

Gender Inequality and Divorce Laws

A Canadian Perspective

Australia and Canada have experienced similar legal backgrounds (except in French Canada) and similar divorce controversies, but several policy choices have differed. **MAUREEN BAKER** highlights a number of legal reforms that have occurred in Canada and in Australia, arguing that the lingering controversies resulting from divorce reform cannot only be resolved through changes to family law.

As divorce rates have increased, most industrialised countries have experienced controversies about how family assets should be divided, and about how child custody and support decisions should be made. In several countries, concerns have been expressed about the wisdom of recent family law reforms, including the extent to which judicial decisions about property and support contain gender biases, and about the 'clean break' philosophy of divorce.

The problem of gender inequality after divorce stems from inequalities within the home and labour force. If parenting were shared equally, and if labour force outcomes were similar for both sexes, gender inequities would diminish after divorce. Furthermore, where childrearing is seen as a *private* family responsibility instead of a societal responsibility, the poverty of women and children after divorce continues.

Unlike Australia, where the Federal Government has jurisdiction over both family law and divorce law, in Canada these are regulated by two independent levels of government. There, the federal government has jurisdiction over divorce, which includes the legal right to remarry as well as guiding principles for child custody, access and financial support. Marriage, however, is presided over by the provinces, which are granted this jurisdiction under the Canadian constitution. The jurisdiction includes the division of family assets upon separation of spouses, and laws pertaining to the granting and enforcing of child custody, access, child support and spousal support.

This means that the laws and practices relating to child custody and support are not uniform across Canada. Furthermore, Canada, which is officially a bicultural and bilingual society, has two different legal systems. English-speaking Canada uses common law, which bases decisions largely on previous court cases, while French-speaking Quebec uses civil law, with guiding principles for judicial decisions and written contracts regarding marital property.

Historically, both Canadian and Australian law was based on the concept of the patriarchal family. This family construct was

fought for decades by Canadian women's rights activists before it became eroded at the end of the nineteenth century. Throughout the twentieth century, laws were gradually amended to make families more egalitarian, to liberalise divorce, and to improve children's rights (Baker 1993). Yet controversies remain concerning the wisdom of some of these amendments, especially within the realm of divorce law.

Divorce Reform

Prior to 1925, Canadian divorce laws differed according to province and divorce was difficult, rare and costly. The laws contained a double standard that enabled men to divorce their wives more easily than women could divorce their husbands. In 1925, the Canadian federal government took over jurisdiction for divorce law and removed the double standard but retained 'adultery' as the main ground for divorce. In Australia, the Commonwealth Government created uniform divorce law much later, in 1959 (Funder, Harrison and Weston 1993).

While Australia moved to 'no fault' divorce in the mid-1970s with the introduction of a provision in the *Family Law Act 1975*, Canada reformed its divorce laws in two stages.

In 1968, a new ground for divorce was created called 'marriage breakdown', but this was not 'no fault' divorce. Marriage breakdown was strictly defined as five years' separation for the 'guilty' party, or three years for the 'innocent' party. Men were still expected to support their children after divorce, but enforcement was essentially left to the custodial parent (usually the mother). A judge might, for example, ask a former husband to pay 'alimony' for life or until such a time that his former wife remarried. If a woman was found guilty of 'matrimonial fault' (such as desertion or adultery), however, she could be made to forfeit any financial settlement and lose custody of her children.

Throughout the 1970s, strong public pressure forced changes to the Canadian divorce laws, which were seen by many groups as cumbersome, time-consuming, inconsistent, expensive and subjective. As in Australia, Canadian men felt that they were paying too much in maintenance costs, while women argued that their unpaid domestic work and childrearing counted for little when property was divided.

Several very public court cases led to considerable public debate about property division. Of particular note was the Murdoch case in 1971 (Dranoff 1977). For many years, Irene Murdoch managed and worked the ranch in Alberta belonging to herself and her husband, while her husband undertook periodic wage work in the city. After 25 years, the marriage ended when he physically abused her. In spite of her contribution to the ranch, she lost any claim to it because her name was not on the deed and because most of the money used to purchase it came from her husband's paid earnings. She was awarded alimony of \$200 a month and permitted to live in the house.

