Workers’ Compensation Act*, R.S.O. 1990, c. W.11, s. 1(1); *Criminal Injury Compensation Act*, R.S.B.C. 1979, c. 83, s. 1(1); *Workers’ Compensation Act*, R.S.B.C. 1979, c. 437, s. 1; and B.C. Reg. 479/76, s. 2(18).

65. R.S.C. 1985, c. O-9, s. 2 as amended by R.S.C. 1985, c. 34 (1st Supp.), s. 1(1).

66. There is a one year residency, public representation by the contributor of the spousal relationship, and opposite sex requirement in *Public Service Superannuation Act*, R.S.C. 1985, c. P-36, s. 25(4) as amended by S.C., 1992, c. 46, s. 13; *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17, s. 29 (1) as amended by S.C. 1992, c. 46, s.43. But in the *War Veterans Allowance Act* R.S.C.

For common law relationships, there is invariably a coresidency requirement and a duration (which can range from one year in most federal legislation in Canada, to three years in others) before the definition of spouse, and resulting obligation to provide support or entitlement to a programme or benefit is triggered. The combination of requiring cohabitation and public representation can place an onerous burden on the young, the aged, the poor, the homeless, and until Canada's immigration legislation is finally amended, gay couples of different national origins who may not be able to live in the same country.⁶⁷

The neutrality, and attendant apparent formal equality, of the legal definitions has obscured the gendered, and substantively unequal, nature of the relations now characterized as spousal. Despite the achievement of formal equality in family law it has been clear that the legal form of a spouse was governed by a prescribed and expressly preferred form of gender relations: the legislators intended to encompass only relations of persons of the opposite sex. And *this* is what the lesbian and gay challenges have attacked. In the case of

1985, c. W-5, s. 2(3) and *The Pension Benefits Division Act* S.C. 1992, c. 46, s. 107 (Sched. II), there is no public representation requirement, only one year residency as spouses and an opposite sex requirement.

67. The requirement of cohabitation in order to reach the 'threshold' of a common law relationship was fatal to the efforts of a gay man to be found to be the spouse of his same sex partner of 20 years who had died intestate (and hence entitled to the estate, or at least to an order for support as a dependent spouse): see *Obringer v. Kennedy Estate*, [1996] O.J. No. 3181. The evidence was that John Obringer and David Kennedy had an intimate relationship extending over 20 years, including sexual relations, holidays together, eating and meal preparation together, and in the later stages of Kennedy's illness, it appears that Obringer had been his caregiver. Their relationship was described as one of "closeness" and "exclusivity." The men had never lived together in the same city: for the entirety of their relationship, Obringer lived and worked in Buffalo, New York; Kennedy had lived and worked in Toronto, Ontario. Obringer came to Toronto "almost every weekend," and Kennedy frequently visited him in Buffalo. Obringer explained that "they could not live together because their employment tied them down" (para. 19). And, as gay men, they could not marry each other. It is not clear what the citizenship or permanent resident status of either men was, but here again, their sexual orientation (historically) would have precluded any form of sponsorship under Canada's immigration legislation. In the end, Obringer was held not even to have met the threshold of "spouse" (leaving aside the issue of sexual orientation), and the equality argument about the arguably discriminatory requirement of cohabitation (in the face of structural impossibility) was not made. Mr. Kennedy's only "heir at law" prevailed: the daughter of his first cousin stood to receive the entirety of his \$575,000.00 estate. For a discussion of this issue in the context of homeless couples, see "Paradise Lost," *supra* note 64 at 615-16.

spousal support,⁶⁸ child support,⁶⁹ and adoption,⁷⁰ these challenges have prevailed. In the case of private and public pension benefit entitlements, and income tax implications thereof, the results have been located along a spectrum between bitter,⁷¹ bittersweet,⁷² and sweet.⁷³

Gays and lesbians have grounded their claims to spousal status at the level of the common law spouse—challenging not the vaunted status of the legally married spouse, but only the ‘opposite sex’ requirement of spouses who are not legally married.⁷⁴ Class relations clearly tell here, I have argued elsewhere,⁷⁵ that it is not without significance that a number of these cases have arisen in the context of the workplace⁷⁶ and collective agreements⁷⁷; and frequently with the active support of the gay or lesbian worker’s union.⁷⁸ Lesbian activist and trade unionist Karen Andrews, whose fight to obtain health coverage for her partner and their two children, launched one of the first same sex relationship recognition cases in Canada, explains how she came to organize and ultimately litigate her “We are Family” campaign:

68. *M. v. H.*, *supra* note 10.

69. *Buist*, *supra* note 8; *Monk v. Sjoberg* [1996] S.J. No. 411 (Sask.Q.B.).

70. *Re K*, *supra* note 9; *Re C.(E.G.) No. 1 and No. 2, Re*, [1995] O.J. No. 4072 & 4073 (Ont. Ct. Gen. Div.)

71. *Egan*, *supra* note 46 per Sopinka J.

72. *Ibid.* per Iacobucci J.

73. *Rosenberg*, *supra* note 3.

