

**"THERE'S NO GENDER BIAS HERE!":
GENDER EQUALITY AND FAMILY COURT CUSTODY
DECISIONS - THE LEGACY OF *MCMILLAN V JACKSON***

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INTRODUCTION

In the recent decision of *McMillan v Jackson*¹, the Full Court of the Family Court of Australia clearly denounced judicial reliance on stereotypical gender assumptions regarding proper parental roles, in the determination of custody² applications:

¹ (1995) FLC 92-610.

² Changes to the *Family Law Act* (1975) took effect 11 June 1996. From that time the concepts of custody, guardianship and access were replaced by residence, parental responsibility and contact. As the cases referred to in this paper pre date the Part VII amendments, I will continue to use the pre

Whilst a trial Judge does not, and is not, expected to leave his or her common sense and worldly experience outside the door of the court, a Judge *must* leave outside the court any pre-conceived notions which he or she may entertain, as a private individual, about the roles which males and females ought to adopt in society.³

However, any claims that such a pronouncement signals a Family Court free of gender bias and committed to gender equality, at least in relation to custody determinations, are somewhat misguided.

This paper discusses the approach taken by the Full Court in the *McMillan* case to gender equality and exposes the limitations of this approach in assisting efforts to counter the oppressive effects on women of the systemic and institutionalised gender role divisions which are ever prevalent in Australian families and reinforced in our laws relating to custody.

It is argued that true gender equality penetrates far deeper than the 'formal' equality alluded to by the Full Court, to issues about equal power in social and economic relations between men and women.⁴

The 'formal' equality approach to gender equality, it is contended, diverts attention from the underlying structurally imposed inequalities between men and women which are in fact reinforced by the apparent gender neutral 'best interests' standard used in custody determinations. The assumption of full

amendment terminology throughout the paper. It is important to note, however, that the factors taken into account in deciding custody are still relevant to the making of parenting orders (which deal with where a child will live and how s/he will be maintained) pursuant to s 65D under the amended provisions.

³ Above n.2, per Baker, Lindenmayer, and Burton JJ, at 82; 084.

⁴ It is this writer's view that a structural analysis of gender inequality which focuses on unequal power relationships is essential if substantial equality is to be achieved.

time parental care as being in the child's best interests is discussed in this context.

Further, the 'formal' equality approach is accused of giving undue weight to future proposals for the care of children (and thereby serving the interests of men) and ignoring the realities of who undertook the primary care of children before separation, thus further undermining the position of women who are still predominantly the primary carers of children during a relationship.

A 'primary carer' presumption is canvassed as one way the Family Court could better recognise the value of the work done by the primary carers of children.

Finally, the paper concludes that the Family Court does have a legitimate role in seeking to attain substantive gender equality. However, the Full Court's formal equality approach can be seen to be a barrier rather than a platform to the achievement of this goal.⁵

THE APPEAL

McMillan v Jackson involved an appeal against an order for custody in favour of the child's maternal great grandmother, in preference to the natural (biological) father.

The appeal centred on comments made by the trial Judge, to the effect that the father's existing and anticipated reliance upon Social Security benefits and the impact of that on the child "demonstrated a clear bias by his Honour

⁵ A detailed discussion of the ways in which the Family Court could reflect a commitment to substantive gender equality is not within the parameters of this paper.

against the father as a custodian.....which resulted in his failing to assess the father's proposals on their merits".⁶

The appellant submitted that his Honour's preconceptions about the roles of males and females in society prevented him from coming to a balanced judgment on the evidence before him about the merits of the competing claims.⁷

By way of background, the child (26 months at the time of the appeal) was in the primary care of the great grandmother (the intervener) from the age of 3 to 7 months. During this time the father and mother of the child lived together with the father being in paid employment but not the mother. The parents then separated and the father returned to live with his parents in another town. Soon after, the father retained care and control of the child following a period of access and this arrangement continued until the order giving custody to the intervener (when the child was 18 months).⁸

Proceedings for custody were originally initiated by the mother following the father's retention of the child. Interim custody was awarded to the father following which the intervener brought an application for sole custody. The mother then abandoned her application and supported the intervener's application.⁹ Both the father and the intervener proposed to care for the child on a full time basis.¹⁰

THE DECISION

The Full Court¹¹ agreed that the trial Judge had allowed preconceived notions about the appropriate social roles for males and females in society to

⁶ Above n 1, at 82, 084.