The outcome was contested by Ilene Murdoch and the case went to the Supreme Court of Canada. There, the decision not to grant her a share of the ranch was upheld because her farm labour was deemed to be 'normal for a rancher's wife' (Dranoff 1977, p.52). This case and others led to reforms in all Canadian provinces concerning the division of family assets. Yet controversy remained

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in respect to what constituted a 'family', 'personal' or 'business' asset, and provinces defined these differently.

In 1985, the Canadian Divorce Act was reformed again, redefining 'marriage breakdown' as one year of separation as Australia had in 1975. However, in Canada the 'no fault' ground was added to the existing fault grounds, and divorce became possible without the other partner's consent. This meant that women lost some of their previous bargaining power in property settlements as they could no longer delay divorce proceedings until they received a higher financial settlement. Life-long 'alimony' was replaced with temporary and gender-neutral 'spousal support', based on the 'clean-break' philosophy of divorce. But as with alimony, spousal

support continued to be paid to women and decisions were still based on legal advocacy and judicial discretion.

In Australia, the 1975 Family Law Act had allowed wide judicial discretion in dividing property to ensure that the division was 'just' and 'equitable', but had not assumed a 50/50 division. Spousal support was viewed as temporary, 'rehabilitative', and a 'bridge between marriage and the labour force' (Funder, Harrison and Weston 1993, p.26).

In Canada, divorced women were expected to be self-supporting after 1985, even if they had young children, although the new law still contained some judicial discretion with respect to spousal support, especially for older women unable to find work and long-term homemakers with few job skills (Diduck 1990). Nevertheless, by the 1990s, only 16 per cent of women asked for spousal support and only 6 per cent received it (Richardson 1996). Furthermore, by the end of the 1980s most Canadian provinces had amended their legislation to presume that property would be divided 50/50 unless it was proven that this would lead to inequity.

Child Custody

Historically, Canadian fathers were granted legal custody of the children during and

after marriage. In practice, however, mothers often cared for their children following desertion or annulment of the marriage. In 1917, British Columbia became the first province to recognise legally a mother's right to custody; Quebec, in 1964, was the last province to do so (Dawson 1990, p.64; Dranoff 1977, p.36).

By the 1940s, however, the practice of awarding legal custody to fathers had reversed to a presumption of maternal custody based on prevailing ideas about maternal bonding and the 'tender years doctrine'. As in Australia, Canadian mothers lost custody only if they were found to be 'unfit' mothers (that being, if they abandoned the children, engaged in 'immoral' behaviour, were alcoholics or were deemed to be mentally ill).

By the 1970s, laws and judicial practices in many countries including Canada and Australia had moved away from the idea that children could be the property of either parent, and began to base their decisions on 'the best interests of the child'. The 1985 Canadian reform clearly stated that either parent or both parents could be granted custody or legal decision-making concerning the child, and that this decision should be based on the 'best interests of the child' rather than parental rights.

Despite these legal changes, most

Australian and Canadian parents decide that the children should live with their mother after divorce. When the Canadian courts become involved in custody decisions, 74 per cent of children are awarded to their mothers, 12 per cent to fathers and 14 per cent to both parents (Statistics Canada 1995, p.25). Joint custody was unavailable as a parenting option prior to the introduction of the 1985 Canadian divorce law.

The percentage of fathers receiving sole custody, however, has remained stable over the years. Canadian fathers typically do not ask for custody (Drakich 1988; Richardson 1996). Some feel they cannot handle it with a full-time job, and a small percentage believe that the courts will not give it to them. Fathers also typically believe that their children will be better off with their mother or do not want to deprive her of custody. Furthermore, fathers tend not to have developed a close relationship with their children because their wives have usually been mediators between them and the children (Dulac 1995).

In Australia, the Family Law Act was amended in 1995 to change the language of parenting after divorce, removing notions of ownership, such as 'custody' and 'guardianship', and replacing them with 'parental responsibilities' (Funder 1996). Divorcing parents are now expected to

YOUNG WOMEN DELAYING FAMILIES

In the mid-1980s¹, 46 per cent of all women aged 25–34 years who had the care of dependent children were in the labour force. By the mid-1990s, this had increased to 54 per cent. This is, by now, a well-recognised trend.

What is not so well-recognised, however, is that over that period, of all 25–34 year old women in the labour force, the percentage who had the care of dependent children had dropped in an almost identical way – from 54 per cent in the mid-1980s to 46 per cent in the mid-1990s. How can this be so?