74. Cf *Layland v. Ontario (Minister of Consumer & Commercial Relations)* (1993), 14 O.R. 3d 658; [1993] O.J. No. 575 (Ont. Ct. Gen. Div, Div. Ct.) where two gay men applied for a marriage license (unsuccessfully) in an attempt to challenge the heterosexual requirement of the Ontario *Marriage Act*, R.S.O., 1990, c. M.3.

75. Shelley A. M. Gavigan, “Feminism, Family Law and Familial Ideology: A Perilous Menage à Trois” in Meg Luxton, ed., *Feminism and Families: Critical Policies and Changing Practices* (Halifax: Fernwood, 1997) 98 [hereinafter “Feminism, Family Law”].

76. *E.g. Leshner*, *supra* note 45. Many of the early sexual orientation human rights cases were generated from the workplace and involved the struggles of gay workers to work in their chosen field. See *e.g. University of Saskatchewan*, *supra* note 47, where the late gay activist Doug Wilson (a teacher) was told by his employer that he would not be allowed to go into public schools and supervise practice teaching because he was gay (and had attempted to promote a “Gay Academic Association” at the University of Saskatchewan). The University obtained an order for prohibition to prevent the Human Rights Commission from investigating his complaint.

77. See *e.g. Andrews*, *supra* note 47; *Mossop*, *supra* note 47; *Rosenberg*, *supra* note 3; *Dwyer v. Toronto (Metropolitan)*, [1996] O.H.R.I.B.D. No. 33. (Board of Inquiry).

78. *Andrews*, *ibid.*; *Rosenberg*, *ibid.*; *Dwyer*, *ibid.*

For many activists, our private lives became embroiled with our working lives. In my view, the equality arguments are easier to make there—we do the same work, so give us the same working conditions. What John Damien fought for in Ontario in 1975—the right to do his job and not be harassed or fired because of his sexual orientation—became my struggle ten years later, to do my job and make the same pay despite my sexual orientation.

Within unions, the support for these arguments has been strong. Unionists understand the old credo that “an injury to one is an injury to all.” They understand that you cannot negotiate a *collective agreement* and leave out a significant percentage of your bargaining unit. Before anyone else, both the national office of the Canadian Union of Public Employees and my Local 1996 provided me with invaluable financial and moral support. Working people know that the so-called “fringe benefits” are no longer “fringe.” In fact, they represent an increasing percentage of the shrinking wage. It was my experience that, with only a little bit of coaxing, unionized people understood denying the lesbian and gay worker family or spousal benefits represented a different job rate for equivalent jobs, and undermined solidarity. In short, it threatened everyone.⁷⁹

As I have observed elsewhere, and as Andrews has argued above, the language of family or spousal “benefits” has a particular resonance in the context of trade unions and collective bargaining agreements.⁸⁰ There is no one meaning of “spouse” but the legal sites in which its meaning has been contested and challenged have expanded beyond the traditional confines of family law litigation (narrowly defined in nuclear family terms). The meaning of family, of spouse, of child, of parent has been “stirred up” in the trade union movement, lesbian and gay activists having broken much of this new ground, legal and otherwise, with essential financial and moral support from their unions.

Welfare Mothers, Welfare Spouses: Who’s in?

It is almost now axiomatic to note that for poor women, especially sole support mothers on social assistance, the definition of “spouse” has always been broad in reach and mean in its application.⁸¹ The introduction of gender neutrality in welfare legislation required a linguistic shift from single *mothers* to single *parents*, and *Mothers’ Allowance* legislation became *Family Benefits*. Until the

79. Andrews, *supra* note 47 at 364.

80. “Feminism, Family Law,” *supra* note 75 at 118.

81. “Manhunt and Bingo Blabs,” *supra* note 53; ‘No Cars, No Radio’, *supra* note 53; “Paradise Lost,” *supra* note 64.

election of a provincial conservative government in 1995, "Family Benefits"⁸² had a distinctly different meaning in the welfare context in Ontario than in the lesbian and gay same sex relationship recognition context. Now the language of family, and indeed welfare, has been expunged entirely from Ontario's legislation, and replaced by (the discursively exhortatory) *Ontario Works Act*.⁸³ But, although the legislative framework has been altered quite significantly, the gendered premises and assumptions of the significance of "spouses" remain intact, although mothers and their dependent children clearly no longer merit a special category of entitlement. In Ontario, Ontarians *work* for welfare. (One wonders whether children, who remain the principal beneficiaries of welfare, are far behind?)

Historically, single mothers have been eligible to receive social assistance for their children and themselves only if they were living as a "single person." If a mother was not living as a single person, but with a man, she was not eligible for benefits as a head of a household. Either her benefits were terminated or, if his financial circumstances were also strained, they were eligible to apply to receive general welfare assistance as a "family unit." This has long been known as the "man in the house" rule, with one of its underlying premises explained early on by Simon Fodden: "[t]here is a presumption that under certain circumstances the welfare recipient is cheating ... [and] ... that personal intimacy implies illegitimate financial intimacy."⁸⁴

Poor women have been expected to conform to an unrealizable and idealized model of family life and responsibilities⁸⁵ and they have also been historically subjected to legislatively mandated harassment by virtue of this notorious "man in the house" rule, to ensure their celibacy, to enforce their dependency and to punish their promiscuity.

