

Commentary

CHOICES AND COMMITMENTS FOR WOMEN: CHALLENGING THE SUPREME COURT OF CANADA IN THE CONTEXT OF SOCIAL ASSISTANCE[©]

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With increasing numbers of sequential marriages [and other intimate adult relationships], solutions to the financial crisis of [family] breakdown must be sought not only within the parameters of family law but also in social and economic policies that promote the financial viability of all persons in need, including the economic victims of [family] breakdown. The war on the feminization of poverty must be won by innovative and coherent socioeconomic policies ...¹

Julien Payne's comment illustrates the need to rethink relationships between "public" policies about the economic security of "private" families and individuals in Canada. In addressing this theme, Susan Boyd and Claire Young identify important connections in recent developments in tax and family law concerning the economic security of individuals in Canadian society.² As they demonstrate, tax law principles are often "hidden" but nonetheless important elements of our fiscal and social policies; and family law principles have consequences that extend well beyond individual parties, affecting other family members, communities, and governmental resources. By linking recent developments in tax and family law, they clearly demonstrate a need to reassess public policies about economic responsibilities, and to rethink traditional relationships between families and the state.

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¹ Julien D. Payne, "Family Law in Canada" in Maureen Baker, ed., *Canada's Changing Families: Challenges to Public Policy* (Ottawa: Vanier Institute of the Family, 1994) 13 at 27.

² Susan B. Boyd & Claire F.L. Young, "Feminism, Law, and Public Policy: Family Feuds and Taxing Times" (2005) 42 Osgoode Hall L.J. 545.

Boyd and Young identify several themes in their analysis of relationships between tax and family law policies, including the impact of privatization and the shifting terrain within which feminist litigation and activism have intersected with claims under the *Canadian Charter of Rights and Freedoms*³ during the past two decades. In this context, they identify the persistent gap between law “on the books” and its impact on women’s lives, particularly the ways in which the construction of the liberal individual so often fails to take account of “real life” for many women. It seems significant that several recent decisions of the Supreme Court of Canada, on a variety of family law issues, have used ideas about individual “choice” as a fundamental principle.⁴ This brief comment explores this idea of choice in some recent family law decisions as a way of examining ongoing tensions about the roles of families and the state with respect to responsibilities for economic dependency.

As Boyd’s analysis demonstrates, earlier Supreme Court decisions in *Moge v. Moge*,⁵ *Bracklow v. Bracklow*,⁶ and *M. v. H.*⁷ consistently expanded the scope of *familial* responsibility for spousal support at the end of a relationship. In *Moge*, the Supreme Court took judicial notice of the “feminization of poverty” and recognized that a former spouse had an obligation to provide support to a dependent spouse to compensate for disadvantages experienced during the marriage and at marriage breakdown.⁸ In *Bracklow*, the court decided that a former spouse could base an application for ongoing support on financial need per se.⁹ As I have argued in relation to these cases, the Court clearly recognized economic need on the part of former spouses (mostly women), but the decisions also conflated this need with an assertion that the obligation to respond to it belonged entirely to (former) family members, not to the state.¹⁰ As a

³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

⁴ Feminist analysis has frequently articulated ideas of “choice” as well. Significantly, however, the Supreme Court’s principles generally reflect a more traditional idea of choice. For a recent analysis, see Diana Majury, “The *Charter*, Equality Rights, and Women: Equivocation and Celebration” (2002) 40 *Osgoode Hall L.J.* 297 at 316-20.

⁵ [1992] 3 S.C.R. 813 [*Moge*].

⁶ [1999] 1 S.C.R. 420 [*Bracklow*].

⁷ *M. v. H.*, [1999] 2 S.C.R. 3.

⁸ *Supra* note 5 at 842.

⁹ *Supra* note 6 at 448.