⁷ *Ibid*

⁸ *Ibid*, at 82, 077.

⁹ *Ibid*, at 82,078.

¹⁰ *Ibid*. at 82, 078-9.

¹¹ Comprising Baker, Lindenmayer and Burton JJ.

influence his assessment of the competing proposals for custody, rather than assessing them according to their merit.¹²

Specifically, the Full Court held that his Honour's preconceptions that the father should be out working to support his son, rather than staying at home to meet his day to day needs, played a significant part in the decision.¹³

His Honour's views in relation to paternal role models would effectively disqualify any father, who wished to give up work and become full time parent, from ever succeeding in a custody application...where there was a viable alternative female custodian, or a male one not dependent on Social Security.¹⁴

The Full Court drew attention to the fact that the trial Judge had emphasised the intervener's full time availability for the child as a positive aspect of her proposal, yet had failed to acknowledge the full time availability of the father as a positive aspect of his proposal.¹⁵

LOCATING MCMILLAN IN POPULAR EQUALITY IDEOLOGY

The issue of gender bias in the substance and administration of the law in Australia, and particularly its detrimental impact on women, has attracted considerable attention in recent years. In Western Australia, for example, the Chief Justice of the Supreme Court of Western Australia has afforded priority to the issue of gender bias. This is evidenced by the establishment of a Task Force on Women and the Law to inquire into and report on the extent to which gender bias exists in the law and the administration of

¹² Above n 1, at 82,084.

¹³ *Ibid*

¹⁴ *Ibid*, at 82,085.

¹⁵ *Ibid*, at 82,084.

justice in Western Australia, and to make recommendations for its elimination.¹⁶

The Chief Justice has also initiated a judicial education programme on gender equality, acknowledging that there is a need for all judges "to be made aware of the possibility of unconscious bias in decision making and of bias in the substantive law in its application to women".¹⁷

On a national level, the Australian Law Reform Commission published a report on *Women's Equality Before the Law* in 1994.¹⁸ The Chief Justice of the Family Court, Justice Nicholson, has also acknowledged the problem of gender bias in family law and has indicated a commitment to an on-going education program for both judges and general Family Court staff.¹⁹

It has therefore now been acknowledged, in the higher echelons of our male dominated legal system, that gender bias permeates all areas of the law, including family law, and that its elimination is a desirable goal which should be rigorously pursued in order to achieve that elusive concept, equality.

It is important to recognise that concern about and interest in gender bias exists in a community climate which supports, if not demands, at least formal or rule equality in our laws. This means that community standards dictate

¹⁶ See Malcolm, D 'Women and the Law - Proposed Judicial Education Programme on Gender Equality and Task Force on Gender Bias in Western Australia' *The Australian Feminist Law Journal* 1 (1993) 139, at 144. The Task Force Report was published in June, 1994, see The Hon Mr. Justice D.K. Malcolm AC, Chief Justice of Western Australia, *Report of Chief Justice's Task Force on Gender Bias*, 30 June 1994.

¹⁷ *Ibid*, at 141.

¹⁸ *Equality Before the Law - Women's Equality*, Australian Law Reform Commission, Report No 69, 1994.

¹⁹ Hon Chief Justice Alistair Nicholson, 'The Family Court and Beyond' (1995) 10(2) *Australian Family Lawyer* 5, at 6-7.

that our laws should not on their face discriminate on the basis of sex.²⁰ Thus, gender equality is perceived as a matter of gender neutral treatment.