Needless to say, women on welfare were frequently "cut off" welfare on the suspicion that they were living with a man. These women occasionally encountered allies in somewhat unexpected surroundings, as some members of the judiciary chided welfare authorities and the Social Assistance Review Board for their assumptions and treatment of welfare mothers' cases. In 1981, Mr. Justice Saunders reminded the Ministry of Community and Social Services:

We are dealing with the necessities of life for a mother and her small child. ... [T]he Board must act on more than mere suspicion to take away

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82. Until recently, in Ontario, this term referred to the *Family Benefits Act*, *supra* note 52, the legislation that governed social assistance for single parents and their children and permanently unemployable persons.
 83. S.O. 1997, c. 25, Schedule A.
 84. Simon Fodden, "The Family and Welfare Assistance Legislation in Canada" in D. Mendes da Costa, ed., *Studies in Canadian Family Law*, vol. 2 (Toronto: Butterworths, 1972) 757.
 85. 'No Cars, No Radio', *supra* note 53.

an allowance. ... [T]here must have been some evidence of cohabitation and consortium which includes the recognition of an obligation to provide support before it can be found that a woman is living with a man as his wife.⁸⁶

Similarly, in 1983, Mr. Justice Sutherland expressed his concern that the Social Assistance Review Board was not paying sufficient attention to the court's interpretation of the 'man in the house' rule:

[T]here is a need for the Board to review both its practices and interpretation of the Act to bring them into line with repeated declarations by this court in this area. It is difficult to avoid the sense that, through error, too many similar cases involving decisions by the director to cancel benefits upon inadequate evidence are upheld by the Board and find their way to the court. *One cannot help wondering how many others, persons who in the nature of things are among the more helpless in the community are thus deterred from asserting claims that would be upheld by the courts.*⁸⁷

In 1985, another judge confronted with a "man in the house" case noted with concern "the disturbing frequency" with which welfare mothers were treated with suspicion and scepticism in their claims for social assistance:

A single mother shackled with the responsibility of raising two children on meagre government assistance no doubt lives under very trying circumstances. It would be a very strong woman indeed who could manage this without daily emotional support from a close friend. To deprive her of her only source of income because her close friend happens to be a man is very harsh. When dealing with the necessities of life for a mother and her children, the mother should be given the benefit of the doubt.⁸⁸

Despite these glimmers of judicial support for welfare mothers who, against the odds, were able to get their cases before the courts, the 'man in the house' rule, with its patriarchal underpinnings, continued to expose women on welfare to "intrusive investigations into private conduct," (in the words of a Cabinet Minister quoted by Mr. Justice Rosenberg in his dissenting judgment in *Falkiner*⁸⁹).

86. *Re Willis v. Ministry of Community and Social Services* (1983), 40 O.R. (2d) 287 (Ont. Div. Ct.) at 293.

87. *Re Burton* (1985) 52 O.R. (2d) 211 (Ont. Div. Ct.) at 223 [emphasis added].

88. *Re Pitts* (1985), 53 D.L.R. (3d) 512 (Ont. Div. Ct.) per Reid J. at 314.

89. *Falkiner*, *supra* note 50 at 131.

In 1987, the Regulations to the Ontario *Family Benefits Act*⁹⁰ were amended following the settlement of a Charter Challenge launched by the Women's Legal and Education Fund (LEAF). A new definition of "spouse" was added to the welfare regulations: "a person of the opposite sex to the applicant or recipient who resided continuously with the applicant or recipient for a period of not less than three years."⁹¹

By implication, a 'new relationship' grace period was introduced: a recipient could live with a person of the opposite sex for up to three years. After three years, the welfare recipient was required to provide evidence that the economic, social and familial aspects of the relationship were such that the continuous residing did not amount to cohabitation. And here, a new legislative twist in the determination of a spousal relationship: sexual factors were *not* to be investigated or considered.⁹² In a criminal case in which a welfare mother was prosecuted on a charge of welfare fraud, and in which she attempted to rely on the definition of "spouse" in the welfare legislation, and the "non relevance" of sexual factors, one Ontario judge expressed his ire:

The purpose of this provision is to protect honest recipients from the risk of losing benefits because of legitimate sexual activity. However, the anxiety to keep the prying eyes of the Director out of the bedrooms of recipients has shackled the Director with an artificial and unrealistic approach to the meaning of cohabitation that is inconsistent with the common law.⁹³

In convicting Ms Jantunen for welfare fraud, because he found that she had received benefits whilst not living as a single person, Mr. Justice Kurisko ignored the greater latitude given to welfare administrators by this regulation, preferring to characterize it as a "distorted and unrealistic" approach imposed upon welfare administrators. He preferred to apply the test for cohabitation he himself had developed in an earlier case,⁹⁴ and at one point offered still another measure or test of cohabitation:

The whole of the evidence pertaining to the societal component of cohabitation brings to mind the evidentiary aphorism that if a bird walks like a duck, quacks like a duck, and flies like a duck, it can be concluded that it is a duck.⁹⁵

90. *Supra* note 52.