¹⁰ Mary Jane Mossman, “Conversations about Families in Canadian Courts and Legislatures: Are there ‘Lessons’ for the United States?” (2003) 32 *Hofstra L. Rev.* 171 at 186.

result, in cases where a former spouse has little or no financial means to provide such support, recognition of a familial obligation will not provide much, if any, economic security.¹¹ In this context, the extension of spousal support obligations to same-sex couples in *M. v. H.*, which confirmed legal recognition for such relationships, simultaneously imposed new *familial* obligations for economic dependency on partners in these relationships as well.¹² Moreover, when these cases about spousal support are linked to the Supreme Court's decision in *Chartier v. Chartier*,¹³ in which the Court concluded that a stepfather in a short term relationship acquired ongoing child support obligations for his partner's biological child, the Court's preference for widening the scope for familial, rather than state, support for dependency is apparent.¹⁴

As noted by Boyd and Young, such decisions create dilemmas for feminist policy analysts. While these cases appear to accept feminist analyses of the economic disadvantages that flow from the division of household labour (at least in heterosexual relationships, and particularly in terms of child care), and feminist critiques about how these factors contribute to poverty for women and children at separation or divorce, the decisions fail to recognize that separating spouses often have resources that are inadequate to maintain two households above the poverty level.¹⁵ In such a context, although federal legislation makes divorce highly accessible, governmental policies offer little or no financial assistance for post-divorce families; in this way, the problem of economic support for post-divorce families remains a private matter. Similarly, governmental policies concerning child support have aspired to identify precise guidelines for parental obligations and to enforce payment more effectively. The appropriateness of such policies has been lauded by media reports about high-income fathers (especially lawyers and sports figures) who have been compelled by courts to support their children at the end of a marriage or cohabiting relationship. Yet these same principles may wreak hardship on poor men who are much less often featured in discussions of public policies

¹¹ *Ibid.*

¹² *Supra* note 7.

¹³ [1999] 1 S.C.R. 242 [*Chartier*].

¹⁴ See also *Monkman v. Beaulieu* (2000), 149 Man. R. (2d) 295.

¹⁵ For a longitudinal analysis of the economic circumstances of men and women at separation, see Ross Finnie, "Women, Men, and the Economic Consequences of Divorce: Evidence from Canadian Longitudinal Data" (1993) 30 *Can. Rev. of Soc. & Anthr.* 205; for a critique of the models, see Margrit Eichler, "The Limits of Family Law Reform or, the Privatization of Female and Child Poverty" (1990-91) 7 *Can. Fam. L.Q.* 59.

concerning “post-divorce family units,”¹⁶ and feminist concerns about the need for *both* family and state support for economic dependency have not received similar media coverage. In effect, both legislative policies and judicial decisions have accepted feminist analyses of the need for economic support post-divorce, but they have not reflected feminist ideas about state support for families (in relation to both intact and disintegrating family units); instead, there has been a privatization of responsibilities for economic dependency through legal recognition of “post-divorce family units.”¹⁷

However, feminist analysis of public policy concerning dependency must now take account of a number of recent decisions of the Supreme Court of Canada that appear to limit support obligations for former family members. In three recent cases, the Court adopted ideas about preserving opportunities for individual choices on the part of spouses. This approach resulted in rejection of a cohabiting woman’s right to share equally in accumulated family property at the end of a relationship and rejection of claims about unfairness for women who signed family contracts, including a separation agreement and a marriage contract. In all three cases, the legal principles limited rights to women’s share of property or entitlement to additional property or spousal support. For example, in *Nova Scotia v. Walsh*,¹⁸ the Supreme Court allowed an appeal by the provincial government from a unanimous Court of Appeal decision, rejecting the cohabiting woman’s claim that her exclusion from the statutory property-sharing regime constituted an infringement of her section 15 *Charter* equality right. In doing so, Justice Bastarache (for a majority of eight, Justice L’Heureux-Dubé dissenting) acknowledged that “unmarried spouses have suffered from historical disadvantage and stereotyping,” but asserted that it was necessary to recognize that some “opposite sex individuals in conjugal relationships of some permanence, have chosen to avoid the institution of marriage and the legal consequences that flow from it.”¹⁹ Thus, he held that “[t]o ignore these differences among cohabiting couples presumes a commonality of intention and understanding that

¹⁶ Mary Jane Mossman, “Child Support or Support for Children? Re-Thinking ‘Public’ and ‘Private’ in Family Law” (1997) 46 U.N.B.L.J. 63; Sherri Torjman, “Crests and Crashes: The Changing Tides of Family Income Security” in Baker, *supra* note 1, 69; and Susan B. Boyd, “Challenging the Public/Private Divide: An Overview” in Susan B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 1.

¹⁷ The concept of the “post-divorce family unit” appeared in *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627; see also Mossman, *supra* note 10.

¹⁸ [2002] 4 S.C.R. 325 [*Walsh*].

