Yours, Mine, or Ours? Charting a Course Through Equity's Determination of Domestic Proprietary Interests

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ABSTRACT

Distributing proprietary interests between domestic heterosexual partners remains the purview of the courts of equity, using the trust. In answering the question: 'Whose property is this?' the courts are faced with the tension between a property law system designed for the market, and property claims arising from within a couple's intimate lives. The law's market orientation favours the party best able to explain their claim in market terms. Because of the gendered structures of society and the family, the process tends to favour the man. This prompts the question central to this thesis: Does equity have the capacity to determine domestic proprietary interests consistent with equality between men and women intimate partners in light of pervasive gender inequality?

Existing analysis of intimate partner trusts predominantly suggests new redistributive mechanisms to resolve the problem of equality. Other work describes the law's evolution towards more 'familial' approaches as ameliorating the unfairness of market norms applied to intimate relationships. This thesis adds to the literature by using relational theory to focus instead on equity's existing property-based distributive framework, charting a course through the tensions inherent in the application of market principles to the intimate context.

The tensions of individual and community, market and home, arise from the tenets of liberalism built into private law. Identifying the law's focus on discrete transactional exchange, this thesis analyses three themes within the trusts jurisprudence — intention, contribution, and home. Re-examining the case law through a relational lens reveals that intention and contribution, overlooked or misconstrued in the search for transactions, might instead represent exchange in a relational sense. Further, the courts' tendency to ignore home as a key to understanding the implications of the parties' exchange can likewise be reoriented to identify a relational exchange that is relevant to determine the parties' distribution of property.

A relational analysis highlights the shortcomings in the law's support for relations of equality. The parties have shared their lives as individuals in the intimate community of marriage or a marriage-like relationship – yet it is the party able to represent their actions in transactional terms who will succeed in a claim. A relational approach to analysing claims for a proprietary interest in the formerly shared home exposes the parties' exchanges over time. The behaviour analysed by the courts evidences exchange that may focus on 'home' and relations, rather than on any discernable transaction. Such analysis reveals the possibility of intention and contribution derived not from transaction, but rather from relations themselves.

The thesis concludes with a reimagined feminist judgment that synthesises the theoretical analysis of exchange in the intimate context — relational exchange — in the practical exercise of judging. It rewrites a leading Australian case, to illustrate how the law might continue to function within its existing doctrinal paradigms — but so as to accommodate the parties' intimate relations. It charts an alternative course through the tensions of individual and community, market and home, using existing tenets of property law, with insight into alternative means to enhance individuals' capacity for autonomy and equality before the law.

DECLARATION

This thesis comprises only my original work towards the award of the Doctor of Philosophy. I have made due acknowledgment in the text to all other material used. This thesis is fewer than the maximum word limit in length.

Kathrine Galloway

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> We live in a web of relationships that shape us, that are necessary for our very capacity for autonomy; the web interacts with and enables an irreducible capacity to initiate, to be ourselves a shaping force, to interact in ways that create. Our conception of autonomy must, then, capture this capacity for creation at the same time that it is built upon the interdependence that makes autonomy possible.[1]

Heartfelt thanks to the 'dream team', my supervisors Matthew Harding and Jenny Morgan who have shown interest in my work and development, have challenged me to improve, have read all my drafts, and who have been good company on this journey.

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I acknowledge those who opened doors for me to undertake this project, in the way that I have done it, through closing doors elsewhere. Even doubters can provide powerful motivation.

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[1] Nedelsky, Jennifer, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2012), 279.

CONTENTS

CHAPTER 1 — INTIMATE PARTNERS' PROPERTY

> A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme [sic] sole, without the intervention of any trustee.[2]

The *Married Women's Property Acts* ('MWPA') enacted in the late 19th century throughout common law jurisdictions[3] mark a milestone in Western women's equality. The Acts redistributed married couples' property, changing the husband's inevitable sole ownership immediately upon marriage, to a possibility of property ownership by them both or even by the wife alone. The statutory redistribution restored the parties to their pre-marriage position as individuals as though the doctrine of coverture[4] had not existed: where married women had previously been unable to retain or to own their own property, post-MWPA they achieved formal equality with married men.

The formal equality ushered in by the MWPA for married women to own property in their own right has not, however, been matched by women's broader substantive equality with men.[5] For many Western women, even as education and paid employment have dramatically improved their economic opportunities, their investment in children, the home, and their relationship continues to come at the cost of genuine economic independence, and their economic and even personal security.[6]

Women's disproportionate expenditure of time and labour in the home relative to men[7] is reflected in structural inequality outside the home, including lower pay and

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[2] *Married Women's Property Act 1882* (Imp), s 1(1).

[3] Ibid; *Married Women's Property Act 1884* (NZ). The English Act was received into Australia, but Australian colonies subsequently passed their own in the late 19th century: see Andrew James Cowie, 'A History of Married Women's Real Property Rights' (2009) 1 *Australian Journal of Gender and Law* 6. Married Women's Property Acts were passed in Canadian provinces commencing in Ontario in 1872.

[4] Under the common law doctrine of coverture 'the very being or legal existence of the married woman is suspended during the marriage and consolidated into that of the husband.' William Blackstone, *Commentaries on the Laws of England* (1765–1769), Chapter 15.

[5] For a discussion on diverse meanings of equality, see eg Reg Graycar and Jenny Morgan, 'Thinking About Equality' (2004) 27(3) *UNSW Law Journal* 833; Reg Graycar and Jenny Morgan, 'Feminist Legal Theory and Understandings of Equality: One Step Forward or Two Steps Back?' (2005) 28 *Thomas Jefferson Law Review* 399 ('One Step Forward'); Reg Graycar and Jenny Morgan, 'Equality Unmodified?' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU e-Press, 2010) 175; Elsje Bonthuys, 'Equality and Difference: Fertile Tensions or Fatal Contradictions for Advancing the Interests of Disadvantaged Women?' in Margaret Davies and Vanessa E Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate, 2013) 85.

[6] See eg the observations in the preface to Anne Summers, *Damned Whores and God's Police* (New South Books, 4th ed, 2016). This is borne out by studies into women's economic independence. See eg Australian Human Rights Commission, 'Accumulating Poverty? Women's Experiences of Inequality over the Lifecycle' (2009) <https://www.humanrights.gov.au/sites/default/files/document/publication/accumulating_poverty.pdf>.

[7] See eg Belinda Hewitt et al, 'Men's Engagement in Shared Care and Domestic Work in Australia' (Office for Women Department of Families, Housing, Community Services and Indigenous Affairs, 2011) <https://www.dss.gov.au/sites/default/files/documents/05_2012/men_engaged_in_shared_care_1.pdf>;

resulting lower superannuation savings.[8] Where this is the case women may, in particular in circumstances of relationship breakdown, death, or personal insolvency, become dependent for their material wellbeing and financial security on a distribution of the shared resources of their relationships, including a distribution of property in the couple's home. This thesis analyses the way in which intimate partner trusts effect such a distribution, and the consequences of this for women's substantive equality.[9]

In the absence of a legal estate in the family home, the nature of women's contribution to the material wellbeing of the couple and their family is not easily comprehended by the common law as contributing to a proprietary interest in that home. By contrast the law more readily understands as proprietary, those contributions of capital and other financial payments directly associated with the acquisition of land. Women who do not or who are unable to make such contributions because their efforts are focussed on the more diffuse shared purposes of the couple's joint lives face the difficult task of demonstrating the requisite intention and contribution to claim a beneficial interest.

The nature of intimate relations is such that a couple will tend to enjoy shared economic interests. But where a woman's investment in the couple's wellbeing is not reflected in her individual economic security through a legal estate — because she is a woman — there is a question to be asked about equality in distribution of material resources. This thesis explores that question. It posits that the law of intimate partner trusts plays a role in upholding a gendered allocation of property within heterosexual intimate relationships, with consequences for substantive equality.

Without drawing on women's exceptionalism before the law — such as the presumption of advancement[10] — or redistributive statutory processes, this thesis argues that substantive economic equality in allocation of domestic proprietary interests demands a distributive solution that goes to the source of rights to property acquired in furtherance of the shared purpose of an intimate relationship. The suggested inquiry into the distribution of property will continue to lie in the parties' own intention and contribution, differentiating this analysis from a redistributive solution.

Despite the paradigm shift in the law of spousal property wrought by the MWPA, the question of determining the distribution of domestic proprietary interests remains. Even in the face of decades of legislative family law reforms designed to *re*distribute spousal interests,[11] equity continues to play a role in answering the bright-line

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Australian Bureau of Statistics, 'Australian Social Trends' Report 4102.0 (2009) <http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/4102.0Publication25.03.095/%24File/41020_Householdwork.pdf>.

[8] See eg 'Gender Equity Insights 2016: Inside Australia's Gender Pay Gap' (Bankwest Curtin Economics Centre and Workplace Gender Equality Agency, 2016) <https://www.wgea.gov.au/sites/default/files/BCEC_WGEA_Gender_Pay_Equity_Insights_2016_Report.pdf>.

[9] 'Intimate relationships' includes married, de facto, and civil unions. 'Spouse' and 'spousal' contemplate all such relationships. This inquiry is limited to heterosexual unions. See on page 9 below.

[10] Exceptionalism relates to women as 'other', outside the framing of a male norm and worthy of protection because of their 'special disadvantage'. The presumption of advancement is discussed below.

[11] See *Divorce Reform Act 1969* (UK); *Family Law Act 1975* (Cth); *Divorce Act 1968* (Canada); *Matrimonial Proceedings Act 1963* (NZ).

property law question of distribution: 'Is this property yours, mine, or ours?' These questions are answered according to the general law. Yet in relations that are both materially and emotionally intertwined, the framework of the law's inquiry may not reveal the contours of the couple's economic entanglement and the intentions or expectations it engenders — intentions arising from the shared purpose of the parties' relations themselves.

Against a background of ongoing and pervasive gender inequality in society generally[12] and the law in particular, this thesis focuses on gender inequality upheld through the application of general legal principles of property distribution. This chapter establishes the research aim of the thesis, and its structure, method, and scope, outlining the conceptual framework for analysing the relevant doctrine. Lastly, the chapter provides an overview of the law at the heart of this inquiry to set up the analysis that follows.

I. Research Aim and Structure

This thesis has three related aims. First, it aims to demonstrate the gendered nature of common law determinations of the distribution of beneficial proprietary interests between heterosexual intimate partners. Secondly, it seeks to frame the consequences of this in terms of women's substantive equality. Finally, while retaining the foundations and key themes of the jurisprudence of intimate partner trusts, it aims to address substantive equality by reframing the courts' interpretation of property distribution: rather than a focus on transaction, it proposes analysing the shared purpose of a couple's relations.

Beyond the formal equality of the MWPA and the ostensibly equal application of law to both men and women, '[s]ubstantive equality renders explicit the relationships between difference and power — showing the disadvantages caused by socially relevant difference...'[13] In this thesis, analysis of substantive equality in spousal property distribution incorporates questions of 'cultural devaluation' of women resulting in 'maldistribution' of economic resources.[14] The economic resource of interest here is property in the family home and the way in which the courts weigh the parties' evidence as to their part in its distribution.

It is acknowledged that while the outcome of any particular case may not represent a maldistribution between those parties, the law of trusts as a system fails to address distribution of domestic proprietary interests in a principled way that upholds substantive equality more broadly. Catering for the realities of intimate relations, including notably the gendered roles of intimate partners, may find the same outcome for many claimants as the present system. However, a different process of navigating the competing interests may accommodate a far more diverse array of circumstances. In doing so, the system itself shifts from one ignoring the gender of couples' economic management that is relevant to a narrow range of applicants, to one that embraces the embedded gender norms of intimate partner exchanges.

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[12] See eg United Nations Development Programme, 'Gender Inequality Index' (2014) <http://hdr.undp.org/en/content/gender-inequality-index-gii>.
[13] Bonthuys, above n 5, 95.
[14] Nancy Fraser, 'Rethinking Recognition' (2000) 3(May–June) *New Left Review* 107, 110.