It is because two trends have been working in parallel. The first is the trend for more of those women who have children to stay in, or return to, the workforce after the birth of a child or during the early child-raising years. The second trend has been occurring with somewhat less fanfare, perhaps because it has not attracted the need for specific services. As Table 1 shows, it is a trend towards non-family living among young women, and is driven largely by declines among young women who have the care of dependent children and to a lesser extent by declines among young women living with a partner.

Table 1 shows that at the end of the

Much of the commentary on women and children in the 1980s and 1990s has been about the increasing labour force participation of women with children. A counter trend, as swift and dramatic, has been masked by this focus, but is likely to have some impact upon the environment in which family-friendly workplace policy is framed.

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discusses a silent revolution among young women.

ten-year period from the mid-1980s to the mid-1990s, among women aged 25–34 years:

- ten per cent fewer young women had dependent children living with them (down from just under 70 per cent to just over 59 per cent);
- the impact of this general trend on those in the labour force has been that 8 per cent fewer young women in the paid workforce had dependent chil-

dren living with them² (down from 54 per cent to 46 per cent);

- seven per cent fewer young women were living with a partner (down from 76 per cent to 69 per cent);
- five per cent more young women were living in non-family circumstances – that is, they were not living with a partner nor with dependent children (up from 16 per cent to 21 per cent).

These are quite significant changes in the lives of women aged 25–34 within a decade. This age range represents the major childbearing years for women. In the period from the mid-1980s to the mid-1990s, more than six in ten of the births that occurred were to women aged 25–34. But between the mid-1980s and the mid-1990s, the annual birthrate for women aged 25–29 years declined from almost 15 per cent to almost 13 per cent of women giving birth during the year.

During the same period, the birthrates of women aged under 25 have also declined. In 1985, almost 10 per cent of young women aged 20–24 years gave birth during that year. By 1995, the annual figure had declined to 7 per cent. This, too,

make a parenting plan for their child(ren) with the assistance of counselling, conciliation and mediation. Both parents retain parenting responsibilities (formerly 'joint custody' and 'guardianship' of the child). Only time will tell whether changing the wording of the law will have any impact on patterns of residence and daily care. In both Australia and Canada, mothers tend to remain the 'residential' parent and the main daily care provider after divorce.

Child Support

Canadian law has always expected fathers to support their children, but enforcement procedures tended to be lax and were often left to the custodial parent (usually the mother).

The 1985 Canadian divorce law used gender-neutral language and made it clear for the first time that mothers were expected to support their children financially. But unlike the Australian Child Support Scheme (introduced in 1988), Canadian awards continued to be set by judges in court. Consequently, child support decisions varied considerably with legal advocacy and judicial discretion and could not be said to be based on the cost of childrearing, the non-custodial parent's income, or equitable sharing between

partners (Galarneau 1992). By the 1990s, awards tended to comprise only 7 per cent of the payer's median income and 12 per cent of the custodial parent's median income (Galarneau 1992). In 1996, a federal/provincial/territorial committee recommended national guidelines for child support decisions.

The Australian Child Support Enforcement Scheme has served as a model for several jurisdictions including Britain and Canada and claims a collection rate of 73 per cent, although this figure has been questioned (Alexander 1995). Among criticisms of the Scheme has been its failure

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to target self-employed people (payments are deducted from the PAYE salaries of non-custodial parents), for failing to deliver efficiently the payment it collects, for poor communication with clients, for excluding children born before 1989, for applying the formula too inflexibly, and for liaison and logistics problems between the two bureaucracies running the Scheme (Alexander 1995). Nevertheless, the collection rate has improved since its introduction. Furthermore, child support assessment has been removed from the

courts, standardised and indirectly paid, thus avoiding continued contact between former spouses. By Canadian standards, this is a vast improvement.

The Canadian provinces have tightened their enforcement procedures since the 1980s, but the systems have been less comprehensive and less effective than the Australian child support scheme. Because jurisdiction for the enforcement of child support is provincial (resulting in twelve different systems), enforcement procedures vary between provinces and some defaulters choose to relocate to avoid payment.