¹⁹ *Ibid.* at 355.

simply does not exist. This effectively nullifies the individual's freedom to choose alternative family forms and to have that choice respected and legitimated by the state."²⁰

Similarly, in *Miglin v. Miglin*,²¹ the Supreme Court allowed an appeal from the Ontario Court of Appeal, with the majority (Justices Deschamps and Lebel dissenting) concluding that choices reflected in private agreements between divorcing spouses should be respected, particularly where both spouses were represented by counsel in their negotiations. And in *Hartshorne v. Hartshorne*,²² the Supreme Court allowed an appeal from the British Columbia Court of Appeal in relation to the terms of a marriage contract. The majority (Justices Binnie, Deschamps, and Lebel dissenting in part) found that the wife had received legal advice that the marriage contract was unconscionable and unfair, but that she had "chosen" to sign it. It was held that her choice should be binding, especially since both spouses were lawyers and thus deemed to understand the nature of such contracts.

By contrast with the majority judgments, the dissenting judges in all three cases pointed to the complexity of ideas of "choice" in marriage and cohabiting relationships. In addition to problems of inequality in bargaining power, well-documented in feminist analyses of family negotiations,²³ ideas about choice in intimate relationships are often complicated by family loyalties, economic dependency (especially if children are involved), and a lack of viable alternatives. For example, in relation to the choice to cohabit, rather than marry, Justice L'Heureux-Dubé stated in *Walsh*:

[T]he choice not to marry is not a matter belonging to each individual alone. The ability to marry is inhibited whenever one of the two partners wishes to marry and the other does not. In this situation, it can hardly be said that the person who wishes to marry but must cohabit in order to obey the wishes of his or her partner chooses to cohabit. This results in a situation where one of the parties to the cohabitation relationship preserves his or her autonomy at the expense of the other Under these circumstances, stating that both members of the relationship chose to avoid the legal consequences of marriage is patently absurd.²⁴

Similarly, the protracted negotiations detailed in the lower court judgments in both *Miglin* and *Hartshorne* suggest that there were important

²⁰ *Ibid.* at 356.

²¹ [2003] 1 S.C.R. 303 [*Miglin*].

²² [2004] 1 S.C.R. 550, 2004 SCC 22 [*Hartshorne*].

²³ See Marcia Neave, "Resolving the Dilemma of Difference: A Critique of 'The Role of Private Ordering in Family Law'" (1994) 44 U.T.L.J. 97; Diana Majury, "Unconscionability in an Equality Law Context" (1991) 7 Can. Fam. L.Q. 123.

²⁴ *Supra* note 18 at 402-03.

constraints on the “real life” choices available to the women who signed these agreements.²⁵ These factors were generally ignored in the Supreme Court’s interpretation of the legal principles.

Beyond the facts and legal principles, these three decisions complicate the terrain of feminism and public policy in significant ways. For example, they seem to signal the Court’s response to concerns about the emphasis on familial support for dependency post-divorce. Indeed, the clear message from the two contract cases is that the Court will not generally intervene if the parties have negotiated a private agreement, particularly if they have received independent legal advice. To the extent that the media publicized the complaints of payor spouses about their continuing responsibilities for former spouses (usually wives), these cases signal the solution: private agreements. In imposing limits on a former spouse’s ability to overturn an agreement, whether a marriage contract or a separation agreement, even if it is “unfair,” it seems likely that there will be more agreements and fewer opportunities to review them. In this way, the cases appear consistent with the earlier principles concerning the privatization of family law.

At the same time, however, these principles about choice also limit private family responsibilities. The Supreme Court’s analysis never addresses whether this gap will be filled by the state. In part, the Court’s failure to address this gap results from the fact that neither Ms. Miglin nor Ms. Hartshorne needed to apply for social assistance, at least not immediately. The Court thus defined family law principles in a context of parties with relatively greater wealth than may be enjoyed by many separating spouses. Interestingly, Ms. Walsh’s situation appeared more vulnerable after the Supreme Court rejected her claim to equal sharing of family property (albeit allowing her to make an application for a declaration of trust). Yet, significantly, Ms. Walsh and Mr. Bona reached a settlement *prior* to the appeal to the Supreme Court of Canada: she received one-half of the property on the strength of the unanimous decision of the Nova Scotia Court of Appeal in her favour.²⁶ The outcome in *Walsh* may demonstrate the importance of assessing “real life” bargaining power in the negotiation of family agreements, a factor that was arguably all too absent from the majority decisions of the Supreme Court in *Miglin* and *Hartshorne*.