Further, in analysing substantive equality this thesis acknowledges social and institutional structures that embed and embody that devaluation, particularly through recognising women's situated experiences. As Bonhuys points out, together these ideas (amongst others) '[illustrate] the limits of formal legal equality.'[15] Identifying these limits in the context of common law spousal property distribution — and therefore the law's capacity to deliver substantive equality — constitutes the core of this thesis.

I draw further specific conclusions, namely that the law does not deliver substantive equality in three key respects. First, in ascertaining the parties' intention as to how beneficial interests are to be distributed, the law prefers an intention that relates to a discrete property transaction: the creation of a beneficial interest. This ignores that couples' intention as to property is more likely to exist tacitly, or to exist through their shared purpose as an intimate couple. Secondly, the law prefers contribution that is comprehensible as a direct exchange, a quid pro quo, for an interest in property. Conversely, it ignores or devalues diverse modes of contribution by the parties towards the acquisition and holding of their home — again, which manifest as part of the daily and long term exchange of the couple in furtherance of their mutual purpose. Thirdly, I interpret claims that invoke 'home' to find that while home does not equate with property at law, it evokes the parties' shared intention and represents the focus of their contributions over time. This reveals a role for home in the interpretation of the parties' own expressions of intention and contribution — themselves core elements in the law of intimate partner trusts.

Through the application of gendered frameworks for ascertaining property — unacknowledged as such — courts misapprehend the distribution of the couple's property, skewing the result in favour of the party best able to present themselves as the liberal subject of law:

> …a socially decontextualized, hyper-rational, wilful individual systematically stripped of embodied particularities in order to appear neutral and, of course, theoretically genderless, serving the mediation of power linked to property and capital accumulation.[16]

My critique of the law's assumptions, notably through the lens of gender, differentiates this thesis from existing doctrinal analyses. While others have sought to analyse the law's limitations by exploring the possibility of a shift in the courts' approach within existing doctrinal bounds, they have not resolved the question of gender and its implications for substantive equality.[17] Although Rotherham for example, does recognise that 'an insistence on private ordering norms is liable to disadvantage women systematically,' he continues to rely on the market and the analogy of market failure to justify intervention.[18] His argument seemingly provides

[15] Bonthuys, above n 5, 88.
[16] Anna Grear, 'Sexing the Matrix: Embodiment, Disembodiment and the Law — Towards the Re-Gendering of Legal Rationality' in Jackie Jones et al (eds), *Gender, Sexualities and Law* (Routledge, 2011) 39, 44.
[17] See eg Matthew Harding, 'The Limits of Equity in Disputes over Family Assets' in Jamie Glister and Pauline Ridge (eds), *Fault Lines in Equity* (Hart Publishing, 2012) 193; Simon Gardner and Katharine Davidson, 'The Future of *Stack v Dowden*' (2011) 127 *Law Quarterly Review* 13; Leonard I Rotman, 'Deconstructing the Constructive Trust' (1999) 37(1) *Alberta Law Review* 133; Simon Gardner, 'Rethinking Family Property' (1993) 109 *Law Quarterly Review* 263.
[18] Craig Rotherham, *Proprietary Remedies in Context* (Hart Publishing, 2002), 227–9.

an exceptional basis for intervention: that is, it does not disturb the initial distribution, but rather offers a remedy where injustice occurs, to 'stimulate a well-functioning market.'[19] In contrast, this thesis conceptualises property beyond the market. It describes a doctrinally coherent alternative to the transactional (market-like) exchange lying at the root of property that will address how courts recognise intimate partners' property distribution.

I also differentiate this thesis from an alternative analysis of the law of intimate partner trusts that focuses on 'familialisation' of property law. This work identifies an evolution in the general law that embodies principles more familiar to family law jurisprudence,[20] ostensibly catering for the intimate context of claims for a domestic proprietary interest. It explains the law's attempts to incorporate intimate relationships into judicial consideration, but as with the doctrinal analyses, it does not address underlying questions of gendered structural inequality. Further, it does not question the way in which the law itself is framed, instead accepting familialisation as an imperfect solution to the problem of distribution.[21]

In contrast to existing critiques of the law of intimate partner trusts, this thesis reframes the interpretation of distributive principles themselves. Without disturbing the underlying liberal conceptual foundation of property embedded within doctrine, it addresses concerns of those who claim that developments in trusts cases threaten property law.[22] Without resorting to 'palm tree justice' or abstract notions of fairness,[23] this thesis works within the ideology on which property is founded: namely, it recognises and maintains the existing structure of intention and contribution and what they represent in terms of foundational liberal principles. At the same time, it critiques the existing interpretation of those principles and through this critical engagement, addresses the limits of formal equality embodied in liberalism in its current iteration.

This thesis contributes to the existing body of knowledge in two principal ways. First, is its framing of the question of women's substantive economic equality within intimate relations. It sees property distribution currently as a product of judicial recognition of the parties' own intention, supported by their contribution towards the distribution. While the gendered contours of trusts have been well traversed, the predominant solution proposed by feminist critique rests on statutory reform that offers redistributive solutions,[24] without necessarily addressing the underlying

[19] Ibid 229.
[20] Andrew Hayward, *Judicial Discretion in Ownership Disputes over the Family Home* (PhD Thesis, Durham University, 2013) <http://etheses.dur.ac.uk/8489/>.
[21] Andrew Hayward, 'Family Property and the Process of "Familialisation" of Property Law' (2012) 24 *Child and Family Law Quarterly* 284 ('Family Property').
[22] Discussed in ibid.
[23] See eg *Stack v Dowden* [2007] 2 AC 432; *Muschinski v Dodds* (1985) 160 CLR 583; *Kerr v Baranow* [2011] 1 SCR 269; *Gillies v Keogh* [1989] 2 NZLR 327.
[24] See eg Lisa Sarmas, 'Trusts, Third Parties and the Family Home: Six Years since *Cummins* and Confusion Still Reigns' (2012) 36 *Melbourne University Law Review* 216; Berend Hovius, 'Property Disputes between Common-Law Partners: The Supreme Court of Canada's Decisions in *Vanasse v Seguin* and *Kerr v Baranow*' (2011) 30(2) *Canadian Family Law Quarterly* 129; Jennifer Flood, 'Share the Wealth? *Kerr v Baranow* and the "Joint Family Venture" ' (2011) 27 *Canadian Journal of Family Law* 361; John Mee, '*Burns v Burns*: The Villain of the Piece?' in R Probert, J Herring and S Gilmore (eds), *Landmark Cases in Family Law* (Hart Publishing, 2011) 175; Simone Wong, 'Would You "Care" to Share Your Home?' (2007) 58 *Northern Ireland Legal Quarterly* 268; Anne Bottomley,

question of distribution itself. Redistribution of resources remains an important component of women's equality overall, but is beyond the scope of this thesis. Unlike existing analyses, this thesis focuses on giving effect to property distribution through common law.

Secondly this thesis provides an alternative account of the requisite elements to establish a beneficial estate: intention to create an interest, and contribution that supports it. I suggest that when inquiring into these elements, courts misapprehend the nature of the parties' course of dealings — in other words, of their exchange. Either they interpret the parties' actions not in the way of intimates but as rational market actors who happen to be in a domestic situation, or they impose assumptions based on stereotypes of married life. Instead, I analogise from Ian Macneil's relational contract theory[25] to articulate anew the processes under scrutiny in the intimate partner claims. In particular, I analyse the parties' behaviours indicating intention as to property, the import of their different type of contributions, and the way the parties use the language of 'home' in their claims, all in terms of relations — between the parties, their family, and within broader society. In this respect, the thesis accounts for the unresolved tension between the individualism of the law's inquiry into what is 'mine' and 'yours', and the parties' relations that give rise to what is 'ours'. It suggests that reorienting the inquiry will cut through the gendered assumptions that currently inhibit substantive equality.

This thesis consists of six chapters. Following this introduction, Chapter Two explains in more depth the theoretical foundations of the inquiry, and how they address the research question. It canvasses the role of transactions in private law, establishing their limited capacity for comprehending the distribution of domestic proprietary interests. Setting up the tensions within the law — of individual/community and market/home — it surveys critiques of the law's liberal stance, settling on relational theory as a benchmark for analysing substantive equality in determining intimate partners' individual property.

Chapters Three to Five each tackle a core element of the intimate partner trust: intention, contribution, and home, respectively. Building on the foundation of relational theory flagged in Chapter Two, each of Chapters Three to Five analyses cases across four jurisdictions to critique the courts' approach to each element respectively. First, Chapter Three frames intention in terms of transactions. It then provides an account of how this limits the law's capacity to accommodate substantive equality as between men's and women's claims. In particular, it establishes that intention (as to property distribution) can be understood as the parties' focus on their shared purpose as a couple. In other words, intention may be identified as a function of the parties' own relations rather than external to relations in the form of a discrete transaction.

'From Mrs Burns to Mrs Oxley: Do Co-Habiting Women (Still) Need Marriage Law?' (2006) 14 *Feminist Legal Studies* 181; Heather Conway and Philip Girard, '"No Place Like Home": The Search for a Legal Framework for Cohabitants and the Familiy Home in Canada and Britain' (2004–2005) 30 *Queen's Law Journal* 715; Patrick Parkinson, 'Intention Contribution and Reliance in the De Facto Cases' (1991) 5 *Australian Journal of Family Law* 268.

[25] See eg Ian R Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (Yale University Press, 1980).

Chapter Four examines contribution, again establishing its role in the law in terms of transaction. It explores courts' treatment of different types of contribution, concluding that contributions that are considered sufficient to support a beneficial interest reflect a gendered understanding of value. It challenges the assumptions implicit in contribution to articulate an alternative view of couples' diverse contributions, appropriate to the relational context of their shared purpose. Because even non-financial contributions occur in furtherance of shared economic purposes, including property acquisition, I argue that they have a role to play in ascertaining the existence and extent of a domestic proprietary interest.

Chapter Five analyses the unacknowledged role of 'home' in the application of the law and in claimants' arguments featured in the implied trust cases. The courts contrast home and property, and perceiving them in opposition reflects the transactional focus of the inquiry thus precluding 'home' from a role in determining property distribution. This chapter canvasses diverse values represented by 'home' that are omitted in courts' analyses, identifying the important role of 'home' as the focal point for both intention and contribution, and thus also in the distribution of property.

Each of these three chapters applies a relational analysis, identifying how the law might be read differently within each element — intention, contribution, and home. The analysis exposes the possibilities of relational exchange to afford a principled approach to ascertaining domestic property distribution that addresses substantive equality.

The last chapter synthesises the elements represented in the three preceding chapters, suggesting an overarching, coherent, theoretical account of the law. It charts a course that promotes substantive equality, navigating the tensions inherent in the distribution of domestic proprietary interests. Drawing on a legal storytelling approach, Chapter Six includes a feminist judgment illustrating the practical possibilities of the preceding theoretical analysis.

II. Method and Scope

In answering the thesis question I analyse selected case law in four common law jurisdictions concerning heterosexual intimate partner trusts, informed by three analytical layers: liberalism, feminist legal thought, and relational theory. This part first outlines how each analytical approach contributes to the method, and then establishes the scope of the inquiry.

A. *Method*

This thesis assumes that the law of property informs the law of trusts, with each reflecting the ideology of market liberalism predominating in Western common law democracies. The premise of this thesis is that this is a problem in the intimate partner trust cases because the market context is inappropriate to understanding the distribution of property between intimate partners. The first stage of analysis thus identifies in the case law how the elements of implied trusts reflect the dominant liberal conceptualisation of property as an individual and absolute right, enforceable against the world.

Integral to the liberal foundation of property, and relevant to this analysis, is the paramountcy of the individual and the expression of his [sic][26] will. In the first place, this is relevant because of the simultaneously shared purposes of the intimate couple, and their desire to establish individual (separate) interests: '[m]an is both an entirely selfish creature and an entirely social creature'.[27] The dynamic between community and individual is not contemplated by an individualistic approach to property.