91. *Family Benefits Act Regulations*. R.R.O. 1990, Regulation 318, s. 1(1)(d)(iv), as am. by O. Reg. 589/87, s. 1(1).

92. *Ibid.*

93. *R. v. Jantunen*, [1994] O.J. No. 889 (Ont. Ct. Gen. Div.) at para. 17 [hereinafter *Jantunen*].

94. *Molodowich v. Pentinnen* (1980), 17 *R.F.L. (2d)* 376 (Ont. Dist. Ct.).

95. *Jantunen*, *supra* note 93 at para. 52.

Legal Forms, Family Forms, Gendered Norms: What is a Spouse?/Gavigan

In June 1995, a provincial election in Ontario ushered in a new Conservative government. The government struck swiftly: tax cuts for the well off, welfare cuts for the poor. The new government effectively declared war on people on welfare: slashing welfare benefits by 22%, imposing harsh new eligibility rules on young people, proposing a definition of disability to mean only physical disability⁹⁶ and not surprisingly, the spouse in the house rule returned with a vengeance. The 1987 definition of spouse in Ontario social assistance law was replaced with a more expansive definition of spouse. The definition of spouse now includes the following:

1(1) (d) a person of the opposite sex to the applicant or recipient who is residing in the same dwelling place as the applicant or recipient if, (i) the person is providing financial support to the applicant or recipient; (ii) the applicant or recipient is providing support to the person, or (iii) the person and the applicant or recipient have a mutual agreement regarding their affairs, and the social and familial aspects of the relationship between the person and the applicant or recipient amount to cohabitation.⁹⁷

Sexual factors are still not to be considered or investigated in determining whether or not a person is a spouse, and there is a presumption that if a person of the opposite sex is residing in the same dwelling place as a recipient, that person is a spouse, unless the recipient provides evidence to the contrary. And, gone too, is the three year 'grace' period that had been imported from the *Family Law Act*.⁹⁸

Without suggesting that legal changes inevitably yield measurable results, it is nonetheless possible to note some direct consequences of the 1995 welfare law reforms: over 10,000 recipients of social assistance have been found to be ineligible as single persons or sole support parents; 89% of those who have been cut off social assistance as a result of this new definition of spouse are women, and the vast majority (76%) are single parents whose children are also disentitled.⁹⁹ See also, the dissenting judgment of Justice Rosenberg in *Falkiner*¹⁰⁰ (Justice Rosenberg appears to have accepted the position of the Applicants.)¹⁰¹

96. Randall Ellsworth, "Squandering Our Inheritance: Re-Forming the Canadian Welfare State in the 1990s" (1997) 12 J.L. & Soc. Pol'y 259 at 272-73.

97. O.Reg.410/95.

98. *Supra* note 54.

99. Factum of the Applicants, *Falkiner*, *supra* note 50 at paras. 40 - 42.

100. *Ibid.* at 139-40.

101. These figures, set out in the factum of Applicants, in fact were derived from affidavit evidence filed by the Ministry (the Respondents). I am grateful to Judith Keene, research lawyer, Clinic Resource Office, Ontario Legal Aid Plan, for providing me with this information, as well as a copy of the Factum of the Applicants.

Five welfare mothers challenged the constitutionality of this new definition, initially applying directly to the Court in order to do so. The majority of the Court hearing the application declined to rule on the merits of the application, holding that the applicants did not have standing, and dismissing it on the grounds that it was premature, and directed the applicants to proceed through the welfare tribunal route and make their constitutional arguments before the Social Assistance Review Board.¹⁰² The dissenting judge was critical of linking eligibility to welfare benefits to spousal status:

The welfare or the benefits should be tied to need and support. If the person is receiving support from elsewhere or has other assets, this should be taken into account. The status as a spouse is irrelevant to this and is based on antiquated stereotypes that the man supports the woman. If in fact no support is being paid, what relevance is the status as a spouse?¹⁰³

Characterizing this criteria of “spousal” status inappropriate, Rosenberg J. noted the further effect of “a significant invasion of the recipient’s privacy necessitated by the determination of co-residency and cohabitation,”¹⁰⁴ including the following incidents reported by women on welfare who said that:

[Welfare officials] have conducted surveillance to watch for the coming and going of male visitors. They have conducted bathroom visits to identify toiletry items which might reveal the presence of a male visitor. In one case a worker believed that hunting magazines, a large stereo and “masculine” clothing revealed the presence of a man in the house, a conclusion clearly based on stereotype. In another case a woman was forced to try on a pair of unisex boots to prove that they belonged to her.¹⁰⁵

102. Ms Falkiner, and her fellow litigants then appealed to the Social Assistance Review Board. Their case was argued in April 1997. In the late summer of 1998, the decision of the SARB was finally released. The S.A.R.B. accepted the arguments of the welfare mothers, and struck down the definition. This decision, predictably, has been appealed by the government, and is scheduled to be heard in September 1999. I am grateful to Ian Morrison, Executive Director, Clinic Resource Office, Ontario Legal Aid Plan, for sharing this information with me.