Formal or rule equality has historically been an instrumental strategy relied on by the women's movement to advance the formal legal rights of women in many areas of the law²¹ and has arguably become an accepted standard by which gender equality is measured.

It is within this ideology of equality that *McMillan v Jackson* is situated and the decision can indeed be seen to reflect a formal equality approach.²² For those of us who are concerned with systemic gender bias, and it would appear that at least the Chief Justice of Western Australia agrees that gender bias is a systemic problem,²³ it is feared that an approach based on formal equality will be unable to effectively address the institutionalised gender inequality which permeates family relationships.

CRITIQUE OF THE FULL COURT'S APPROACH

The *McMillan* case originally came to my attention in the local newspaper. Initially, my reaction consisted of outrage and amazement at the blatant bias of the trial Judge and agreement with the Full Court that men should not be disadvantaged in custody disputes for wanting to care full time for their children instead of pursuing the traditional role of 'bread winner'.

However, on closer analysis, it became apparent that the Full Court's attitude to gender equality was narrowly construed and could have the effect of further entrenching the disadvantage experienced by women as a

²⁰ For an explanation and critique of this approach see above n 18, at 45.

²¹ See generally Smart, C *The Ties That Bind*, Routledge, 1984.

²² How the formal equality approach is reflected in the decision will be discussed shortly.

²³ The Chief Justice draws on the work of Mahoney, K, and Graycar, R. & Morgan, J who all draw attention to the systemic nature of gender bias, see Malcolm, D. 'Women and the Law', above n 16.

result of systemic gender bias, while further enhancing the position and power of men in family relationships.

McMillan indicates that formal equality ideology is now a central component in defining the 'gender neutral', best interests of the child standard used to decide custody issues under the *Family Law Act*.²⁴ Although the importance of reforms achieved by reliance on formal equality for women cannot and should not be minimised, the dominance of formal equality ideology presents a considerable barrier to attaining substantive gender equality. As Sheehy points out: "[u]nequal gender relations thrive when the rhetoric of gender neutrality denies their existence".²⁵

(a) Control of the Gender Equality Agenda?

It is rather ironic, and disappointing, that despite feminist endeavours to expose the disadvantages women face in custody disputes as a result of the imposition of traditional sex role divisions in family relationships, and in particular within the institution of marriage,²⁶ and the recent interest shown

²⁴ In determining child custody prior to the June 1996 amendments, the Family Court's overriding concern was for the 'best interests of the child' pursuant to s 64(1): "In proceedings in relation to the custody, guardianship or welfare of, or access to, a child - (a) the court must regard the welfare of the child as the paramount consideration...". S 64(1) was expressed in gender neutral terms and went on to list a number of specific factors which the court must consider in its determination of the best interests of the child. The paramountcy of the best interests of the child is also made explicit in the 1996 Part VII amendments, see s 63B(b) (Parental Agreements); s 63H(2) (Court's power to set aside, discharge, vary, suspend or revive registered Parenting Plans); s 65E (Making of Parenting Orders); s 65L(2) (Ordering supervision of or counselling to assist compliance with, Parenting Orders). Division 10 details the factors the court must consider in determining what is in the child's best interests (see s 68F(2)). These largely replicate those factors considered by the Court in deciding custodial issues under the old provisions pursuant to s 64(1).

²⁵ Sheehy, E A. 'Personal Autonomy and the Criminal Law: Emerging issues for Women', in Graycar, R. & J Morgan, *The Hidden Gender of Law* The Federation Press Sydney, 1990, at 41.

²⁶ See generally Boyd, S. 'Child Custody, Ideologies and Employment', (1989) 3 *CJWL* 111; Boyd, S. 'From Gender Specificity to Gender Neutrality? Ideologies in Canadian Child Custody Law', Chapter 6; Fineman, M. 'The Politics of

by prominent legal players in gender bias against women in the law²⁷, the first reported Full Court decision striking down a custody decision on the grounds of gender bias, deals with gender bias against a male.²⁸ It is doubtful that this is what feminists writers envisaged as a result of their efforts!