Further, individualism explains how courts understand their role as effecting the parties' distribution of property, leaving redistribution to the Parliament.[28] The general law deals with distribution of property as a question of the parties' own intention. By contrast, family law legislation effects State-mandated property redistribution, evincing alternative norms and mechanisms of property allocation. This thesis deals only with general law recognition of the parties' property distribution, recognising it as a function of liberalism. Its scope does not extend to legislative redistribution.

A further implication of liberalism, and likewise an important analytical tool in this thesis, is the law's implicit adoption of a public/private divide. Within this dichotomy, the domestic sphere of intimate partner property claims is traditionally ostensibly beyond the reach of the law.[29] Private law generally serves to uphold rights invested in the individual as against other similarly situated individuals, preferring not to recognise intimates as the bearers of rights.[30] This binary presents a challenge for intimate partner property claims. While the law itself determines the boundaries of what is private (beyond law) and what justifies intervention,[31] intimate partner claims based on individual rights lie at the intersection of market norms (public) and the intimacy of home (private), challenging the traditional norms of private law.

Having established the liberal foundations of property, I then turn to feminist analysis to identify how those foundations limit the potential for substantive equality. Feminism reframes the initial analysis to expose the gendered assumptions of the law, and to interpret their implications. Feminist thought animates concerns about substantive equality in the law,[32] exposing the effect on women of ongoing gendered,

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[26] In recognition of the gendered foundation of property, this chapter uses masculine pronouns in reference to market liberal precepts.
[27] Ian R Macneil, 'Values in Contract: Internal and External' (1983) 78 *Northwestern University Law Review* 340, 348.
[28] See eg Rotherham, above n 18, 36–9, citing *Re Polly Peck International Plc (in Administration)* [1998] 3 All ER 812.
[29] Martha Albertson Fineman, *The Neutered Mother, the Sexual Family* (Routledge, 1995); Margaret Thornton, 'The Cartography of Public and Private' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 2; Ngaire Naffine, 'Sexing the Subject (of Law)' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 18; Jenny Morgan, 'Sexual Harassment and the Public/Private Dichotomy: Equality, Morality and Manners' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 89; Nikolas Rose, 'Beyond the Public/Private Division: Law, Power and the Family' in Peter Fitzpatrick and Alan Hunt (eds), *Critical Legal Studies* (Basil Blackwell, 1987) 61; Katherine O'Donovan, 'Protection and Paternalism' in Michael D A Freeman (ed), *State, Law and the Family: Critical Perspectives* (Sweet & Maxwell, 1984) 79; Frances E Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96(7) *The Harvard Law Review* 1497.
[30] See eg discussion in O'Donovan, above n 29.
[31] Olsen, above n 29, 144. See also Thornton, above n 29.
[32] Graycar and Morgan, 'One Step Forward', above n 5, 400.

historical standards in a broader social context of gendered structural inequality. Further, through asking 'the woman question',[33] it interrogates the law's claims to neutrality implicit in its consideration of 'objective' standards, and 'facts'. Despite the recognised evolution of the law of intimate partner trusts in its attempt to accommodate the intimate context — and by implication the feminine[34] — a feminist mindset reveals embedded masculine framing of the issues, thereby prompting examination of the law's capacity to deliver substantive equality.

The third analytical layer adapts relational theory to bridge the atomistic individualism of liberalism in the law, and the feminist critique of liberalism. It speaks to the law's struggle to navigate the tension between the individuals before the court ('yours and mine') and their community identity ('ours'). Relational contract theory[35] is called upon to reframe further the elements of the law of intimate partner implied trusts, while retaining its overall structure. Relational theory offers a language with which to contrast courts' approach to applying the law, and the parties' own experiences of intimate relations. Relations serve the analytic purpose of reorienting the law to recognise parties' differential experiences in communion with each other, as a feature of economic interaction — and thus potentially property distribution — as well as of their intimacy. Through its distributive potential, such an approach has 'downstream' implications for substantive equality both within a household and thus in society more broadly.

This method is designed to clarify the law's implicit ideological motivation as representative of the tenets of liberalism. In particular it reveals the law's construction of the parties as atomistic individuals engaging in discrete transactions allocating interests in the family home — a view at odds with the fact of the parties' intimate relations and their shared purpose of a life lived together. The method not only reveals the gendered contours of the law's inquiry, but also paves the way for alternative means of navigating claims grounded in both the collective and the individual.

B. Scope

The scope of this inquiry into intimate partners' property distribution is bounded by its focus on heterosexual intimate relationships, by doctrine, in that it considers only trusts, its embrace of law in four common law jurisdictions, and the importance of substantive equality.

1. Relationships

Naturally, the domestic context of a claim for a beneficial interest in land might encompass diverse relations — heterosexual and same-sex partners, parents and children, siblings, carers and the cared-for. The sole focus of this thesis however rests on heterosexual relationships — referred to here variously as domestic, spousal, or intimate relationships. This is not to diminish the importance of property in same-sex relationships and more broadly. Rather it provides a bounded context within which to

[33] See eg Katharine T Bartlett and Rosanne Kennedy (eds), *Feminist Legal Theory: Readings in Law and Gender* (Westview Press, 1991).
[34] See eg Rosemary Hunter, 'Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism' in Margaret Davies and Vanessa E Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate, 2013) 13.
[35] Ian R Macneil, 'The Many Futures of Contracts' (1974) 47 *Southern California Law Review* 691.

explore the gendered nature of property and its distribution as enforced by the courts, itself a reflection of the gendered history of married women's property.

The cases examined here involve both de jure marriages and de facto unions. While the jurisdictions examined have enacted statutes providing for property redistribution in marriages,[36] and most have legislated for property redistribution as between de facto spouses,[37] the law of trusts tends not to be precluded from application. Indeed in the Australian context, it forms the starting point for ascertaining the extent of spouses' individual interests at law and in equity, before a statutory reckoning is commenced.[38] Further, the law remains relevant in third party claims against one spouse[39] and claims made after death,[40] in all cases subject to the provisions of the *Family Law Act 1975* (Cth).

2. Trusts

'Trusts' here encompasses both resulting and constructive trusts, which are frequently referred to together with little differentiation.[41] There is significant debate surrounding the taxonomy of trusts,[42] but the taxonomic implications are beyond the scope of this thesis. Instead, the purpose of considering resulting and constructive trusts is to examine the nature of judicial acknowledgement of property distribution between intimate partners.

The law of intimate partner trusts reached a turning point following the leading English decisions of *Pettitt v Pettitt*[43] and *Gissing v Gissing*.[44] These cases mark a separation from Lord Denning's widely applied interpretation of the MWPA, and the start of what came to be described in England as the common intention trust.[45] Despite the development of statutory schemes of spousal property redistribution in many jurisdictions, applications continue to be made based on the general law and

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[36] *Family Law Act 1975* (Cth); *Family Law Act 1996* (UK); *Property (Relationships) Act 1976* (NZ). Canadian provinces have responsibility for division of matrimonial property under s 92(13) of the *Constitution Act 1867* (Imp), 30 & 31 Vict, C 3 — see eg *Matrimonial Property Act*, RSNS 1989, C 275; *Family Law Act*, RSO 1990, C F-3.

[37] *Family Law Act 1975* (Cth); *Family Court Act 1997* (WA); *Property (Relationships) Act 1976* (NZ). As with married couples, Canadian provinces have jurisdiction over de facto property although not all provinces have enacted relevant legislation. For a summary of legislative provisions, see eg David Frenkel, 'Joint Family Venture: A Synthesis of the Post-*Kerr* Case Law' (2014) 34 *Canadian Family Law Quarterly* 35. There is presently no de facto legislation in the UK. This thesis does not distinguish between marriage and registered heterosexual civil unions where a registration scheme has been enacted.

[38] See eg *Stanford v Stanford* (2012) 247 CLR 108.

[39] See eg *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278; *Draper v Official Trustee in Bankruptcy* [2006] FCAFC 157; *Midland Bank Plc v Cooke* (1995) 27 HLR 733; *Lloyds Bank Plc v Rosset* [1991] 1 AC 107.

[40] See eg *York v York* [2015] EWCA Civ 72; *Hillman v Box (No 4)* [2014] ACTSC 107; *Parianos v Melluish* [2003] FCA 190; *Hayward v Giordani* [1983] NZLR 140.

[41] See eg *Gissing v Gissing* [1971] AC 886, 896, 898, 901, 905, 906, 910, discussed in *Muschinski v Dodds* (1985) 160 CLR 583, 593–4.

[42] See eg discussion in A J Oakley, *Constructive Trusts* (Sweet & Maxwell, 3rd ed, 1997), 28–31; Gbolahan Elias, *Explaining Constructive Trusts* (Clarendon Press, 1990).

[43] [1970] AC 777 ('*Pettitt*').

[44] [1971] AC 886 ('*Gissing*').

[45] Australia had already made the interpretive change: see eg *Wirth v Wirth* (1956) 98 CLR 228, however the English decisions came to be cited also as authority as in *Allen v Snyder* [1977] 2 NSWLR 685.

courts in each of England, Australia, Canada, and New Zealand continue to refer to the foundational principles articulated in *Pettitt* and *Gissing*.[46]

3. Four Jurisdictions

Despite their doctrinal differences, the law in each jurisdiction is directly referential to the law of England[47] and the four together offer a solid foundation for exploring general law principles of distribution of domestic proprietary interests familiar to common law jurisdictions.[48] Further, each jurisdiction can be said to have roughly comparable socio-political systems based on Western market liberalism.[49] Social movements in the four broadly align: thus the introduction of the MWPA,[50] women's suffrage,[51] second-wave feminism,[52] the rise of home ownership[53] and personal finance, the liberalisation of divorce laws,[54] and the rise of de facto relationships,[55] have occurred across all jurisdictions. While not reproduced exactly, the general social trajectory of each jurisdiction provides a sufficiently similar background to the

[46] For example, *Jones v Kernott* [2012] 1 AC 776; *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278; *Kerr v Baranow* [2011] 1 SCR 269; *Lankow v Rose* [1995] 1 NZLR 277.
[47] See eg *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278; *Muschinski v Dodds* (1985) 160 CLR 583; *Pettkus v Becker* [1980] 2 SCR 834; *Kerr v Baranow* [2011] 1 SCR 269; *Lankow v Rose* [1995] 1 NZLR 277.
[48] See eg discussion of the four jurisdictions in *Lankow v Rose* [1995] 1 NZLR 277, 288–9. This law is relevant beyond the four jurisdictions here. See eg: *Chan Yuen Lan v See Fong Mun* [2014] SGCA 36; *Abbott v Abbott* [2007] UKPC 53 (26 July 2007).
[49] Notably, all jurisdictions share the Westminster system and broadly speaking, the common law tradition.
[50] See above n 3.
[51] Women's suffrage was won in New Zealand in 1893. In Australia it was introduced state by state, commencing with South Australia in 1895, and by 1911 all states had legislated for women's suffrage. It was not until 1928 that the UK enacted universal women's suffrage. In Canada, qualified women's suffrage commenced in 1917. Both Australia and Canada excluded Indigenous women and other minority groups from suffrage until the mid-20th century.
[52] Kaitlynn Mendes, 'Reporting the Women's Movement: News Coverage of Second-Wave Feminism in UK and US Newspapers, 1968–1982' (2011) 11(4) *Feminist Media Studies* 483; Mary Holmes, 'Second-Wave Feminism and the Politics of Relationships' (2000) 23(2) *Women's Studies International Forum* 235; Jill Vickers, 'The Intellectual Origins of the Women's Movements in Canada' in Constance Backhouse and David H Flaherty (eds), *Challenging Times: The Women's Movement in Canada and the United States* (McGill-Queen's University Press, 1992); Germaine Greer, *The Female Eunuch* (Fourth Estate, 1971).
[53] See eg 'Submission to the Inquiry into Home Ownership: House of Representatives Standing Committee on Economics' (Reserve Bank of Australia, 2015) <http://www.rba.gov.au/publications/submissions/housing-and-housing-finance/inquiry-into-home-ownership/pdf/inquiry-into-home-ownership.pdf>, 4.
[54] See above, nn 36, 37.
[55] Australian Bureau of Statistics, 'Marriages, De Facto Relationships and Divorces' (Australian Bureau of Statistics, 2012) <http://www.stats.govt.nz/browse_for_stats/people_and_communities/marriages-civil-unions-and-divorces/marriage-and-divorce-in-nz.aspx>; Statistics New Zealand, 'Marriage and Divorce in New Zealand' (2001) <http://www.stats.govt.nz/browse_for_stats/people_and_communities/marriages-civil-unions-and-divorces/marriage-and-divorce-in-nz.aspx>; Office for National Statistics, 'Number of Marriages, Marriage Rates and Period of Occurrence' (Office of National Statistics, 2014) <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/datasets/numberofmarriagesmarriageratesandperiodofoccurrence>; Office for National Statistics, 'Civil Partnerships in England and Wales: 2015' (2015) <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/bulletins/civilpartnershipsinenglandandwales/2015>; Statistics Canada, 'Marital Status: Overview' (Statistics Canada, 2011) <http://www.statcan.gc.ca/pub/91-209-x/2013001/article/11788-eng.htm>.

development of intimate partner implied trusts. Each jurisdiction grapples in its own way with challenges common to all — principally in accommodating the domestic context within the general law framework developed with the market in mind.