103. *Falkiner*, *supra* note 50 per Rosenberg J. (dissenting) at 138, para. 65.

104. *Ibid.* at para. 67.

105. *Ibid.* at 138–39, para. 168. In this passage, Rosenberg J. drew directly from the Factum of the Applicants in *Falkiner*, *ibid.* at 16, para. 32. In turn, the Applicants’ counsel had relied in this paragraph upon affidavit evidence filed by Professor Margaret Hillyard Little of Queen’s University, Kingston, Ontario, a leading expert on welfare mothers. See “Manhunts and Bingo Blabs,” *supra* note 53; ‘No Car, No Radio’, *supra* note 53.

Beyond a return to this form of intrusion repudiated a short eight years earlier by a Liberal government, the creation of a "Welfare Fraud Hotline" in 1995 (by an N.D.P. government) encouraged third parties to report perceived violations of welfare, including the presence of another adult in a welfare mother's home, under protection of anonymity. Beyond this surveillance and harassment, the new definition of opposite sex co-residents as spouses has made it difficult for two opposite sex adults to reside together and share expenses: a 60 year old disabled man wanted to rent part of his home to his sister in law and her son; he was told that he would not then be entitled to receive family benefits as a single disabled person as she would be considered to be his spouse.¹⁰⁶

Thus, in Ontario, there is a presumption that an adult male co-resident of a single mother on social assistance is her spouse if they have a mutual agreement about their financial affairs (which can include an agreement simply to split household expenses on a 50-50 basis).¹⁰⁷ As Rosenberg J. noted, an inference of interdependence is directed when independence is likely the better inference from a 50-50 arrangement concerning household expenses. Unless the welfare recipient can demonstrate that "the social and familial aspects of the relationship" with the co-resident do not amount to cohabitation, she (and her children) will be disentitled from receiving social assistance as a single parent household. The legal form of spouse in this area of law creates spousal relationships out of co-residency and expense sharing, and eliminates significant indicia of cohabitation between spouses: evidence of a sexual relationship (or an explanation of its absence), sexual fidelity and expressions of affection.¹⁰⁸ Indeed, the only "sex" of relevance to a welfare mother's entitlement to receive welfare in her own right is the sex (modified by opposite) of her coresident. A male boarder may be her spouse; a gay man may be her spouse; an adult male relative may be her spouse. The only real requirement is that this coresident be a

106. *Ibid.*

107. *Falkiner, supra* note 50 per Rosenberg J. dissenting, at 135.

108. In 1980, an Ontario judge attempted to delineate "seven descriptive components involved, to varying degrees and combinations, in the complex group of human inter-relationships broadly described by the words 'cohabitation' and 'consortium': 1. Shelter (*e.g.*, Did the parties live under the same roof; What were the sleeping arrangements); 2. Sexual and Personal Behaviour (*e.g.*, Did the parties have sexual relations? If not, why not? Did they maintain an attitude of fidelity to each other? What were their feelings toward each other?, etc.); 3. Services: What was the conduct of the parties in relation to meal preparation, washing and mending, shopping, housework, and so on? 4. Social (*e.g.*, what was their relationship within the community and extended family?) 5. Societal: How were they received in the community? 6. Support (economic) (*e.g.*, What were the financial arrangements between the parties, etc?) 7. Children: What was the attitude and conduct of the parties concerning children? For the complete list of questions posed under each component, see *Molodowich, supra* note 95.

man. In this insistence on the facial appearance of a heterosexual spouse, the Ontario government has lagged behind other provincial governments in Canada who have eliminated even the opposite sex requirement of the co-resident. In New Brunswick, “sex,” whether opposite or same, does not merit mention in the Regulations:

“spouse” means: (a) the husband or wife of a unit head, or (b) a person who resides with a unit head who shares the responsibilities of the unit and who benefits economically from the sharing, food, shelter, or facilities.¹⁰⁹

In the province of British Columbia, “spouse” for the purposes of welfare assistance means:

(a) the husband or wife of an individual, or (b) an individual who resides with another individual and represents himself or herself as the spouse of that person, or represents himself or herself as married to that person, or indicates a parental responsibility for that other person’s child by assisting in caring for the child and providing the child with the necessities of life; (c) an individual who lives with another individual in a conjugal relationship not recognized as a marriage under the laws of the province, whether or not the individuals share their respective incomes; or (d) an individual living with another individual in a common law marriage.¹¹⁰

These definitions of spouse in welfare law do not insert new relational content into the legal form of spouse, but rather remove relational content from the form. In Ontario, coresidency and a financial agreement with a person of the opposite sex (but no evidence of sex) will almost do it; in British Columbia, a conjugal relationship (with its sexual inference) will do it, whether or not there is any sharing of income. In New Brunswick, anyone who resides with a “unit head” and who “shares the responsibilities of the unit” and “benefits economically from the sharing” is a spouse. No conjugal relationship is necessary in New Brunswick, a conjugal relationship (or not) is not relevant in Ontario, and in British Columbia, an economic relationship is not necessary.