²⁵ See *Miglin v. Miglin* (1999), 3 R.F.L. (5th) 106 (Ont. Sup. Ct. J.); *Hartshorne v. Hartshorne*, [1999] B.C.J. No. 2861 (S.C.) (QL).

²⁶ See D. A. Rollie Thompson, *Nova Scotia v. Walsh*, Annotation (2002), 32 R.F.L. (5th) 81.

What is crucially missing in all three cases is any sense of how a spouse who is not entitled to familial support, but who is not otherwise economically “independent,” is supposed to function in Canadian society. The shift from familial responsibility for the “post-divorce family unit” to individual choice and responsibility may not work in real life for (too) many Canadians. Moreover, as Young explains, although these cases are characterized as matters of family law, the issues about familial and state responsibilities for dependency clearly invoke important issues of fiscal policy. For me, issues about the intersection of family and fiscal policies are most contested in the context of social assistance.²⁷ For example, the Supreme Court of Canada rendered a decision about social assistance in *Gosselin*,²⁸ an appeal from Quebec in 2002 in which the Court was quite divided: a bare majority of five justices upheld a Quebec statute which prescribed a lower level of social assistance benefits for persons under the age of thirty unless they participated in job training schemes. For the majority of the Court, the ameliorative purpose of creating incentives for young persons in receipt of social assistance to participate in such educational programmes removed any possibility of a challenge under the section 15 equality guarantee of the *Charter*; applicants could choose to participate in the programmes and thus obtain a higher level of benefits. Significantly, however, the majority also concluded that the government’s failure to provide sufficient places for all recipients under thirty, which consigned the applicant to living in poverty, did not contravene the provisions of section 7.²⁹

Four justices dissented. One of the dissenters, Justice Bastarache, suggested that the government’s assumption, in enacting this differential level of benefits for recipients under thirty, was that they would receive assistance, particularly in relation to housing, *from their parents*.³⁰ Unfortunately, this assumption was untrue for Ms. Gosselin, so that she was forced to live on an amount of social assistance that was less than the

²⁷ For recent analyses of these issues, see also Gwen Brodsky & Shelagh Day, “Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty” (2002) 14 C.J.W.L. 185; Martha T. McCluskey, “Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State” (2003) 78 Ind. L.J. 783.

²⁸ *Gosselin v. Quebec* (2002), 221 D.L.R. (4th) 257 (S.C.C.) [*Gosselin*].

²⁹ The decision in *Gosselin* has been criticized by a number of commentators. See e.g. Jamie Cameron, “Positive Obligations under Sections 15 and 7 of the Charter: A Comment on *Gosselin v. Québec*” (2003) 20 Sup. Ct. L. Rev. (2d) 65; Nathasha Kim & Tina Piper, “*Gosselin v. Quebec*: Back to the Poorhouse...” (2003) 48 McGill L.J. 749; and David Matas, “*Gosselin v. Quebec*: Is Starvation Illegal? The Enforceability of the Right to an Adequate Standard of Living” (2003) 4 Melbourne J. Int’l L. 217.

³⁰ *Gosselin*, *supra* note 28 at 360-61 [emphasis added].

defined basic survival amount in Quebec. It is clear that the normative assumption of this social assistance legislation was the existence of *familial*, not governmental, support for dependency. As a result, *Gosselin* appeared to reach a different conclusion than the three recent family law decisions about responsibility for economic dependency: while the family law cases stressed choice and private decision making to limit ongoing familial support, the majority in *Gosselin* limited state support for economic dependency, apparently assuming the availability of familial support. Does the result in *Gosselin* mean that social assistance recipients (and other Canadians who are poor) are less entitled to choice and private decision making?