One might ask why the Full Court has responded so strongly at this time to the plight of the father in this case when there has been a comparative lack of concern shown by the law for so many years regarding formal legal rights for women. One might cynically reply, as Smart observes, that:

Whilst the law has been very slow in responding to equal rights claims by women, it appears to respond with alacrity to perceived inequalities in formal legal rights where fathers are concerned.²⁹

The profile of groups concerned with men's rights in family law, including Australia, has been raised substantially in recent years.³⁰ These groups

Custody and Gender', Chapter 2, and Smart, C. 'Power and the Politics of Child Custody', Chapter 1, in Smart, C. & S. Sevenhujsen (eds), *Child Custody and the Politics of Gender*, Routledge, 1989; Boyd, S 'Child Custody and Working Mothers', in Mahoney, K & S Martin, *Equality and Judicial Neutrality*, Carswell, 1987, at 168; Smart, C. above n 21; Berns, S. 'Living Under the Shadow of Rousseau: The Role of Gender Ideologies in Custody and Access Decisions', (1991) 10 *UTLR* 233; Berns, S. 'Towards a Theory of Relational Equality', (1993) 16(2) *UNSW Law Journal* 394; Hasche, A 'Sex Discrimination in Child Custody Determinations' (1989) 3 *Australian Journal of Family Law* 218; Polikoff, N 'Gender and Child Custody Determinations: Exploding Myths' in Chapter 10, Diamond, I (Ed), *Families, Politics, and Public Policy*, Longman, 1983; O'Donovan, K *Family Law Matters*, Pluto Press, 1993; Fineman, M 'Custody Determinations at Divorce: The Limits of Social Science Research and the Fallacy of the Liberal Ideology of Equality', (1989) 3 *CJWL* 88.

²⁷ See above n 16-19.

²⁸ The issue of gender bias against a male in a custody decision was also reported in the case of *Sheridan v Sheridan* (1994) FLC 92,517, again in a decision by Rourke J, but the Full Court held that the issue of gender bias did not significantly influence the trial Judge's decision.

²⁹ Smart, C in Smart, C & S Sevenhujsen (eds), above n 26, at 9

³⁰ See generally Hasche, Boyd, Fineman, Polikoff, & Smart, above n 26; and Drakich, J 'In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood', 3 *CJWL* 88.

have successfully used the platform of formal equality which has been responsible for many of the advances gained for women in the area of formal legal rights, to advance the interests of men. The Full Court has responded to the call.

While it is clear that 'male equality', in relation to custody determinations, has attracted the attention of the Full Court, what is of greater concern is the implications for women of a Family Court which has expressed the view, at the highest level, that gender equality is merely an issue of 'equal treatment' of the sexes.

(b) The Formal Equality Approach - Problems and Limitations

The rhetoric of the Full Court in *McMillan* in relation to gender bias can be seen to be internally inconsistent. In addition to adhering to the view that it is inappropriate to impose stereotypical parental roles, the Court also states that:

The Family Court, above all other Courts, has the obligation and responsibility to reflect community standards and opinions, subject only to the *Family Law Act*³¹

Does this mean that if parental roles, based on traditional gender roles which are inherently stereotypical, are condoned by the community, the Family Court is obliged to reflect them? It would appear that what the Full Court means is that the imposition of parental stereotypes is only unacceptable if formal equality principles are offended, in accordance with the popular parameters of equality adopted by the wider community.

Formal or rule equality is premised on the 'sameness of treatment' principle and renders irrelevant the issue of gender.³² Formal equality simply requires

³¹ See above n 1, at 82,085.