The significance of these deemed spouses in welfare law is that sexual relations, performative “I do’s,” and proclamations that “We are Family” are neither necessary nor relevant. While public representation of a spousal relationship and cohabitation is one form of spouse (in British Columbia), other persons can easily find themselves unexpected spouses (in New Brunswick, for instance, two siblings living together can be spouses, as can two friends, or a

109. *General Regulation Social Welfare Act New Brunswick, Reg. 82-227, s. 2* made under *The Social Welfare Act, 1973, c. S-11.*

110. *Guaranteed Available Income For Need Regulations, B.C. Regulation 479/76, s. 2,* as amended by *B.C. Regulation 487/77, made pursuant to the Guaranteed Available Income For Need Act, R.S.B.C. 1979, c. 158.*

parent and adult child). As one of my students once argued, Ontario's social assistance rules proceeded from the "Man in the House" rule to the "Spouse in the House" Rule to the "Is there *anyone* in the House?" Rule.¹¹¹ The forms may be complex and contradictory, but the purpose is simple: to ensure that women on welfare are not residing with and (possibly, but not necessarily) deriving economic support from another adult.

Considered against the complex and comprehensive definitions of spouse in this area of poverty law, the definition of spouse for the purpose of family property determination in family law is breathtaking in its simplicity: legal marriage and only legal marriage will do. The "I do" must be spoken in the appropriate forum. The legal form of spouse is clearly a many-splendoured thing, and it is a form that shapes and is shaped by class and gender relations. Even Tina Turner would be shocked to know how little love has to do with it.

Lesbian Parents, Lesbian Spouses: Who's Out?

"It is characteristic above all of law and the legal system, probably more than of any other social institution ... that it appears to be essentially neutral, an empty vessel that can be filled with whatever content society chooses."¹¹² In the previous section, I have argued that the elastic and contradictory nature of the legal form of spouse is revealed when one looks closely at the definition of spouse, and its implications, in Canadian social assistance law. In this section, I consider the nature of the challenge to the legal form of spouse in same-sex relationship recognition cases. Is the legal form of spouse "an empty vessel" into which new "same-sex" content can be poured, leaving form and (new) content unchanged? Or, does the new relational content do violence to the traditional form of marriage and legal form of spousal relations (as Justices Gonthier, LaForest, and Finlayson have warned above)? Or, rather, is it possible that the power of the legal form is being revealed just as it appears to be being transformed?

I hope to illustrate the way in which the legal form of spouse has been able to accommodate new relational content whilst simultaneously *imposing* itself and its requirements upon the relationships of lesbian parents who seek to adopt the children in their lives.

In recent Canadian litigation, Attorneys-General have begun to make "concessions of inequality" with respect to what Madam Justice Abella in the

111. Joanne Boulding, paper submitted in partial fulfilment of the requirements of Osgoode Hall Law School's Intensive Programme in Poverty at Parkdale Community Legal Services, Fall 1987 (on file at Parkdale Community Legal Services) [unpublished].

112. "The Theory of the State," *supra* note 12 at 172.

Ontario Court of Appeal has characterized as an “under inclusive definition of spouse.”¹¹³ In other words, in these cases the Attorneys General have been prepared to concede that the equality section of the Canadian *Charter of Rights and Freedoms*¹¹⁴ has been violated. The question then arises whether this violation is a “reasonable limit” which “can be demonstrably justified in a free and democratic society,” and thus “saved” by section 1 of the *Charter*. These lesbian spouse cases, and the two I will discuss below, illustrate the importance of the point made by Doreen McBarnet, with respect to the use of legal form by active subjects, as initiators of case law, whose lawyers “shape cases from the start by setting the agenda for decision making.”¹¹⁵ The Attorney General, in these cases, has been both active legal subject and actor.

Two prominent pieces of litigation launched in the province of Ontario, relevant to this paper, illustrate the significance of the role of and positions taken by different provincial Attorneys General in relation to the constitutionality of the heterosexual requirement of spouse. In a case recently argued in the Supreme Court of Canada, *M. v. H.*,¹¹⁶ a lesbian challenged the legislative definition of (common law) spouse in order to bring herself and her former relationship within the expanded definition of spouse in s. 29 of the Ontario *Family Law Act*.¹¹⁷ She argued that the express requirement that spouses be persons of the opposite sex for the purposes of entitlement to spousal support violates s. 15 of the *Charter*. Her financially better-off former partner appealed to the Supreme Court of Canada in order to resist the spousal hook, and its financial implications. The change in government effected a change in position taken by the Attorney General who had intervened. In this case, the provincial election occurred after the parties had filed their factums, but before the matter was heard. Before trial, the Attorney General reversed the (legal) position taken with respect to the constitutionality of the provision. The chronology of the A.G.’s “irresolute role”¹¹⁸ is detailed below:

On September 1, 1994, the Attorney general of Ontario (“A.G.”) intervened in response to the notice of constitutional question and conceded that s. 29 of the FLA was unconstitutional. On November 1, 1994, it filed a factum in support of this position. On August 16, 1995, after a change in government, the A.G. advised it would now be arguing that s. 29 was constitutional in that the admitted infringement of s. 15(1) of the *Charter* could be saved under s.1. The A.G. removed its first factum

113. *Rosenberg*, *supra* note 3 at para. 12; See also *Kane*, *supra* note 45 at para. 5.