Since 1987 the federal government has shared information with the provincial governments to help locate these defaulters. However, while some provinces have focused their enforcement systems on welfare recipients, others have based their reforms on a first default principle. This means that the government scheme for tracking defaulters only works for parents who make a complaint about unpaid child support. A further factor in Canadian child support is that Canadian child support enforcement systems treat these payments the same as any other form of income and subtract welfare benefits from the families receiving support. In other words, the

has shown up in the family arrangements of young women.

Table 2 shows that at the end of the period from the mid-1980s to the mid-1990s, among all young women aged 20–24 years:

- six per cent fewer young women had dependent children living with them (down from 24 per cent to 18 per cent);
- eleven per cent fewer young women were living with a partner (down from 40 per cent to 29 per cent);

- ten per cent more young women were living in circumstances other than with their own formed family (that is, they were not living with a partner nor with dependent children, although an increasing number were living with their own parents).

Although there has been some increase in birthrates over the decade among women in their thirties, that catchup has not been sufficient to make up for the losses at the younger age range. The birthrates for

women aged 30–34 years increased from 9 per cent in 1985 to almost 11 per cent in 1995, and for women aged 35–39 years from just under 3 per cent to just over 4 per cent. The percentage of women aged 35–44 who have the care of dependent children dropped slightly over the decade, from 79 per cent to 76 per cent, and the percentage living with a partner from 82 per cent to 78 per cent.

The intersection of trends has meant that between the mid-1980s and the mid-1990s, there has been no increase in the percentage of the female workforce with children under the age of ten years (23 per cent at both time periods). In the coming decade, if current trends continue, this percentage is likely to drop as the participation rate of women with children in the workforce stabilises while the participation rate for women without children continues to grow.

This should be reasonably good news for employers who want to offer additional flexibility to parents with young children because it means that costs are not likely to increase significantly. On the other hand, if the voices of parents with young children are dulled by a drop in numbers, it behoves employers to ensure that they continue to focus on the needs of such families, and not let them get buried in the larger section of the workforce who do not have such needs.

The latest Australian Bureau of Statistics child care survey (ABS 1996b) indicates that growth in demand for formal child care has

Table 1 Labour force and family status of females aged 25–34 years, mid-1980s and mid-1990s, Australia

	Females aged 25–34			
	Total: % with dependants	In labour force: % with dependants	Total: % in couples (with/without dependants)	Total: % not in own families#
mid-1980s	70	54	76	16
mid-1990s	59	46	69	21

not living with a partner or with dependent children
Source: ABS (various years), *Labour Force Status and Other Characteristics of Families*. Catalogue No. 6224.0.

Table 2 Labour force and family status of females aged 20–24 years, mid-1980s and mid-1990s, Australia

	Females aged 20–24			
	Total: % with dependants	In labour force: % with dependants	Total: % in couples (with/without dependants)	Total: % not in own families#
mid-1980s	24	9	40	55
mid-1990s	18	8	29	65

not living with a partner or with dependent children
Source: ABS (various years), *Labour Force Status and Other Characteristics of Families*. Catalogue No. 6224.0.

children are no better off if the money comes from the government or from the children's non-residential parent.

Despite these criticisms, Canadian default rates have decreased with the new enforcement systems, although 50 per cent to 70 per cent of cases are still in default (i.e. either the total amount was not paid, was not paid on time, or was not paid at all) (Fine 1994). Considerable research has been done in Canada concerning the non-payment of child support. Recent data from New Brunswick indicate that there is full compliance in 58 per cent of child support cases, while the percentage of fathers who clearly refuse to pay ('dead-beat dads') is only about 10 per cent. Some defaulters are temporarily unable to pay, caught in administrative disputes, or in the process of having the award adjusted in court (Lapointe and Richardson 1994).

Poverty, Divorce and Advocacy Groups

In both Canada and Australia, lone mothers tend to live in poverty. In Canada, 44 per cent rely on social assistance for at least some of their income; 57 per cent of lone mothers are employed; and about 80 per cent of those employed work full-time

slowed considerably over the years 1993–1996. Most of that slowing has come from increased provision to meet demand, but some of it is coming from a slowdown in growth of overall numbers of children. The combination of this new labour force analysis and the 1996 child care data suggest that the recent assessment of demand made by the Economic Planning Advisory Commission (EPAC 1996) might be an upper range of possible need for child care.