³² For general discussion and analysis of the formal equality model see *LRC Report 69*, above n 18, at 44-48; O'Donovan, K & E Szyszczak, *Equality and Sex*

that women and men be treated exactly the same in all circumstances and assumes that the creation of a level playing field, of itself, will create equality.³³

The Full Court's commitment to this ideal is evidenced by its view that both the father's and the intervener's proposals, based on full time care of the child, should be treated 'equally' and assessed on their respective merits³⁴. The Full Court was of the view that the father was denied equality of treatment by being required to conform to the trial Judge's preconceptions regarding the proper role of fathers in society.³⁵

The fundamental flaw in the formal equality approach is that it erroneously assumes that men and women are equal to begin with, that is, that they are equally situated in society.³⁶ Rule equality corrects any ensuing discrimination by demanding equal treatment. But women are not and have never been located in the same socio-economic structures as men³⁷ and thus the legitimacy of the formal equality model falls away.³⁸ A liberal belief in formal equality leaves issues of power and privilege untouched.³⁹

MacKinnon's analysis of gender inequality suggests that further to leaving untouched issues of power, gender neutral approaches to equality perpetuate further inequality because the more gender neutral the law professes to be,

Discrimination Law, Chapter 1, Basil Blackwell, 1988; MacKinnon, CA. *Feminism Unmodified*, Harvard University Press, 1987; Mahoney, K 'International Strategies to Implement Equality Rights for Women: Overcoming Gender Bias in the Courts', (1993) 1 *The Australian Feminist Law Journal* 115.

³³ LRC Report, above n 18, at 45.

³⁴ Above note 1, at 82,084-5.

³⁵ *Ibid*, at 82,085.

³⁶ Boyd, S 'Some post Modernist Challenges to Feminist Analyses of Law, Family and State: Ideology and Discourse in Child Custody Law', (1991) 10 *Canadian Journal of Family law* 79, at 112.

³⁷ Boyd, S 'Child Custody, Ideologies and Employment', above n 26, at 123.

³⁸ Smart, *Ties That Bind*, n 21, at 139.

³⁹ See Code L, Review of O'Donovan, K *Sexual Divisions in the Law*, Weidenfeld and Nicholson, 1985, at 193.

the more 'male' it is.⁴⁰ Thus, women are offered 'rule equality' as defined by a male view of the world.

The traditional family, with its clearly defined gender roles - women as passive, emotional, dependent, nurturers and carers of children, and men as independent, active, and achievement oriented⁴¹ - reproduces patriarchal relations and keeps women in a position of powerlessness.⁴² The law celebrates traditional family roles by privileging legal marriage, thereby reproducing and perpetuating the most secure foundations of patriarchal relations - the family and gender division.⁴³

O'Donovan argues that traditional gender role divisions are likely to remain so long as legal marriage remains a central concept in family law. She describes marriage as a heterosexual dyad, " ...a union of opposites, a bipolar model of attributes, bodies, gestures, conduct, aptitudes and expectations of what a gendered person is and what a gendered person does".⁴⁴ O'Donovan goes on to pose the question of whether the greater care to appear neutral by the judiciary is actually a step forward. Her answer is instructive: despite the elimination of directly gendered provisions which has resulted from the adoption of a gender neutral/formal equality approach, institutional sexism, which is harder to define and root out, remains.⁴⁵

There is a substantial body of feminist research detailing the ways in which systemic gender bias disadvantages women in custody disputes.⁴⁶ Some of the main concerns identified from case analyses are:

⁴⁰ MacKinnon, above n 32, at 42-43.

⁴¹ Berns, 'Towards a Relational Theory of Equality', above n 26, at 424.

⁴² Smart, *Ties That Bind*, n 21, at 10-11, & 220.

⁴³ *Ibid*, at 4 and 221; Boyd, S 'Child Custody, Ideologies, and Employment', above n 26, at 114-5.

⁴⁴ O'Donovan, above n 26, at 61.

⁴⁵ *Ibid*, at 63.