The Supreme Court's decision to grant leave to appeal in *Falkiner v. Ontario* represented an opportunity to test this thesis. Although the applicants in this case were unsuccessful in their *Charter* claims at the initial tribunal hearing, both the Divisional Court and the Ontario Court of Appeal³¹ rendered strong decisions confirming the right of these social assistance mothers to make "choices" to ensure the economic viability of their families. Their challenges had been launched following governmental changes to the definition of "spouse in the house" in Ontario in 1995, so as to include single mothers living with male persons with whom they shared expenses.³² The applicants were all single mothers who were living with men who were not the biological fathers of their children, and they all had arrangements for sharing some of the costs of rent, food, and other household expenses. They argued that, pursuant to Ontario law, none of these male cohabitants had responsibility to support the mothers or (at least at that time) their children. Significantly, some of the women had previously been in abusive relationships, and although they were hoping that these new relationships would become permanent, they all "chose" to test the relationships for a time, while maintaining financial independence from their male partners. Although the new definition of "spouse" in 1995 required that all of these relationships be characterized as "familial," thus denying entitlement to social assistance for these single mothers, the Ontario Court of Appeal upheld a decision of the Divisional Court, confirming that the new definition contravened the equality guarantee in section 15 of the *Charter*:

Beyond purely financial concerns, more fundamental dignity interests of the [applicants] have been affected. *Being reclassified as a spouse forces the [applicants] and other single mothers in similar circumstances to give up either their financial independence or their*

³¹ (2002), 59 O.R. (3d) 481 (C.A.) [*Falkiner*].

³² See R.R.O. 1990, Reg. 366, as am. by O. Reg. 409/95; see also O. Reg. 134/98.

*relationship Forcing them to become financially dependent on men with whom they have, at best, try-on relationships strikes at the core of their human dignity.*³³

Falkiner clearly established that the state, rather than the “family,” had primary responsibility for the financial dependency of these single mothers and their children. In addition, the Ontario Court of Appeal’s decision appeared to recognize an opportunity for choice on the part of single mothers on social assistance, at least for the three-year period prior to the creation of legal obligations pursuant to the *Family Law Act*.³⁴ Thus, *Falkiner* recognized the appropriateness of state, rather than family, support while it also confirmed some scope for choice on the part of social assistance recipients, a significant achievement.

Interestingly, the Ontario Court of Appeal’s approach in *Falkiner* appeared consistent with the Supreme Court’s approach in the three recent family law decisions: the encouragement of private agreements, the scope for exercising “choice,” and a recognition of limits on “private” familial responsibility for economic dependency. At the same time, however, *Falkiner* appeared rather inconsistent with the decision in *Gosselin*: the “choices” of the social assistance recipients in *Falkiner* clearly increased levels of public spending, so that the case directly confronted the privatization agenda that appeared significant in *Gosselin*.³⁵ Moreover, in contrast with Ms. Miglin and Ms. Hartshorne, whose lack of entitlement to familial support did not require state assistance, the Ontario Court of Appeal’s decision in *Falkiner* clearly recognized opportunities for choice for women, even when their choices created a need for economic support on the part of the state. In this way, the *Falkiner* appeal appeared to stand at the intersection of family law and fiscal policy, challenging the Supreme Court to confirm, in the social assistance context, the efficacy of its principles of choice and private decision making in relation to agreements limiting familial responsibility for dependency.

Significantly, the *Falkiner* challenge remains unresolved because the Ontario government withdrew its appeal in September 2004.³⁶ As a result, the questions of public policy embedded in *Falkiner* also remain unresolved:

³³ *Falkiner*, *supra* note 31 at 512 [emphasis added]. See also Dorothy E. Chunn & Shelley A.M. Gavigan, “Welfare Law, Welfare Fraud, and the Moral Regulation of the ‘Never Deserving’ Poor” (2004) 13 Soc. & Legal Stud. 219; Nancy Fraser & Linda Gordon, “A Genealogy of ‘Dependency’: Tracing a Keyword of the U.S. Welfare State” in Nancy Fraser, *Justice Interruptus: Critical Reflections on the “Postsocialist” Condition* (New York & London: Routledge, 1997) 121.

³⁴ R.S.O. 1990, c. F-3, ss. 29-30.

³⁵ See also Majury, *supra* note 4 at 335-36.

³⁶ Notice of discontinuance filed 1 September 2004. See [2004] S.C.C.B. at 1330; see also O. Reg. 197/02.

are the Supreme Court's messages about the significance of choice and private decision making intended only for relatively wealthy families, or do they also apply in "real life" for other Canadians, including social assistance recipients? Although the *Falkiner* case will not be heard by the Supreme Court of Canada, it seems clear that the Court's principles about respecting private family choices will still have to be confronted at some point within the most contested terrain for Canadian fiscal and family policy: social assistance.