114. *The Constitution Act, 1982*, R.S.C. 1985, Appendix II, No. 44, Schedule B, Part I, s. 15.

115. “Law and Capital,” *supra* note 27 at 231.

116. *Supra* note 10.

117. *Supra* note 54 at s. 29.

118. *M. v. H.*, *supra* note 10 at 425, per Finlayson J.A., dissenting.

from the court file without seeking leave to do so, and filed a new factum in support of its changed position. The A.G. filed no evidence in support of its new s. 1 argument. It neglected to withdraw the affidavit of Professor Margrit Eichler, which it had filed earlier in support of its former position that family law should generally treat same-sex couples in the same manner as opposite sex couples.¹¹⁹

Here again, we are confronted with the significance of the contribution of not only legal subjects, actor and judges, but electoral politics to the legal form. The summer of 1995 was a busy one for the new provincial government in the province of Ontario: new welfare regulations were introduced, welfare rates were cut by 22%, the definition of spouse in welfare law was changed again, and the new Conservative Attorney General was confronted with an embarrassingly progressive legacy from his predecessor in respect of the constitutionality of the opposite sex requirement in the definition of spouse in s. 29 of the *Family Law Act*. His about-face drew the ire of Finlayson J.A. in the Court of Appeal, ire that spoke not only of 'irresolution' but of his frustration at the government's feeble defence of marriage, family and its own legislation.

The second case concerns the issue of lesbian couple adoption; this case was decided (and not appealed) before the provincial election changed the political face of Ontario. In 1995, the N.D.P. government in Ontario introduced a Bill that would have redefined spouse to include persons in same sex relationships in every piece of provincial legislation.¹²⁰ When the Bill seemed destined to be defeated, the Attorney General attempted to save it by introducing an amendment the night before the vote in the legislature. This compromise would have restricted the definition of spouse in the case of adoption, to ensure that gay and lesbian couples would not be able to adopt children. The Bill nonetheless went down to defeat.

In the aftermath of this political defeat, four lesbian couples went to court to apply to adopt the children they were raising together.¹²¹ Each of the four applications involved lesbian parents, one of whom was a biological mother and the other, a social parent. In each, the biological mother consented to the application by the 'social parent.' And in each application, it was clear that the lesbian social parent had a relationship with the children to bring them within the definition of "parents" within both family law and adoption legislation.¹²²

119. *Ibid.* at 421–22.

120. Ursel, *supra* note 48.

121. *Re K*, *supra* note 9.

122. At p. 684 of his judgment, the trial judge in *Re K*, *ibid.*, noted that all the children had known only the respective applicants as their parents for their entire lives; each applicant had clearly demonstrated "a settled intention to treat the children involved as children of her family" (*Family Law Act*, *supra* note 54 at s. 1), and in one case, the couple had obtained a court order for joint custody.

However, adoption law involves the severing of a child's legal tie to the biological parent and redefining an adopted child's legal identity as the child of the adoptive parent. Thus, if the lesbian social parent attempted to adopt the child as a parent, the biological parent's legal relationship to the child would be severed. In the province of Ontario, there is but one exception to this severance; section 158(2)(b) of the *Child and Family Services Act* provides:

For all purposes of law, as of the date of the making of an adoption order, ... (b) *the adopted child ceases to be the child of the person who was his parent* before the adoption order was made and that person ceases to be the parent of the adopted child, *except where the person is the spouse of the adoptive parent.* (emphasis added)¹²³

Further, the only way they could make an application jointly was to challenge the heterosexual definition of spouse incorporated into the Ontario Act, as here again only spouses are allowed by the legislation to make a joint application to adopt.¹²⁴ And, for the purposes of this legislation, the governing definition of spouse is contained in the Ontario *Human Rights Code*.¹²⁵ The *Code's* definition provides that spouses, whether married or unmarried, are persons of the opposite sex.¹²⁶ In order to proceed with the joint adoptions, the lesbian couples challenged the constitutionality of the opposite sex definition of spouse.

In a case where the constitutionality of a piece of legislation is challenged, the parties are required to serve "Notification of Constitutional Question" upon the Attorney General. In *Re K.*, the Attorney General participated in the litigation and, as Nevins J. noted in his judgment, "chose not defend the legislation in question, and in fact urged me to agree with the position taken by the applicants ..."¹²⁷

Once the 'husband and wife' opposite sex dyad was struck, the lesbians had led enough evidence to establish themselves as both spouses and parents. They did this by drawing upon a range of conjugality and cohabitation, intimacy, interrelated lives and romantic affection, to demonstrate the spousal nature of their relationship. The trial judge noted the following indicia:

Each of the couples have cohabited continuously and exclusively for lengthy periods, ranging from six to 13 years; their financial affairs are

123. R.S.O. 1990, c. C.11 [emphasis added].

124. *Ibid.*

125. Section 136(1) of the *Child and Family Services Act* provides that, for the purposes of adoption, "spouse" has the same meaning as in Parts I and II of the *Human Rights Code*, R.S.O. 1990, c. H. 19.