There are of course, obvious differences. Canada's *Charter of Rights and Freedoms*[56] and the UK's enactment of the European human rights framework[57] each have potential to inform the development of law in contrast to states with no similar human rights enactments. England and some provinces of Canada have not introduced de facto relationship legislation, and the application of family law statutes otherwise differs across jurisdictions.

On the whole however, the general law of intimate partner trusts shares more in common across jurisdictions than it differs. The law's common foundation across the four jurisdictions, evidenced by the cross-referential approach in each,[58] supports the cross-jurisdictional analysis in this thesis. Investigating four jurisdictions affords a range of case law that gives a better picture of the effects on substantive equality of underlying shared property law principles. It also permits testing the theories applied in this thesis in the broadest, but still meaningful, way. As this research engages with the heart of the liberal basis of property, analysing this framework within diverse doctrinal contexts permits looking beyond the doctrinal particularities of any one jurisdiction, to understand the implications of common law property distribution at a foundational level.

4. Equality

Finally, at its heart this thesis concerns substantive equality — a feature that gives form to the purpose and method of the inquiry. Analysing equality in this context involves assessing the way in which the law accounts for each party's experiences as 'wife' and woman; and as 'husband' and man. It requires questioning the law's frequently implicitly gendered assumptions about human behaviour, and their application to real people. Importantly also it involves exposing the law's silence as to the pervasive effect of gender norms on women's and men's experiences before the law. Beyond the circumstances of individual cases this thesis therefore contextualises the implications of the law for women's substantive equality within the broader social fabric, drawing on sociological literature relevant to the courts' assumptions.

Despite what some have described as an evolution of trusts to cater for the intimate context,[59] the law remains firmly grounded in precepts of market liberalism. In this respect it takes an 'equal treatment' approach to relationships, holding the couple to the same (market) standard as applies to non-domestic proprietary claims, and entrenching those standards by holding each party to the standards of the market. In a further example of formal equality, as between parties to a claim the law is ostensibly 'equal' through the 'impartial' application of the same standards to both parties. This

[56] *Canada Act 1982* (UK) C 11, Sch B Pt I.
[57] Enacted in the UK by the *Human Rights Act 1998*. Note Wong's observations about 'the emerging human rights culture in the UK' Simone Wong, 'Trust(s) and Intention in Resolving Disputes over the Shared Home' (2005) 56 *Northern Ireland Legal Quarterly* 105.
[58] See eg *Stack v Dowden* [2007] 2 AC 432; *Muschinski v Dodds* (1985) 160 CLR 583; *Kerr v Baranow* [2011] 1 SCR 269; *Lankow v Rose* [1995] 1 NZLR 277.
[59] Hayward, 'Family Property', above n 21.

thesis however exposes the inequality of the law in terms of its incapacity to appreciate and accommodate the relevant differences between the parties.

While professing equality before the law through neutral and objective application of rules, it is well recognised that courts presuppose a masculine subject.[60] Recognising that case law adheres to the law's own understanding of equality, this analysis imposes an alternative conceptualisation of what equality might mean. In its close reading of the cases this thesis adopts feminist legal method,[61] critiquing the law's implicit claims to formal equality — that the parties are treated equally before the law. As a method applied in the interests of equality, it considers

> …the effects of a law…and its social context. For that legal analysis must move away from principles that require a superficial comparison with men to a more substantive understanding of equality as a response to economic, social and political disadvantage of women.[62]

Such an inquiry responds to the limitations of adopting a 'difference' approach[63] as between the parties: one that might ostensibly recognise the different roles of each party as husband and wife but which otherwise fails to question whether that difference is warranted. On a systemic level, a difference approach might leave the parties with redistributive remedies, which would fail to address the initial and unequal principles of distribution. On an individual level a difference approach might relegate women to special treatment because of their difference from men,[64] which I call here 'exceptionalism'. In each case, the purported solution imports the benchmark of the man of law without truly understanding the parties' context. In response to this analysis, this thesis adopts legal storytelling to highlight how doctrine might otherwise be framed, taking heed of the experiences of women,[65] thereby exposing structural barriers to women's economic and social advancement and thus their substantive equality.

Importantly, equality here does not mean equal interests — that the parties necessarily hold equally because of the fact that they are a couple. It does not propose community property as a measure of equality within the relationship or of outcomes of property claims. Instead in focussing still on the parties' individual claims and in furtherance of the individualism of property itself, this thesis articulates the way in which 'equal treatment' has instead worked to exclude women and to uphold the structures that prevent women's equal participation in social and economic life.

III. Doctrine in Four Jurisdictions

[60] See eg Naffine, above n 29.
[61] Ann Scales, 'Feminist Legal Method: Not So Scary' (1992) 2 *UCLA Women's Law Journal* 1; Katharine T Bartlett, 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829.
[62] Australian Law Reform Commission, 'Equality before the Law: Justice for Women: Part II' (Report 69 Part II, 1994), [3.29].
[63] See eg Jenny Morgan, 'Feminist Theory as Legal Theory' (1988) 16 *Melbourne University Law Review* 743.
[64] Such as occurs in the presumption of advancement — see eg Lisa Sarmas, 'A Step in the Wrong Direction: The Emergence of Gender Neutrality in the Equitable Presumption of Advancement' (1994) 758.
[65] See eg Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (The Federation Press, 2nd ed, 2002), 74–7.

Broadly speaking, there are two avenues in trusts law for ascertaining an undeclared underlying beneficial interest in property: the resulting and the constructive trust. Both are trusts[66] and both are of interest to this inquiry.

The resulting trust is more limited in its scope, depending upon a direct capital contribution to the acquisition of real property.[67] Apart from the (counter-) presumption of advancement,[68] it relies far less on the fact of the intimate relationship and courts are not drawn into making pronouncements about the effect of the parties' behaviour upon their entitlement to property. A capital payment not reflected in the proportionate allocation of the legal interest effectively speaks for itself.

A constructive trust on the other hand is more nuanced, particularly in the complicated factual matrix of intimate relations.[69] It is a trust arising by operation of law regarded as both a remedy and an institution.[70] Despite the apparent ambiguity surrounding its 'true' nature, [71] the doctrine of constructive trusts is nonetheless regarded here as embodying norms sufficient to support a proprietary interest.[72]

While there is a range of circumstances in which a constructive trust might arise,[73] this thesis is concerned with the intimate partner constructive trust. It was the English decisions in *Pettitt*[74] and *Gissing*[75] that led the contemporary development of the law of intimate partner trusts throughout the four common law jurisdictions, and the line of cases selected here follows from the decisions in *Pettitt* and *Gissing*.[76] The selection includes leading cases in each jurisdiction, other cases that are frequently cited in both the case law and in the literature on this area, and some that are most recently handed down. Cases are 'leading' if they have been heard by superior courts so that they represent authority in their jurisdiction, and are recognised as such in other jurisdictions and in scholarly commentary. This work does not purport to canvass an exhaustive selection of cases, but rather an organic array of decisions likely to be familiar to scholars in the field.

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[66] See generally eg Simon Gardner, *An Introduction to the Law of Trusts* (Clarendon, 3rd ed, 2011).
[67] See eg *Baumgartner v Baumgartner* (1987) 164 CLR 137, 155.
[68] The presumption of advancement accounts for a husband's capital contribution to his wife's legal interest that is not otherwise reflected on the legal title. Instead of finding a resulting trust in his favour, the presumption assumes he paid the money intending to advance his wife's interests. On this basis, his claim for a resulting trust might be rebutted and the wife's legal interest will be found to be at home with the beneficial interest. See eg *Calverley v Green* (1984) 155 CLR 242. This is discussed further in Chapter Four below.
[69] See eg discussion in *Stack v Dowden* [2007] 2 AC 432, 439.
[70] Contrast the judgment of Deane J, who did away with the distinction in *Muschinski v Dodds* (1985) 160 CLR 583, 614.
[71] See eg Hang Wu Tang, 'The Constructive Trust in Singapore: Five Persistent Puzzles' (2010) 22 *Singapore Academic Law Journal* 136; Pamela O'Connor, 'Happy Partners or Strange Bedfellows: The Blending of Remedial and Institutional Features in the Evolving Constructive Trust' (1996) 20 *Melbourne University Law Review* 735; David M Paciocco, 'The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors' (1989) 68(2) *Canadian Bar Review* 315; R P Austin, 'The Melting Down of the Remedial Trust' (1988) 11 *University of New South Wales Law Journal* 66.
[72] See discussion in Chapter 15 of Gardner, above n 66.
[73] *Muschinski v Dodds* (1985) 160 CLR 583, 616, where Deane J found that 'neither principle nor authority requires that [the Court] be confined to…any category of case.' See eg Elias, above n 42.
[74] [1970] AC 777.
[75] [1971] AC 886.
[76] With the exception of *Wirth v Wirth* (1956) 98 CLR 228.

The following overview of each jurisdiction highlights the various doctrinal approaches to determining intimate partners' distribution of beneficial property interests.

A. England — Common Intention

It is logical to start with the English line of authority, in that the early leading decisions of *Pettitt* and *Gissing* remain widely cited across the four jurisdictions.[77] Both cases involved married couples, and the earlier *Pettitt* was brought under the *Married Women's Property Act 1882* (Imp). The decision of the House of Lords in *Pettitt* changed the way the courts of England and Wales dealt with domestic property claims, and its influence spread throughout the Commonwealth.

Mr Pettitt claimed a beneficial interest in his former matrimonial home, solely owned at law by his wife. He argued that his labour in redecorating and improving the house had enhanced its value. The first question was whether the MWPA empowered the Court to allocate property, or whether it was simply a procedural provision. Section 17 provided that:

> In any question between husband and wife as to the title to or possession of property, either party…may apply by summons or otherwise in a summary way to any judge of the High Court of Justice…and the judge…may make such order with respect to the property in dispute…as he thinks fit.

The provision had previously been found to afford the court a general discretion to 'make such order with respect to the property'[78] as it thought fit. *Pettitt* however confined the scope of the discretion in section 17 to that of finding the parties' separate property. Its purpose was not 'to override existing rights in the property and to dispose of it in whatever manner the judge may think to be just and equitable in the whole circumstances of the case.'[79] Lord Reid for example found it 'incredible that any Parliament of that era could have intended to put a husband's property at the hazard of the unfettered discretion of a judge…if the wife raised a dispute about it.'[80] Instead, the relevant inquiry into the parties' property interests was to be based on general principles of law to be found in the law of trusts, rather than matrimonial or contract law.[81]

In *Pettitt* the Court found, through the application of these general law principles, that the parties did not have the requisite common intention that Mr Pettitt share a beneficial interest simply because he had performed work on the house. A spouse's contribution to improvements, as occurred in *Pettitt*, would not of itself support an inference of intention to create a beneficial interest. The Court unanimously found that the husband's improvements were so ephemeral as not to amount to anything more than what a reasonable husband would undertake in the course of domestic life.