⁴⁶ See generally the work of Boyd, Fineman, Hasche, Smart, Polikoff, Drakich, & Berns, above n 26.

1. Judges penalise mothers who are in paid employment for not spending sufficient time with their children.⁴⁷ Working mothers are viewed as inadequate mothers as they do not conform with the traditional female role.⁴⁸
2. Judges attach significance to a father's ability to provide a 'surrogate' mother in the form of a new female partner or relative, thereby creating a traditional family unit where traditional roles are adopted.⁴⁹
3. Full time parental care is held up as being in the best interests of the child, but in practice is enforced more rigidly against mothers than fathers.⁵⁰ Fathers who are in paid employment are less likely to be penalised because they are performing an accepted 'fatherly' role.⁵¹
4. Significance attached to economic capacity fails to recognise the structural inequalities women face in regard to socio-economic status.⁵²

The protestation of the Full Court that "...it is inappropriate to impose a stereotypical norm of proper parental roles"⁵³ when determining custody applications, displays a degree of hypocrisy when considered in light of the above analyses. Within a formal equality framework, the Full Court recognised that it is unfair that the father be required to conform to a

⁴⁷ See Hasche, *ibid*, at 224; Polikoff, *ibid*, at 188-9; Boyd, S. 'Child Custody and Working Mothers', *ibid*, at 174.

⁴⁸ Hasche, *ibid*, at 226; Boyd, 'Child Custody, Ideologies, and Employment', above n 26, at 120.

⁴⁹ Hasche, *ibid* at 224-8; Boyd, *ibid*, at 120-21; Boyd, Ch 2, in Smart & Sevenhujsen, above n 26, at 141.

⁵⁰ Polikoff, above n 26, at 190;

⁵¹ *Ibid*

⁵² See Polikoff, *ibid*, at 189-90; Hasche, above n 26, at 224.

⁵³ Above n 1, at 82,085.

stereotyped norm of fatherhood, which prevented his proposal from being treated on an equal footing with that of the intervener. Yet, the Full Court, by adopting a formal equality approach, essentially leaves unchallenged the stereotypical norms of parenthood which result in the types of discrimination against women in custody disputes alluded to above.

In addition to the formal equality model failing to address these areas of gender inequality and reinforcing the 'ideology of motherhood', further problems for women are created by the erroneous assumptions of equality of status. As Boyd remarks:

The newer ideology of equality tends to assume equal female participation in the market place and equal male participation in child care.⁵⁴

Thus, there is an assumption of equal parenting potential between mother and father⁵⁵ which ignores both the effect of systemic gender inequalities and the realities of child care responsibilities.⁵⁶

It has been well documented world wide, that women still undertake the primary care of children,⁵⁷ even where both parties are in full time employment.⁵⁸ A formal equality approach gives insufficient recognition to the realities of the primary carer role because it tends to focus on future interest in and arrangements for the child, rather than past care, thereby insulating gendered, pre-separation roles from examination.⁵⁹ The

⁵⁴ Boyd, above n 36, at 106.

⁵⁵ Boyd, above n 43, at 116.

⁵⁶ See generally Boyd, Hasche, Fineman, Drakich, & Polikoff, above n 26.

⁵⁷ See for example Boyd, S 'Child Custody, Ideologies, and Employment', above n 26, at 112; Hasche, above n 26, at 229; Drakich, above n 30, at 83-85.

⁵⁸ This has been widely referred to as the 'double shift' role which characterises many mother's lives.