126. *Ibid.*, s. 10.

127. *Re K.*, *supra* note 9 at 682.

interconnected; they share household expenses, have joint bank accounts and in some cases, they own property together in joint tenancy; they share the housekeeping burdens to the extent that they are able in light of their respective careers and employments; the individual partners share a committed sexual relationship. Most importantly, they all share the joys and burdens of child rearing.¹²⁸

These indicia of cohabitation and conjugality in a spousal relationship resonate with the criteria delineated by Kurisko D.C.J. in *Molodowich v. Pentinnen*,¹²⁹ the absence or presence of which (Kurisko J.'s decision in *Jantunen*¹³⁰ notwithstanding) are intended to be precluded from welfare mothers trying to avoid being labelled spouses. And while it is undeniable that the applicants in this litigation were not in the desperate financial circumstances experienced by welfare mothers, it would be a mistake to underestimate the political motivation and significance of this case. The *Re K* lesbians undertook a defiant piece of litigation, in the aftermath of a bitter betrayal of the Bill 167 "compromise" and defeat, when lesbian relationships and lesbian households were characterized as no place to raise (or adopt) a child, as unsafe places for children. Confronted with this public and political judgment, they invoked the legal form, initiated their case, and with their lawyer, they shaped the agenda for the judge, an agenda which was not contested by the Attorney General.¹³¹ Their 'agenda' produced a judgment fulsome in its vindication of child rearing lesbian households:

When one reflects on the seemingly limitless parade of neglected, abandoned and abused children who appear in our courts in protection cases daily, all of whom have been in the care of heterosexual parents in a "traditional" family structure, the suggestion that it might not ever be in the best interests of loving, caring and committed parents, who might happen to be lesbian or gay, is nothing short of ludicrous.¹³²

The decision, which resulted in the striking down of the opposite sex requirement of spouse for the purpose of a joint application to adopt a child, was

128. *Ibid.* at 683–84, per Nevins J.

129. *Molodowich*, *supra* note 94.

130. *Jantunen*, *supra* note 93.

131. One of the litigants from *Re K* spoke as a panellist on "Lesbian Families" at the *Mothers and Daughters Conference*, sponsored by the York Institute for Feminist Research, York University, 19–21 September 1997. She said that she and her partner thought long and hard about commencing this litigation, but in the end they felt they had to do it for their children, who were old enough to follow the public debate surrounding Bill 167, and who could not understand why their family was regarded as not a good home to adopt children.

132. *Supra* note 9 at 708.

not appealed before the provincial election resulted in a change of government, and not incidentally then a change of provincial Attorney General.

As profound as the challenge of the lesbian adoptions is, it is clear that striking down of the opposite sex requirement alone does not, cannot, address the constraints and assumptions that are embedded in the adoption legislation in Ontario. Under this legislation, it is not enough for the lesbian social parents to be "parents." In order to make a joint application, and thereby preserve the biological mother's tie to the child(ren), they must also be spouses in Ontario, and indeed in every province other than British Columbia.¹³³ In order for the lesbian parents to be full parents, they had to be spouses, same-sex spouses to be sure, but spouses nonetheless. The spousal requirement for joint adoptions and preservation of children's ties to their biological parents is not amenable to constitutional challenge. The legal form of spouse coupled with its foundational place as a social form triumphs as it shapes and constrains the nature of the challenges that can succeed. As Brophy and Smart, quoted at the outset of this paper, observed over a decade ago, "we cannot opt out of these legal parameters ..."¹³⁴

Conclusion

The contrast between the social and legal positions of welfare mothers and lesbian parents in relation to the legal form of spouse is striking, and it is less than certain that the distance can be captured or ameliorated by the equality guarantees of the Canadian *Charter of Rights and Freedoms*. Whereas welfare mothers are deemed to have spouses, irrespective of their wishes, intentions and actual relationships, lesbians have struggled to be found to be spouses based on their wishes, intentions and actual relationships.

The gender neutrality of the concept of spouse has produced contradictory results. Its claim to neutrality and formal equality belies the substantive inequality between men and women in spousal relationships, a contrived symmetry where asymmetry is in fact the norm.¹³⁵ The attempts by the legislature to insist upon an opposite sex requirement offer further illustration of the deeply gendered nature of gender neutrality, and yet it is this very characterization of the relationship as spousal that has facilitated the challenge to expand the form. But the form itself, new content notwithstanding, constrains

133. In the province of British Columbia, *The Adoption Act*, S.B.C. 1995, 48, s. 29 allows for "one adult or two adults jointly" to apply to the court to adopt a child.

134. Smart & Brophy, *supra* note 1 at 1.

135. M. D. A. Freeman, "Violence Against Women: Does the Legal System Provide Solutions or Itself Constitute the Problem?" (1980) 7 *British Journal of Law and Society* 215.

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the full force of the challenge. The legal form defies transcendence though law. But, there are many tremors in this terrain, the shifts are significant, and the form may be buckling a bit.