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[77] See eg *Jones v Kernott* [2012] 1 AC 776; *Stack v Dowden* [2007] 2 AC 432; *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278; *Kerr v Baranow* [2011] 1 SCR 269; *Lankow v Rose* [1995] 1 NZLR 277; *Ferreira v Stockinger* [2015] NZHC 2916 (20 November 2015).
[78] Ibid.
[79] *Pettitt v Pettitt* [1970] AC 777, 792.
[80] Ibid 793.
[81] Ibid 822 — though the large part of the judgment engages in consideration of contract and intendment of legal consequences within a marriage; *Gissing v Gissing* [1971] AC 886, 902.

Thus the extent of his contributions was insufficient to support a common intention that he derive a beneficial interest.

Gissing affirmed this approach as the foundation of non-legislative family property law. Ms Gissing claimed a beneficial interest in the former matrimonial home owned solely in law by Mr Gissing. Ms Gissing had worked throughout the marriage contributing to household expenses, and had paid a small capital sum towards the acquisition of the property. However the Court found her contribution to the property acquisition insufficient to support an intention that she hold a beneficial interest.

In each case the court's task was to answer the question 'whose [property] is this?'[82] Normally, the beneficial interest would be expected to follow the legal title. To demonstrate a differential beneficial interest, the court required evidence that the parties intended the beneficial interest would be held otherwise. Where the court found that the parties did intend a beneficial interest, the second aspect to the inquiry was to ascertain the extent of that beneficial interest. This involved ascertaining the relative contributions the parties made to the acquisition.

As a matter of principle, a beneficial interest would be found based on the parties' agreement.[83] The courts did not expect this to be an express agreement because as spouses, the parties were unlikely to have articulated a property arrangement.[84] Lord Hodson for example described it as 'grotesque' to consider 'a normal married couple spending the long winter evenings hammering out agreements about their possessions'[85] and Lord Morris thought it would be 'unnatural' to find a precise statement of where ownership rested as between spouses.[86]

The Court in *Pettitt* was prepared to rely on intention that is implied or imputed because invariably the circumstances are such that the 'evidence is meagre.'[87] While some judges found a 'wide gulf' between imputed and implied intention,[88] others found little difference[89] and seemed to use the terms interchangeably.[90] Regardless, the courts interpreted the parties' contributions to the property acquisition and improvement as a means of ascertaining intention.

In these earlier decisions, had there been a capital contribution to the purchase price that was not reflected in the legal title the outcome would unproblematically have been a beneficial interest under the general law of resulting trusts.[91] Where one party contributes capital to the acquisition of property but that contribution is not reflected in the legal title, a court will find the beneficial interest in proportion with the parties'

[82] *Pettitt v Pettitt* [1970] AC 777, 798.
[83] Ibid 799.
[84] Ibid 810, 820, 821.
[85] Ibid 810.
[86] Ibid 799.
[87] Ibid 799.
[88] *Gissing v Gissing* [1971] AC 886, 897.
[89] Ibid 902.
[90] See the discussion in *Stack v Dowden* [2007] 2 AC 432, 443.
[91] For example, see *Pettitt v Pettitt* [1970] AC 777, 814.

respective capital contributions by way of resulting trust: 'the trust of a legal estate…results to the man who advances the purchase-money.'[92]

Both decisions were more complex, however: there were no direct financial contributions to the purchase price (and thus no resulting trust), nor even indirect financial contributions via payment of mortgage instalments or expenses. In such cases the courts resort to a search for intention as to the beneficial interest, and the calculation of the extent of any beneficial interest, based on the parties' conduct. Because neither of these decisions had found the requisite intention to support a beneficial interest, the extent of any interest was not in issue and the second part of the inquiry was not undertaken.

Ensuing decades saw the law evolve, though not always in a clear singular direction. A number of cases have been subjected to academic and judicial commentary along the way — and many of these cases will be explored further in this thesis. In apparent contrast to *Pettitt*, *Eves v Eves* for example saw a woman successfully claim against her de facto partner for a beneficial interest arising from her significant physical contribution to the property's improvement.[93]

Ms Grant and Ms Oxley were also successful in claiming a beneficial interest. *Grant v Edwards*[94] involved a house owned jointly in law by Mr Edwards and his brother. Mr Edwards had told Ms Grant that her name should not go on the title because it would interfere with matrimonial proceedings against her then husband. The Court found that this indicated a clear intention that Ms Grant was to hold a beneficial interest, and she was successful in her claim.

Ms Oxley had contributed to the purchase of the home she shared with Mr Hiscock through exercising her right to buy a discounted council property. This home was sold and the proceeds used to acquire a bigger house in Mr Hiscock's name alone. Ms Oxley's solicitor had advised her to take security over the new house, but she had declined to do so. The Court found in Ms Oxley's favour as to an interest commensurate with her financial contribution. The intention to share beneficially was to be inferred from the mutual contribution to the acquisition.[95]

In contrast, Ms Burns and Ms Rosset were each unsuccessful in their claims for a beneficial interest. Despite Ms Burns' homemaking activities and some work outside the home, she was found to have made no contribution to the purchase price[96] and the Court could find no intention as to a shared beneficial interest. Similarly, Ms Rosset's work in redecorating the matrimonial home using 'special skills…over and above the average housewife'[97] was insufficient to support an intention that she hold a beneficial interest in her husband's sole legal title. The 'finding of an agreement or

[92] *Dyer v Dyer* (1788) 2 Cox Eq Cas 92, 93. See also *Calverley v Green* (1984) 155 CLR 242; *Walker v Hall* [1984] Fam Law 21.
[93] *Eves v Eves* [1975] 1 WLR 1338.
[94] *Grant v Edwards* [1986] Ch 638.
[95] *Oxley v Hiscock* [2005] Fam 211.
[96] *Burns v Burns* [1984] Ch 317.
[97] *Lloyds Bank Plc v Rosset* [1991] 1 AC 107, 130.

arrangement to share in this sense can only … be based on evidence of express discussions between the partners …'[98]

Much of the commentary on these cases and others like them has arisen because of the difficulty in locating within them a coherent approach to the law.[99] This appeared to have been resolved when in 2007 the House of Lords revisited common intention and the question of its inference or imputation, in *Stack v Dowden.*[100] The parties held the legal title jointly, but Ms Dowden claimed a beneficial interest in Mr Stack's estate on the basis of her long-term contributions. Amongst other things, the Court accepted her separate accounting of household expenses including mortgage payments, as evidence of an intention that the parties hold beneficially differential interests.

As joint tenants, the starting point was for the claimant to establish a common intention that the beneficial interest was held otherwise. The parties' common intention was evinced through examination of matters ranging from the parties' discussions at the time of acquisition, to their financial arrangements, and even to their 'individual characters and personalities'.[101]

Baroness Hale, with whose reasoning the majority agreed, observed that 'the search is to ascertain the parties' shared intention, actual, inferred or imputed with respect to property in light of the whole course of conduct.'[102] Furthermore, the parties' intention may change during their relationship. Both the fact and derivation of intention was of considerable interest in this decision although it is not clear on the face of the judgment whether in this case the parties' common intention was implied or imputed.

In *Stack* the parties' 'true intentions' as to the beneficial estate would depend on 'advice or discussions' between the parties, 'the purpose for which the home was acquired', 'whether [the couple] had children for whom they both had responsibility to provide a home', 'how the parties arranged their finances, whether separately or together or a bit of both', and 'how they discharged the outgoings on the property and their other household expenses.'[103] Where a couple is in a relationship, integral to each of these factors is what might be described as 'give and take'. The implication of the inquiry is that none of these factors is unilateral, for the purpose of determining intention. The intention is common, shared by both, and arises from decisions that are made about the allocation of energy, time, money, and labour as between the two. In other words, Baroness Hale's factors represent an inquiry into the terms of the parties' exchange so as to represent their consent to the distribution of property.

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[98] Ibid 132.
[99] See eg Wong, above n 57; John Randall, 'Proprietary Estoppel and the Common Intention Constructive Trust — Strange Bedfellows or a Match in the Making?' (2010) 4(3) *Journal of Equity* 171; Rebecca Probert, 'Land, Law and Ex-Lovers' (2005) Mar/April *Conveyancer and Property Lawyer* 168; Rebecca Probert, 'Trusts and the Modern Woman — Establishing an Interest in the Family Home' (2001) 13(3) *Child and Family Law Quarterly* 275; Mee, above n 24.
[100] *Stack v Dowden* [2007] 2 AC 432 ('*Stack*').
[101] Ibid 459.
[102] Ibid 455.
[103] Ibid 459.

Signalling a change from the 'broad general principle' of the early cases of *Pettit* and *Gissing*, Baroness Hale pointed out that the presumption of a resulting trust was not a rule of law. She found its focus on 'crude factors' of money contribution less convincing than the 'subtle factors of intentional bargain,'[104] factors including indirect contribution of significant improvements and complete pooling of resources. Mr Stack had little evidence that he had made such contributions. Coupled with Ms Dowden's evidence, and the parties' unusual circumstances of long-term separate accounts and accounting, this supported her 65 per cent beneficial interest.[105]

The decision also considered the relevance of the parties' relationship as intimate partners to the application of the general law. Lord Neuberger found that the 'same principles should apply whether legal co-owners are in a sexual, platonic, familial, amicable, or commercial relationship.'[106] Baroness Hale in contrast, found that in an intimate relationship, the behaviour of the parties differed from that of 'commercial men' [sic].[107] This was recognised in the complex matrix of factors she felt relevant to determining the parties' common intention and their contributions.

More recently in *Jones v Kernott*[108] the Court clarified aspects of *Stack*. The parties bought a home in joint names. Mr Kernott gave Ms Jones a weekly payment from which she paid household expenses and the mortgage. Once they separated, she took sole responsibility for all expenses associated with the property. At this time, the parties agreed that they held joint beneficial ownership. Subsequently Mr Kernott cashed in a joint insurance policy and bought his own property, later seeking to recover his interest in the former joint home. Ms Jones successfully claimed a sole beneficial interest.

The judgment clarified the way in which the court would ascertain intention.

> (1) The starting point is that equity follows the law and they are joint tenants both in law and in equity. (2) [The] presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change. (3) Their common intention is to be deduced objectively from their conduct… [109]

Further, where there was a change to the original intention and there is no direct evidence as to the extent of the interest, 'each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property.'[110] Finally, each case would turn on its own facts.

Despite the evolution of the approach to intention, the courts have been consistent on the need to uphold, not redistribute, the parties' property.[111] Their power is not to disturb a property interest but rather to give effect to the parties' will where evidence

[104] Ibid, citing Kevin Gray and Susan Francis Gray, *Elements of Land Law* (4th ed, 2005), 864.
[105] Ibid 465.
[106] Ibid 468.
[107] Ibid 449.
[108] *Jones v Kernott* [2012] 1 AC 776.
[109] Ibid 794.
[110] Ibid.
[111] See eg *Stack v Dowden* [2007] 2 AC 432, 468; *Grant v Edwards* [1986] Ch 638, 651; *Pettitt v Pettitt* [1970] AC 777, 817.

supports a common intention at variance with the legal title. As cited above however, courts will turn to what is fair in determining the extent of each party's interest provided it can first establish an intention as to distribution. What is fair will tend to depend on the nature and extent of the parties' contribution over time. It is clear however that the key elements that feature in the English law are intention and contribution.

B. Australia — Unconscionability

The leading Australian decisions were handed down over a decade after their English precedents. In *Calverley v Green*[112] the evidence did 'not raise for consideration the question whether any…trust arose in favour of the respondent under the principles discussed in *Pettitt* and *Gissing*'.[113] Instead, *Calverley* dealt with a claim for the distribution of the beneficial interest on the basis of a resulting trust, considering also the presumption of advancement. By contrast, *Muschinski v Dodds*[114] and *Baumgartner v Baumgartner*[115] used the avenue of a constructive trust to justify a claim principally by reference to unconscionability. As others have observed though, this fails to advance the justification for the title itself.[116]

In *Calverley* the parties lived in a de facto relationship for about ten years. To satisfy the lender's requirements, the parties acquired a home jointly in law. Mr Calverley provided the deposit and met the mortgage repayments,[117] although the parties were jointly and severally liable for repayment under the mortgage. Mr Calverley brought the action to recover the whole of the interest in the property as a reflection of his contribution to its acquisition.