⁵⁹ Fineman, above n 26, at 88. It is acknowledged that the Family Court does, under s 68F (pre June 1996 amendments, s 64(1)) of the *Family Law Act*, consider the issue of primary care giving, albeit indirectly, by consideration of the desirability of changing existing arrangements between parent and child and the effect of separation from either parent pursuant to s

inappropriateness of considering future care proposals based on presumptions of equality when past care has not displayed such equality, is apparent.⁶⁰

Formal equality therefore has the effect of rendering invisible and devaluing the traditional child care work still undertaken predominantly by women.⁶¹ One suggestion mooted by several writers to acknowledge the reality of child care responsibilities, is the introduction of a "primary carer" presumption.⁶² It is arguable that while such a measure does not challenge the traditional gender role dichotomy, it does nonetheless give some recognition, within a custody framework which purports to promote gender equality, to the differential situations of men and women in relation to their roles within the family.⁶³

Criticism that such an initiative further promotes the economic dependence of women because it reinforces the 'caring' role of mothers, misses the point that such a step may be required until gender neutral laws reflect gender equal relationships in wider society.⁶⁴ Arguably, it is in the child's best interests to be cared for by the person who has been primarily responsible for his or her care and nurturing. A primary carer presumption has the capacity to recognise the contribution made by many women, while also recognising the contribution of the minority of fathers who *are* primary carers.

The approach of the Full Court in *McMillan* suggests that women may be facing increasing obstacles in gaining custody due to the increased priority placed on formal equality principles. The significance of who has been the

68F(2)(c)(see pre June 1996, s 64(1)(bb) (iii)) & s 64 (1) (bb) (ii)). However, it is argued that the weight given to primary care giving is inadequate and inconsistent.

⁶⁰ Boyd, 'Child Custody, Ideologies and Employment', above n 26, at 116.

⁶¹ *Ibid*, at 113 and Fineman, above n 26, at 90.

⁶² See generally Hasche, Polikoff, Smart, Boyd & Fineman, above n 26.

⁶³ Boyd, above n 37, at 123.

⁶⁴ Fineman, above n 26, at 108.

primary carer becomes less important under this model and future plans (which may be largely unsubstantiated) assume a far greater importance.⁶⁵ This is likely to be of assistance to men wishing to contest custody and detrimental to mothers who have been primary carers.

If men were participating equally in child care responsibilities before separation and were genuinely embracing the concept of the 'new father',⁶⁶ the Full Court's approach would not be cause for concern. However, there is a danger that the formal equality approach to custody may serve the interests of men whose motives are fuelled not by a desire to play a more active role in the caring and nurturing of their children, but by a desire to re-assert entrenched privileges and rights to their children.⁶⁷

It was pointed out above that custody decisions have reflected an attitude that the interests of the child (particularly pre-school aged children) are best served by the full time care of a parent.⁶⁸ While the formal equality approach in *McMillan* argues that a mother or father may equally fill this role, the requirement for full time parental care itself is not challenged. There appears in the *McMillan* case, to be an implicit assumption that full time parental care is the basic criterion to be met in order to meet the best interests of the child. A more substantive approach to equality might recognise that this standard perpetuates the traditional motherhood ideology by pressuring mothers who wish to retain custody of their children to assume the traditional role of the full time, at home mother.⁶⁹ A recent unreported case of the Family Court of WA, highlights the problem. Barblett, J. states, in relation to a mother's proposal for custody of child X:

⁶⁵ Smart, Chapter 6, in Smart & Sevenhuysen (eds), above n 26, at 150-1, argues that past demonstrated parenting ability should weigh heavily in assessing the genuineness of current offers to parent in the future.

⁶⁶ Drakich, above n 30, at 87, argues that research has shown that claims that they have are seriously inflated.

⁶⁷ *Ibid*, at 83-87, and Smart, Chapter 1, in Smart & Sevenhuysen (eds), above n 26, *supra*.

⁶⁸ See above n 49 & 50.

⁶⁹ See generally Boyd, Chapter 6, in Smart & Sevenhuysen (eds), above n 26, at 127.

I am not quite sure that the [proposal for the] future of X shows that the wife demonstrates a regard for the duties of parenthood because of the fact that she is going to have to continue to work.⁷⁰

This presents a double edged sword for mothers who need, or want, to work. By working outside the home, the risk of losing custody of their children is increased and, at the same time, their chances of custody may be lessened if they do stay at home full time due to an unfavourable economic position in comparison with the father.⁷¹

An approach based on formal equality is incapable of identifying, let alone addressing, the persistent and systemic gender bias inherent in the full time parental care assumption.