One recent policy for which the effects might be felt upon this age range is the increase in direct costs of education to students, and a prolonged impact on wages during the early years of workforce participation and repayment of those costs. The likely effect will be to push out the ability to enter the house purchase market; and unless more young people decouple home ownership from the start of a family, there will be some flow-on effect to the age of first childbearing, compounding the trends described.

Beyond those policy implications lies the need for further exploration of the meaning of these trends for young women. Are we looking at a generation which has needed to gain a hold in the workforce before they can think about having families? Are we looking at a generation for whom the only age-specific achievements which will not stretch out almost forever are those associated with the biological clock? Young people may have to prolong the age by which they achieve a secure job, secure housing, and secure relationships,

(Statistics Canada 1996). There is no sole parent pension or any other special benefit for low-income mothers in Canada.

In Australia, the employment rates of lone mothers are much lower, with around 44 per cent employed, and about half of these employed full time. Poverty among lone mothers continues to be influenced by labour force participation rates, by the types of (low-wage) jobs they are able to accept, by high unemployment rates, by low rates of social assistance, and by lack or low levels of child support. About 89 per cent of lone mothers receive the Sole Parent Pension (DSS 1996).

Controversies over divorce and support laws are largely gender-based in Canada. Fathers' rights groups continue to argue that mothers are being given preference in custody cases and that fathers are being asked to pay too much in property settlements and child support. Especially when men repartner, they and their wives argue that they cannot support two sets of children. They also claim that men fail to pay child support because their former wives deny them access to their children; because they are unemployed, underemployed or have cash-flow problems and cannot afford to pay; or because they are asked to pay too much (Crean 1988; Richardson 1996).

but the one time point which is rather less flexible is the end of the child bearing period for women.

These trends are likely to be reflected in many post-industrialised countries but, set in a total international context, they are well ahead of the declines in birthrates throughout the major populations of the world. They suggest that countries like Australia may be on the edge of a revised form of policy agenda for families, one which recognises that a declining number of people are likely to participate in the raising of families as a direct experience.

How far these trends will go is not clear. Australia's Total Fertility Rate, at 1.824 for 1995, is still considerably higher than the figures for recent years in countries like Hong Kong (1.2), Italy (1.3), and Japan and Greece (each 1.4) (ABS 1996a), although it is falling and is likely to continue to do so into the near future. Canada and the United Kingdom have current Total Fertility Rates similar to those in Australia, while the United States and New Zealand have rates at around replacement level (2.0). Australia is likely to remain closer to these latter groups of countries, with which it shares other similar trends, into the near future.

Nevertheless, the data in this article show that the re-ordering of the lives of young women over the past decade will continue to impact upon the revision of policy and the distribution of paid work. The biggest impact of all, though, may be upon the lives of young people themselves, deciding in an indecisive world

Feminist groups, on the other hand, argue that the courts give custody to mothers because fathers do not want the responsibility. Furthermore, they argue that because women are given inadequate social support for mothering, accepting custody after divorce usually leads to poverty for women. Joint custody often means that the father acquires decision-making over their children while the mother shoulders the burden of daily care. It also means that the mother cannot move to another location without the father's permission, thereby reducing employment opportunities or a chance to begin a new life (Crean 1988; Drakich 1988).

Canadian feminists also emphasise that fathers tend to become interested in their children only after divorce. They argue that custody after divorce should normally be given to the primary caregiver during marriage (Boyd 1989) and that child support should be paid indirectly through an agency, as in Australia, to avoid continued enforced contact between former partners.

Despite their efforts, fathers' groups have not been effective in curbing the widespread trend to reform legislation on child support enforcement. Furthermore, research undertaken by the Canadian government has failed to support the inequalities in the law alleged by these groups.

about the value of children. Policy development which allows this decision to be well-balanced, and not driven solely by economic hardships at the beginning of the traditional family life cycle stages, is to be encouraged.

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Notes

¹ In this article, the term mid-1980s refers to the years 1984–1986, and the term mid-1990s to the average of the years 1994–1996, in order to smooth the variation in annual figures.

² The data are drawn from household labour force surveys. They do not measure the number of births women have had, but rather the composition of the household in which women are living. There may therefore be a small group of women who have had children but are not living with them. There may also be a small group of women who have not had children but are caring for the children of a partner. The data do not allow an analysis of these circumstances, nor of any change in these circumstances in the time period.