At first instance, Rath J held that the reason for the parties holding joint legal interests was to satisfy the lender's requirements and that they did not express an intention to give a beneficial interest to Ms Green. This decision was overturned on appeal, and the High Court subsequently had to determine the distribution of the parties' interests in equity. In doing so, the Court considered the parties' intention as to the beneficial interest at the time of acquisition,[118] and their respective contributions. Payment of the mortgage was not considered a contribution to the purchase of the house, but rather a contribution to the release of the bank's charge over the land.[119] However, both parties had contributed to the purchase price itself through their joint borrowing from the bank and therefore Mr Calverley could not claim a full beneficial interest. The question then became one of ascertaining the parties' relative beneficial interests based on the extent of their respective contributions.

The majority found the relevant analysis to be the application of the general law presumption of resulting trust. When jointly held legal interests did not reflect the parties' respective contributions, in the absence of an intention to the contrary,

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[112] (1984) 155 CLR 242 ('*Calverley*').
[113] Ibid 253.
[114] (1985) 160 CLR 583 ('*Muschinski*').
[115] (1987) 164 CLR 137 ('*Baumgartner*').
[116] See eg discussion in *Lankow v Rose* [1995] 1 NZLR 277, 288.
[117] This 'accorded with the financial arrangements made by the parties for meeting items of recurrent expenditure while they were living together.' *Calverley v Green* (1984) 155 CLR 242, 255.
[118] Ibid 262.
[119] Ibid 258.

beneficial interests would be held to reflect the proportion of the parties' contributions. This might have been overturned by a presumption of advancement — whereby a husband is deemed to have intended to advance the interests of his wife through a grant of a legal interest. The presumption arises from 'the absence of any reason for assuming that a trust arose or in other words that the equitable right is not at home with the legal title.'[120] The Court affirmed however, that the presumption would only apply to a married couple and not to de factos and was therefore not applicable in this case. The matter would therefore be remitted to the Supreme Court to determine the extent of the parties' beneficial interests if they could not otherwise agree.[121]

The cases that followed did invoke the law set down in *Pettitt* and *Gissing*. *Muschinski* involved a joint legal title in a couple's shared home, paid for by Ms Muschinski. Her partner, Mr Dodds, had promised to contribute when he received a payout from his pending divorce. The payout did not occur and the relationship broke down. Ms Muschinski sought a beneficial interest commensurate with her significantly greater capital contribution. The Court found however, that the parties had intended that Mr Dodds take a joint legal and beneficial estate. It analysed the parties' arrangement, finding that Ms Muschinski had agreed to grant Mr Dodds a legal interest in exchange for his assurance of later contribution. Importantly, the Court did not interpret this to be a conditional grant. Rather the giving of the assurance alone was the consideration. It was relevant also that Ms Muschinski had received and acted upon legal advice. She was entitled to a constructive trust as security for an accounting of her contribution upon sale, but no beneficial interest in land.

Unlike *Muschinski*, Mr Baumgartner held the sole title to the couple's home. Ms Baumgartner claimed she had contributed financially to its purchase, and was therefore entitled to a beneficial interest. The Court examined the parties' financial arrangements to ascertain their intention as to the beneficial title. It was highly relevant that they had pooled their finances, and that Mr Baumgartner had used them to pay the mortgage. On this basis, the Court inferred an intention as to a shared beneficial estate, reflecting the parties' differential financial contribution.

Both cases focussed on whether it was unconscionable for the legal titleholder to refuse to acknowledge the interest of the other. They nonetheless still sought to ascertain the parties' intention as to the creation of a beneficial interest, doing so through an examination of the parties' financial contributions to the property acquisition.

In *Muschinski* the Court found that the presumption of resulting trust was rebutted by an actual intention that the parties were to hold both the legal and beneficial titles equally. Deane J used a joint venture analogy however, to find that that it would be unconscionable following the failure of the couple's joint venture, for Mr Dodds to deny Ms Muschinski's contribution.[122]

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[120] Ibid, 256, citing *Martin v Martin* (1959) 110 CLR 297, 303.
[121] Ibid, 262.
[122] *Muschinski v Dodds* (1985) 160 CLR 583, 619.

The judgment overall is also indicative of the divergent views on how to ascertain the parties' intention with reference to their contributions, and in characterising the nature of the parties' transaction as between themselves. This is evident from discussions about the nature of Mr Dodds' undertaking to contribute financially in the future, and what this meant in terms of the parties' understanding of the initial acquisition. This aspect of the parties' transaction was considered in contractual terms.[123]

In the majority judgment in *Baumgartner*, the fact of the pooled finances and their expenditure for the common benefit of the parties and their child meant that it was unconscionable for Mr Baumgartner to deny Ms Baumgartner an interest — although the court stopped short of identifying what that interest was. Mr Baumgartner's unconscionability however, called for the imposition of a constructive trust. The Court determined its extent according to the parties' respective contributions to the joint account, taking into account the original capital contribution.

The scope and focus of inquiry shifted in Australia somewhat in the 2006 decision of *Cummins v Cummins*,[124] which took a different approach to ascertaining the parties' interests. Ms Cummins had contributed 75 per cent of the purchase price on acquisition of the matrimonial home, which the parties held as joint tenants in law. Then, in August 1987, Mr Cummins transferred his interest in the home to Ms Cummins and this transfer was subsequently challenged under bankruptcy legislation. His trustee in bankruptcy sought to uphold the earlier joint title, to secure a full one half interest in the property for creditors, but Ms Cummins sought to have her beneficial interest reflect her initial contribution.

The Court asked:

> what was there to conclude in August 1987 that the face of the register did not represent the full state of the ownership of the…property and that ownership as joint tenants was at odds with and subjected to, the beneficial ownership established by trust law?[125]

In ascertaining whether Mr Cummins' beneficial interest followed the legal title, the Court started and ended its examination at the fact of the parties' matrimonial relationship and their joint tenancy, which together it found resulted in equal beneficial ownership.

In contrast with earlier decisions and also with the subsequent English reasoning in *Stack*, the Court in *Cummins* commenced with an inference of equal beneficial ownership because of the parties' status as married. It found that this applied 'with added force' because the parties held their legal title jointly.[126] It noted the 'disinclination of equity to intervene through the doctrine of resulting trusts…'[127] thus immediately disposing of any presumption of a beneficial tenancy in common based on shares representing financial contribution. This also dispensed with the need to engage with any evidence about contrary intention.

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[123] See eg *Muschinski v Dodds* (1985) 160 CLR 583, 602–7, per Brennan J.
[124] *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 ('*Cummins*').
[125] Ibid 298.
[126] Ibid 303.
[127] Ibid.

To affirm joint ownership the Court relied on the form of transfer, which nominated consideration of half the value of the property. If the parties did intend Ms Cummins hold a three-quarter share, then, it reasoned, that would have been reflected in the consideration for the transfer. Importantly however, without using the phrase 'equality is equity,' the Court found that the parties' matrimonial relationship presupposed a joint ownership regardless of contribution.[128] This contrasts with the earlier English decisions' dislike of this approach, believing it to be 'misused'.[129]

Despite the decision in *Cummins*, *Muschinski* and *Baumgartner* continue to represent the prevailing approach in Australia to determining beneficial estates of intimate partners.[130] As with the English decisions, and despite *Cummins*, the parties' intention as to the creation of a beneficial interest and their contributions to the acquisition and improvement of the family home remain the central focus of the courts' inquiry.

C. Canada — Unjust Enrichment

Intention — actual, implied, or imputed — does not feature in the Canadian cases in the way it does in England and Australia. In the leading decision in *Pettkus v Becker*,[131] the Court took the opportunity to 'clarify the equivocal state in which the law of matrimonial property [had been] left.'[132] Taking its point of departure from *Pettitt* and *Gissing*, the majority acknowledged it would be unlikely for the parties to form a common intention, describing it as artificial.[133] The majority accepted the trial judge's finding that the parties had no common intention as to the beneficial interest. In the majority's view however, it is 'unjust enrichment that lies at the heart of the constructive trust.'[134] To establish the trust, three requirements must exist: 'an enrichment, a corresponding deprivation, and absence of any juristic reason for the enrichment.'[135]

In this case, the contributions of Ms Becker over nearly 20 years, involving paying for household expenses, labouring in the parties' bee-keeping business, and contributing her external income to the household, had both allowed Mr Pettkus to amass significant savings, and to sustain a profitable business. This enabled him to purchase two properties in his sole name. Although there was no common intention that Ms Becker hold a beneficial interest, she had suffered detriment, Mr Pettkus was enriched, and there was no juristic reason for the enrichment. These were the elements necessary to support a finding of constructive trust.

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[128] Ibid 283, citing *Pettit v Pettit* [1970] AC 777, 815.
[129] *Gissing v Gissing* [1971] AC 886, 903, 908: 'It is only if no such inference [of probable common understanding] can be drawn that the court is driven to apply as a rule of law, and not as an inference of fact, the maxim 'equality is equity' and to hold that the beneficial interest belongs to spouses in equal shares.'
[130] See eg *Hillman v Box (No 4)* [2014] ACTSC 107; *Sui Mei Huen v Official Receiver for and on Behalf of the Official Trustee in Bankruptcy* [2008] FCAFC 117; *Draper v Official Trustee in Bankruptcy* [2006] FCAFC 157; *Parianos v Melluish* [2003] FCA 190.
[131] *Pettkus v Becker* [1980] 2 SCR 834.
[132] Ibid 841.
[133] Ibid 843.
[134] Ibid 847.
[135] Ibid 848.

From the same foundation as that of the decisions in *Pettitt* and *Gissing*, the minority instead relied on a presumed intention, based on the parties' conduct, sufficient to support a resulting trust.

> Contributions made by one spouse and freely accepted by the other for use in the acquisition and operation of a common household give rise to a rebuttable presumption that at the time when the contributions were made and accepted, the parties both intended that there would be a resulting trust.[136]

On this reasoning, the conjugal nature of the parties' relationship underscored the presumption. This represents a further material difference between the majority and dissenting decisions, but also differs from the earlier English decisions on which it was based. It conflicts directly with the approach taken subsequently in the Australian decision of *Cummins.*

The Canadian approach has more recently been affirmed in *Kerr v Baranow.*[137] The one report involves two claims: *Kerr v Baranow*, and *Seguin v Vanasse*.[138] Ms Kerr claimed a beneficial interest in a house solely owned in law by Mr Baranow, arguing a resulting trust and unjust enrichment. Mr Baranow counterclaimed that Ms Kerr had been unjustly enriched by his care of her over the years since she had suffered a stroke. The Court dismissed the argument about resulting trust, but ordered a retrial of both Mr Baranow's claim and Ms Kerr's claim for unjust enrichment.

Ms Vanasse had also claimed a beneficial interest in her partner's accrued wealth, including land. She argued that he had been unjustly enriched through her having given up her own career to stay at home, look after the house, and care for the couple's three children. Her claim was successful, and she was awarded a half share in the value of the estate accruing during the time she had stayed at home.