If substantive equality were to be applied, custody decisions would be more fairly determined by focussing on who has been the primary care giver, irrespective of whether either, both or neither of the parents are employed. By challenging the assumption that full time care equals the best interests of the child, women will be more freely able to depart from traditional gender roles without fearing loss of custody.

In summary, an approach to custody law based on formal equality disadvantages women because it assumes equal economic opportunities for men and women, undervalues primary care taking, and yet still expects a significant degree of conformity to the traditional ideology of motherhood.⁷² The challenge for the Family Court is therefore to 'peel back the thin veneer of formal equality'⁷³ in order to address the structural inequalities produced

⁷⁰ *B V B*, Unreported decision of Family Court of Western Australia, 29 March, 1994, at 8.

⁷¹ See generally Boyd 'Custody, ideologies and Employment', above n 26, at 133.

⁷² Boyd, Chapter 6, in Smart & Sevenhujsen (eds), above n 26, at 148.

⁷³ A phrase used by Helena Kennedy, QC in a paper on *Justice, Power, and Discrimination*, presented at the 5th National Family Law Conference on Family Law, September 1992, at 601.

by the relegation of women to their traditional roles. *McMillan v Jackson* suggests that the Full Court is reluctant to do so.

CONCLUSION

In defence of the formal equality approach endorsed by the Full Court in *McMillan v Jackson*, perhaps it is unrealistic to expect such fundamental changes in the relationships between men and women to be initiated by Family Court judges.

It has been suggested, by a former Judge of the Family Court, in response to claims of gender bias, that the Family Court is a servant of society and that it is up to Parliament to lead efforts directed toward social change.⁷⁴

With respect to the former Judge, while it is acknowledged that the law:

....mirrors society with all its imperfections and therefore reflects the subordination of women,...holding up a mirror can never be its sole function. The law affects as well as reflects and all those involved in the administration of justice have a special obligation to reject society's irrational prejudices.⁷⁵

it has also been argued by some feminists⁷⁶ that women's inequality will not be transformed by legal rules and that it is the larger culture which must change if there is to be real reform.

It cannot be disputed that the social changes necessary for gender equality are required at other levels than the law itself, for example, in

⁷⁴ Nygh, J 'Sexual Discrimination and the Family Court', (1985) 8 *NSW Law Journal* 62, at 78-9.

⁷⁵ Kennedy, above n 73, at 620.

⁷⁶ For example, Fineman, above n 26, at 108.

family structures, taxation policies, education and employment.⁷⁷ However, locating the problem in wider structures should not allow the law to escape its responsibility in rejecting society's prejudices, including entrenched gender inequality.

Furthermore, the law is capable of change and positive influence rather than merely negative restraint.⁷⁸ Carol Smart argues, for example, that the legal system is part of the 'production of consent' and that it has a positive and educative function which orchestrates public opinion.⁷⁹

The legal system is therefore a legitimate target for critique and reform, firstly because it is capable of reform and secondly because it has a responsibility to reject gender inequality instead of perpetuating it.⁸⁰

Until the Full Court acknowledges that it has, in *McMillan v Jackson*, endorsed a formal equality approach to gender bias and recognises the fundamental limitations of such an approach in attacking systemic gender bias, any claims that the Full Court is vigorously committed to the elimination of gender bias from Family Court custody decisions are delusory.

⁷⁷ Berns, 'Towards a relational theory of Equality', above n 26, at 427.

⁷⁸ Smart, *The Ties That Bind*, above n 21, at 221.

⁷⁹ *Ibid*, at 21.

⁸⁰ See generally Smart, *ibid*. Mahoney, above n 32, at 120, also argues that substantive gender equality is a legitimate goal for the judiciary and wider legal system.