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The courts almost never deny the non-custodial parent some access to the children, although it may be closely supervised if there is a history of abuse, violence or insanity (Bala and Clarke 1981; Richardson 1996, p.233) and joint custody is becoming more prevalent. Men are also more likely to receive sole or joint custody when they ask for it (Price and McKenry 1988; Richardson 1996). However, child custody laws have not changed and the basis of custody decisions remains 'the best interests of the child'.

Another controversial issue relates to the payment of income tax on child support received. Until recently, the Canadian government has allowed divorced parents (usually fathers) to receive an income tax

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deduction for both child and spousal support paid, but required tax to be paid on support received (usually by the mother). These regulations were designed to motivate fathers to pay and to provide tax relief for 'the divorced family' by taxing the mother, who would usually be in a lower tax bracket.

Yet feminist groups argued that this tax relief to the 'divorced family' was really a benefit only to the husband/father, who in the majority of cases had less need for the money than the mother, and thus further undermined the ability of custodial mothers to support their children. They noted that the tax deduction for men has never been an effective incentive to pay, but taxing lone mothers has contributed to their high rates of poverty. Furthermore, married fathers do not receive a tax deduction on money given to their wives for the children, so why should this deduction be granted to divorced fathers?

These tax regulations were contested in the Federal Court of Appeal in 1994 and the Supreme Court of Canada in 1994 and 1995, with the case of Suzanne Thibaudeau, a lone mother from Quebec. In May 1995, the Supreme Court of Canada overruled the lower court decision, and concluded that asking custodial parents to pay income tax on child support received was not a violation of the *Canadian Charter of Rights and Freedoms*. Feminist groups strongly opposed this decision. After considerable public pressure in 1995–96, the federal government eliminated both the income tax deduction and requirement to pay tax on child support awards, effective from May 1997. The tax regulations, however, remain unchanged for spousal support.

Conclusion

Laws relating to divorce and custody in both Canada and Australia have been inconsistent and misleading for the judiciary and the public. Although the law is written as gender neutral and designed to ensure the equal division of matrimonial property, in reality gender remains a key

variable in divorce outcomes. Women after divorce tend to retain the daily care of the children, their earning capacity tends to be lower than men's, and they are more likely to live in poverty. And while recent legal reforms have suggested that divorce should represent a 'clean break' between former partners, this is hardly possible for parents who share the ongoing care and support of their children.

The legal obligations on divorced parents to support their children are quite unequivocal, yet without adequate enforcement, many fathers fail to pay child support. In both Canada and Australia, over half of all mother-led families live on poverty-level incomes (DSS 1996; National Council of Welfare 1996), yet research indicates that in countries such as Sweden, for example, which have advanced maintenance systems, universal child benefits and employment equity policies for women (Baker 1995; Wennemo 1994), one-parent households are most likely to remain above the poverty line.

In spite of this research evidence, the Canadian provinces are cutting back on social assistance benefits and only recently beginning to enforce child support and pay equity. Furthermore, the Canadian government is placing more emphasis on the 'employability' of mothers (Baker 1996), has recently replaced the universal Family Allowance with the income-tested Child Tax Benefit, and is reducing the level and duration of Unemployment Insurance benefits (but adding a supplement for employed parents).

To some extent, divorced fathers in Canada, and also in the United States, have become scapegoats and continue to be blamed for the poverty both of their children and of their former wives. It is now more cost-effective and politically acceptable for conservative governments to hunt down 'dead-beat dads' than to provide high-quality and affordable child care services, to guarantee full employment, or to ensure pay equity for women. There is no question that if more fathers supported their children after divorce the children's household income would improve and public expenditures would be reduced. Yet gender-neutral laws and more rigorous child support enforcement procedures are not sufficient to raise lone-parent families out of poverty.

The emphasis on 'making fathers pay' detracts public attention from the need for job creation, employment equity strategies, leave for family responsibilities, and effective income security programs. In addition, it reinforces the stereotype of men as breadwinners rather than caregivers. Clearly, the daily care of children, the maintenance of the home, and the rewards of paid work need to be shared more equitably if we want to eliminate the gendered outcomes of divorce. These matters cannot only be dealt with through

reforms to family law, but require much wider changes in social and economic policies and as well as in public attitudes.

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