In both cases, the Court first rejected the application of a common intention resulting trust in Canada. It then clarified the application of unjust enrichment in the intimate partner claims, affirming a holistic consideration of the parties' 'joint family venture'.[139] The parties' interdependence was a key part of the Court's analysis, through the elements of enrichment without juristic reason, and corresponding detriment. In assessing whether the parties were in fact engaged in a joint family venture, the Court proposed four primary lines of inquiry: 'mutual effort, economic integration, actual intent, and priority of the family'.[140] This is 'not a checklist' but rather a 'useful way to approach a global analysis of the evidence and some examples of the relevant factors.'[141]

The parties' mutual effort represents the extent to which they share common goals and are prepared to work together towards them. Other cases look to the parties pooling money, for example, indicating mutual effort in the Canadian context.[142] Closely related is the degree of the parties' economic integration, signified for

[136] Ibid 860.
[137] *Kerr v Baranow* [2011] 1 SCR 269 ('*Kerr*').
[138] The judgment will be referred to as *Kerr*, unless outlining issues specific to *Seguin v Vanasse*.
[139] See discussion in *Kerr v Baranow* [2011] 1 SCR 269, 304.
[140] Ibid 315.
[141] Ibid.
[142] Ibid 316.

example, by a joint bank account. But there is qualitatively more, notably in perceiving the interests of the family's overall welfare above those of the individuals.[143]

In line with the assumptions of liberalism about personal autonomy, the court is to make no assumptions about a couple's intention to become economically intertwined — and so the parties' actual intent is a relevant factor in determining whether there is truly a joint family venture.[144] There are however many and diverse ways of ascertaining intent. Finally the priority of family in decision-making is integral to the court's consideration. 'Understandings about shared future, which may or may not be articulated,'[145] financial sacrifices for the family, dependence on the relationship, and sacrifice in the interests of the family unit, all fall under this head.[146]

As Baroness Hale had observed in *Stack*, there are myriad factors relevant in analysing the parties' behaviours as part of the overall inquiry into the distribution of the beneficial interest.[147] While similar kinds of behaviours were found relevant in *Stack* to ascertain a common intention, in contrast, establishing a joint family venture in Canada draws on a context within which to assess the parties' mutual contribution and their respective benefits and detriments: that is, each approach appears to serve a different immediate purpose. Each approach however shares the idea of exchange, implying mutuality as to the sharing of resources, including the family home.

The Canadian approach does not identify 'intention' as an express element of the law, as do the English authorities, or as a locus of inquiry as occurs in Australia.[148] Nonetheless 'actual intent' is a stipulated relevant factor underpinning the joint family venture. Further, in the same way that *Stack* explained the mutuality of labour (and financial) specialisation between the parties, so too does the Canadian approach to the joint family venture imply the search for an ongoing exchange, representing the consent of the parties. The four primary lines of inquiry make this clear. The effort, for example, is mutual and the requisite 'team work'[149] necessarily implies an exchange of sorts for a purpose outside the individual. The parties' efforts through time, labour, and finances, are transformed into the object of the joint family venture. Similarly the parties' economic 'interdependence' necessarily implies the specialisation of exchange — wherein one party offers their contribution to support the other, and the other party offers what they can in return. The parties' will — their intention — necessarily underlies such an exchange.

Such an approach offers a hopeful response to the challenge of substantive equality however, unlike the law in Australia and England, in Canada the remedy is restitutionary only. The aim of the court's award is to reverse the unjust enrichment.[150] It does not found a proprietary right in land based on the parties' distribution, although the restitution may occur in via proprietary award. In this sense

[143] Ibid 317.
[144] Ibid.
[145] Ibid 319, citing Patrick Parkinson, 'Beyond *Pettkus v Becker*: Quantifying Relief for Unjust Enrichment' (1993) 43 *University of Toronto Law Journal* 217, 243.
[146] *Kerr v Baranow* [2011] 1 SCR 269, 319.
[147] *Stack v Dowden* [2007] 2 AC 432, 459.
[148] *Muschinski v Dodds* (1985) 160 CLR 583, 589.
[149] *Kerr v Baranow* [2011] 1 SCR 269, 315.
[150] Ibid 298.

any trust, despite denoting a beneficial interest, effectively serves as no more than security to ensure the parties' financial equilibrium is restored. A restitutionary award could similarly consist of a transfer of value through some other means, such as a cash payment or a trust over a joint bank account. The trust in this case therefore differs conceptually from a declaration that the applicant holds a proprietary interest in their own right. Such a declaration is not simply a means of restitution, rather it enforces a distribution of property.

D. New Zealand — Expectation Interest

In the leading New Zealand case of *Lankow v Rose*[151] (predating *Cummins*) the New Zealand Court of Appeal reviewed the three other jurisdictions canvassed here, finding their approaches to be interrelated. Tipping J however described the English imputed intention to be 'unnecessarily artificial'.[152] He preferred a method that would impose a trust because 'equity will not allow the legal owner to deny a beneficial interest'[153] even without the consent, express, implied or imputed, of the constructive trustee.

In a case in which Ms Rose was 'totally committed' to the relationship, she was found to have made a significant contribution to the development of the parties' fortunes. Mr Lankow's estate had appreciated from no net worth at the commencement of their relationship, to a net worth of $650,000 by the end. The assets, including land, were held in his name alone and Ms Rose applied for a declaration of her beneficial interest. The New Zealand Court of Appeal focussed on the detriment or enrichment of the defendant, and the unjustified deprivation of the plaintiff, outlining four essential requirements.

> Contributions, direct or indirect, to the property in question; the expectation of an interest therein; that such expectation is a reasonable one; and that the defendant should reasonably expect to yield the claimant an interest. If the claimant can demonstrate each of these four points equity will regard as unconscionable the defendant's denial of the claimant's interest and will impose a constructive trust accordingly.[154]

The New Zealand approach focuses on what amounts to an expectation interest in the plaintiff; namely that a 'reasonable person in the appellant's circumstances ought to have expected to have yielded the respondent an interest.'[155] This is an 'objectively determined reasonable expectations approach' that would encompass the principal features present across other Commonwealth jurisdictions.[156] The reasonable expectation evinces a state of mind as to property. As such, for these purposes, it satisfies the principles underpinning the concept of intention.

In *Lankow v Rose* the Court did not make presumptions based on the parties' relationship status, but did recognise the background of social attitudes that might inform the parties' reasonable expectations as to beneficial ownership.[157] What was

[151] [1995] 1 NZLR 277.
[152] *Lankow v Rose* [1995] 1 NZLR 277, 293.
[153] Ibid.
[154] Ibid 294.
[155] Ibid 278.
[156] Ibid 287.
[157] See eg ibid 290, per McKay J.

however, relevant in terms of the relationship, was measuring whether Ms Rose's contribution was greater than the benefit she received from the relationship. Mr Lankow had argued that while she had contributed, she received the benefit of their lifestyle including their home, cars and overseas holidays. The Court found these an expression of their affection and companionship — manifestations of their shared lives. In weighing up the parties' exchange these 'benefits' balanced contributions for 'ordinary domestic services' but not for other contributions.[158] The Court stressed that it was important that the contribution be made either directly or indirectly to the property at issue rather than to the relationship. Ms Rose's contributions included administration of the tenancies, secretarial work for Mr Lankow's company, dealing with company creditors and debtors, office work, planning and furnishing the new home, and entertaining. These were clearly referable to the property in question. However they also set a high standard of the type of contribution that would be required to support an expectation of a beneficial interest.

Despite recent application in *Ridge v Parore*[159] and a mention in *Ferreira v Stockinger*[160] the intimate partner trust is less frequently called upon in New Zealand than in the other three jurisdictions, largely as a result of the breadth of application of the *Property (Relationships) Act 1976* (NZ). The body of law propounded before the statute displaced it nonetheless remains a valuable point of comparison for the purpose of this thesis, and the law remains on foot even if infrequently used.[161]

Conclusion

The primary element in the law across these jurisdictions is that of intention: intention to hold a legal title,[162] intention to share a beneficial title,[163] shared intention,[164] and contribution with expectation of title.[165] Intentions have been found through an examination of evidence of the parties' conduct, they have been implied, and they have been presumed and imputed (to the extent that there is a difference). Doctrine within each of the four jurisdictions holds the concept of the parties' intention at its core.

Having found intention, courts turn to contribution to ascertain the extent of the intended beneficial interest, or the extent of the detriment corresponding to the unjust enrichment depending on the jurisdiction. As noted in *Lankow v Rose*, the four jurisdictions share features regardless of whether they frame the inquiry as quasi-contract, unconscionability, unjust enrichment, or expectation interest. Their common features have however, manifested differently and judges even within a majority decision have tended to offer variants on the theme.

Unremarked but at the heart of all claims also, is the locus of the claim — the couple's home. 'Home' is present but without forming part of the courts' reasoning.

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[158] Ibid 285.
[159] [2014] NZHC 318 (28 February 2014).
[160] [2015] NZHC 2916 (20 November 2015).
[161] *Lankow v Rose* was affirmed, for example, in *Harvey v Beveridge* [2013] NZHC 1718 (8 July 2013) — albeit a case that did not involve intimate partners.
[162] *Muschinski v Dodds* (1985) 160 CLR 583.
[163] *Baumgartner v Baumgartner* (1987) 164 CLR 137.
[164] Exemplified for example in *Stack v Dowden* [2007] 2 AC 432; *Pettitt v Pettitt* [1970] AC 777.
[165] *Pettkus v Becker* [1980] 2 SCR 834; *Lankow v Rose* [1995] 1 NZLR 277.

The rationale for its omission is unclear on the face of the judgments, but is worthy of examination in light of the implications it has for the women in the cases.

It is contended here that these two key elements, intention and contribution, and the unstated third element of 'home' together represent a source of tension in this 'vexed branch of the law'.[166] Some judges have decided that the law in this area is no different from that of the law generally,[167] and others that the intimate context is somehow different.[168] In more recent decisions, the law appears to have accommodated the intimate context within this framework. However, strategies for inquiring into intimate relations continue to resonate in the liberal assumptions at home in the market. This raises questions as to the capacity of the law to give voice to the intention and contribution emblematic of intimate relations. Where the law represents a gendered understanding of the parties' actions, there are questions raised about substantive equality in the distribution of property.

Chapters Three to Five will analyse each of the three elements in turn, but to frame the analysis, the next chapter establishes the law's emphasis on transactions as a feature of its liberal origins. In particular, it establishes the tension implicit in the intimate partner trust cases, contrasting the transactional expectations embedded within the text of the law, and the relational experiences of intimate partners.

[166] *McFarlane v McFarlane* [1972] NI 59, 66.
[167] See eg *Stack v Dowden* [2007] 2 AC 432, 468 per Lord Neuberger; *Muschinski v Dodds* (1985) 160 CLR 583, 618 per Deane J.
[168] See eg Baroness Hale in *Stack v Dowden* [2007] 2 AC 432, 459.

CHAPTER 2 — TRANSACTIONS AND RELATIONS

> The [traditional marriage relation] consists not of a series of discrete transactions, but of what happened before (often long before), of what is happening now ('now' itself often being a very extended period), and of what is expected (in large measure only in the vaguest of ways) to happen in the future. These continua form the relation without a high degree of consciousness of measured transactions. Nonetheless, exchange, both economic and social, takes place in such a relation, even if not in the measured terms of the transaction.[1]

Like contract law, property law is concerned with exchanges, a feature of human behaviour[2] including within the intimate context. Exchange is not directly invoked in the intimate partner trust but its elements, present through intention and contribution, reflect contract law's agreement and consideration.[3] These prerequisites to property point to the bilateralism and mutuality indicative of exchange. Yet despite the diffuse exchange emblematic of marriage and marriage-like relations, private law searches for the discrete transaction of the market[4] to establish property interests.

This chapter analyses the role of transaction in intimate partner trusts, and its limitations. In the first part I explain how and why transactions are central to judicial inquiry in the intimate partner trust cases. Importantly, the requisite discrete exchange (transaction) embodies the tenets of liberalism whereby the anticipated individual subject of law in the public sphere of the market is in conflict with the reality of the community of domestic relations. This conflict, resolved for the most part in favour of market precepts, is central to understanding the limited capacity of a transactional focus to achieve substantive equality. In comprehending the community of relations, I go on to examine whether the communitarian critique of liberalism answers the shortcomings of transaction. This analysis reveals that despite addressing some of the faults of liberalism, a communitarian analysis continues to prioritise transactions to the exclusion of relations.

The second part of this chapter responds to the limitations of exchange as transaction. I draw on relational contract theory, first to identify the behaviour typical of intimate relations in terms of exchange. Instead of attempting to interpret intimate partners' actions to demonstrate a discrete transaction involving their property, it is possible to locate the requisite indicia of exchange occurring within relations over time. Necessarily however, the exchange occurs in a more diffuse way. Although courts focus on the indicia of the couple's exchange comprising a single transaction, it is more appropriate to characterise their exchange as embodying the shared purpose of intimate relations. In the final section, I suggest that this shared purpose provides the focal point for exchange that both represents the couple's intention, and draws together their contributions with sufficient proximity to the distribution of property.

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[1] Ian R Macneil, 'The Many Futures of Contracts' (1974) 47 *Southern California Law Review* 691, 721 (footnotes omitted) ('Many Futures').
[2] Marshall Sahlins, *Stone Age Economics* (Tavistock, 1974).
[3] As explained for example in NC Seddon, RA Bigwood and MP Ellinghaus, *Cheshire and Fifoot Law of Contract* (LexisNexis Butterworths, 10th ed, 2012), especially Chapters 3 and 4.
[4] See eg P S Atiyah, *The Rise & Fall of Freedom of Contract* (Clarendon Press, 1979).

This chapter shows that rather than exchange directed intentionally at a single point of acquisition of property (a transaction), intimate partners' concern for the shared purpose of their relations represents a more accurate understanding. It offers an overarching rationale for intimate partners' exchanges as part of their relations — including the possibility of attaching to property — and it bridges the tensions that abound within this law between individual and community, public and private. This establishes the frame for analysis in the chapters that follow.

I. TRANSACTIONS

In a 'hunter-gatherer' society, the purpose of exchange is to bind that society. Through the medium of exchange — of gifts, tribute, and norms of sharing — the individual is subsumed into the higher good of community, and 'the chief creates collective goods beyond the conception and capacity of society's domestic groups [and individuals who comprise them] taken separately.'[5] By contrast, in a complex society such as that of a contemporary Western liberal market democracy, exchange represents the separateness of individuals, rather than their community. In a market context individuals remain separated, engaging in relations only so far as is necessary to exchange. Exchange does not 'dissolve the parties within a higher unity' as it might for a 'primitive' society.[6]

The dilemma for intimate partners claiming a beneficial title in the family home, is that the exchange forming the basis of their claim frequently does not sit well within the market context of discrete transactions between 'strangers': yet it is this market context that informs the law of intimate partner trusts. Instead, perhaps more akin to 'primitive' exchange, their claim tends to lie within exchange continua that form the relation itself.[7]

Although exchange necessarily presupposes relations in that it requires more than one person, any particular exchange may occur along a spectrum of associations. At one end are those exchanges embedded within the social relations of 'life-defining connections,'[8] which I refer to as *relational* exchanges.[9] At the other end of the spectrum are impersonal and highly economic exchanges involving 'negative reciprocity'[10] where parties' interests are not convergent, but opposed. Each seeks to maximise their own utility at the expense of the other, aiming for 'the unearned increment'.[11] This describes what I call *transactional* exchange,[12] emblematic of market liberalism and the law that supports it, including the law of intimate partner trusts.

Transactional exchange operates in the abstract, independently of the parties' existing relationship. Relationships will only arise at law out of a transaction determined independently of pre-existing connection. According to traditional contract theory,

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[5] Sahlins, above n 2, 140.
[6] Marshall Sahlins, *Stone Age Economics* (Tavistock, 1974), 170.
[7] Macneil, 'Many Futures', above n 1.
[8] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2012), 42.
[9] After Ian R Macneil, 'Relational Contract: What We Do and Do Not Know' (1985) *Wisconsin Law Review* 483.
[10] Sahlins, above n 2, 195.
[11] Ibid.
[12] Following Macneil, 'Many Futures', above n 1.

'there is a *moment of contract* — when an offer has been accepted'.[13] Such an initiating exchange — including exchanges resulting in creation of a property interest — embodies requisite legal elements and is discrete, bounded by the parties' rational utility-maximising behaviour as economic men [sic].[14] The market context further renders the transaction discrete in that 'no relation exists apart from the exchange of goods.'[15] When such individuals generate legal relations, as Sahlins might put it, the social aspects of exchange are absent in favour of the material alone[16] — a stark contrast to the entwined social and economic exchange of the intimate couple.

The law's focus on transactions generates two tensions in the intimate context. The first, examined in the first section, lies between the individual and the couple. On one hand, private law enforces transactions entered into between arms-length actors — liberalism's atomistic individuals. And intimate partners' status as individuals is central to their claims for property interests independent of each other. The tension arises however, from the genesis of those property interests, which is intertwined with their coupledom. In the first section of this part of the chapter, I establish the individualism of transaction in the law as a feature of liberalism, and contrast individualism with communitarianism to analyse liberalism's limitations in discerning domestic proprietary interests. However, communitarianism likewise only advances the argument in some respects. I therefore draw on relational theory as an extension of the positive elements of both liberal and communitarian approaches, seeking to respond to their drawbacks.

The second section in this part of the chapter looks to the tension between public and private implicit in the intimate partner implied trust cases. While public and private can be delineated in various ways, for these purposes the distinction is drawn between a market/economic viewpoint espoused by the law, and that of the 'virtuous' home. I explore the limits of this liberal conception, again assessing whether the communitarian critique might answer the weaknesses in the liberal approach but again, finding it lacking.

A. Individual v Couple

In privileging individualism, the law does not recognise exchanges between parties who are emotionally or socially connected and who are therefore found not to hold the requisite intention to create legal relations.[17] Such exchanges imply the opposite of rationality associated with the utilitarian, materialistic commitment of the man of the market,[18] rationality that signals and is signalled by intention and deliberate

[13] Seddon, Bigwood and Ellinghaus, above n 3, 94 (emphasis added).
[14] Masculine pronouns are used here to indicate the gendered origins of private law.
[15] Ian R Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (Yale University Press, 1980) ('New Social Contract'), 10.
[16] Sahlins, above n 2, 194.
[17] See recently in *Ashton v Pratt* (No 2) [2012] NSWSC 3 (16 January 2012) which failed on appeal in *Ashton v Pratt* [2015] NSWCA 12 (16 February 2015).
[18] See eg discussion in Katharine B Silbaugh, 'Commodification and Women's Household Labor' in Martha Albertson Fineman and Terence Dougherty (eds), *Feminism Confronts Homo Economicus* (Cornell University Press, 2005) 338, 338, where Silbaugh observes the dichotomy between economic productivity in the workplace and 'housework as an expression of affectionate emotions associated with the family setting.'

action. Instead domestic relations are often characterised by love or altruism,[19] representing community where the law prefers to deal with the rights of an atomistic individual. Private law does not generally concern itself with domestic exchanges.

Unlike purported contractual relations between intimates the law does however, concern itself with the distribution of domestic proprietary interests. In *Pettitt*, the Court found that such claims lay in property rather than in contract, justifying the court's intervention.[20] However, although some more recent developments appear to cater for the domestic context,[21] general law principles and their market assumptions remain. This has implications for intimate partners, where the law understands their actions as those of discrete individuals despite their having occurred as an incident of joint relations.

The law's assumption of atomistic individualism is recognised as a barrier to equal treatment of parties whose lives as individuals are lived in and through myriad relationships.[22] Yet while characterising parties as discrete individuals fails to capture the true nature of their community and shared purpose, to characterise the couple as an unindividuated whole is also problematic — akin to the law's assumptions about unity within the private sphere.[23] These ostensibly polarised positions reflect the divergent standpoints of the longstanding liberalism/communitarian debate, and spell out the challenge in determining individual interests derived through intimate relations. This challenge is further complicated by suggestions that intimate relationships are increasingly individualised. If the implication of individualisation is a loss of relations themselves, then the perceived tension evident in the nature of the claims between individual and community would logically resolve.

1. *Individualisation: The Transactional Nature of Contemporary Relations*

While the individual has always been central to classical liberalism,[24] individualisation has been theorised as a contemporary sociological phenomenon extending beyond the market into the social.[25] Accounts of individualisation represent

[19] See eg *Balfour v Balfour* [1919] 2 KB 571; *Ashton v Pratt* [2015] NSWCA 12 (16 February 2015); Michael J Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press, 2nd ed, 1998).
[20] *Pettitt v Pettitt* [1970] AC 777, 796.
[21] See eg *Stack v Dowden* [2007] 2 AC 432; *Kerr v Baranow* [2011] 1 SCR 269. In contrast to assumptions of these cases' relational approach, they have attracted critique. See eg Jennifer Flood, 'Share the Wealth? *Kerr v Baranow* and the "Joint Family Venture"' (2011) 27 *Canadian Journal of Family Law* 361; Rebecca Probert, 'Equality in the Family Home? *Stack v Dowden*' (2007) 15 *Feminist Legal Studies* 341.
[22] See eg Laura T Kessler, 'Is There Agency in Dependency? Expanding the Feminist Justifications for Restructuring Wage Work' in Martha Albertson Fineman and Terence Dougherty (eds), *Feminism Confronts Homo Economicus* (Cornell University Press, 2005) 373; Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004); Jennifer Nedelsky, 'Law, Boundaries and the Bounded Self' (1990) 30(Spring) *Representations* 162.
[23] In contradistinction to the competition of the market; a 'unity grounded in sentiment' — Carole Pateman, *The Disorder of Women* (Polity Press, 1989), 20. See also: Ann Laquer Estin, 'Can Families Be Efficient? A Feminist Appraisal' in Martha Albertson Fineman and Terence Dougherty (eds), *Feminism Confronts Homo Economicus* (Cornell University Press, 2005) 423; Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books, 1989) ('Justice'); Ruth Deech, 'Matrimonial Property and Divorce: A Century of Progress?' in Michael D A Freeman (ed), *State, Law and the Family: Critical Perspectives* (Sweet & Maxwell, 1984) 245; Susan Moller Okin, *Women in Western Political Thought* (Princeton University Press, 1979).
[24] Ellen Meiksins Wood, *Mind and Politics* (University of California Press, 1972), 10–11.
[25] See generally, Ulrich Beck and Elisabeth Beck-Gernsheim, *Individualization* (Sage, 2003).

society as a collection of self-absorbed individuals lacking capacity for intimacy, with an 'attenuated sense of connection.'[26] Further, the intrusion of market individualism into the home appears to challenge liberalism's own assumptions about the private sphere, including the unity traditionally assumed in marriage. Of interest here is whether in an individualised society intimate partners might properly be considered discrete market actors before the law — whether community in relationships remains at all.

Rather than the traditional expression of ascribed community status attendant on marriage,[27] individuals now apparently seek self-expression and self-actualisation through their intimate relationships, just as they do through consumerism.[28] Marriage is now predominantly recognised as contractual: an individualised exchange.[29] Reflecting broader social understandings of marriage, no-fault divorce for example no longer apportions blame when redistributing property but sees each party as an individual with rights.[30]

For some, the ascendancy of the individual has eroded the concept of intimacy, calling into question the very nature of marriage. Regan, for example, analyses consumer culture and the 'cult' of individualism in terms of individuals' capacity to sustain an intimate relationship.[31] He observes that consumer culture provides satisfaction upon the acquisition of a new item (or partner), but that this is short lived. His analysis evokes the discrete transaction internalised into what had previously been assumed to be the high water mark of relationships. Thus, the 'sphere of production [has] put affect at the centre of models of sociability, [and] intimate relationships are increasingly put at the centre of a political and economic model of bargaining and exchange.'[32] Modernity's focus on constant improvement and consumerism has changed the relative importance of community and self. The classical liberal 'private' sphere of intimate relationships thus becomes another transaction between self-interested utility-maximisers.

On this characterisation, domestic property interests might be distributed simply as an incident of a relationship that itself is no more than a transaction. In this case, the law's referent point of market behaviours to determine proprietary interests appears justified. There are however more complete accounts of individualisation that illustrate the unnecessary association of this vision of society with the atomised subject of the law, supporting an understanding of marriage and marriage-like relationships as community.

Despite the moral panic surrounding an individualistic society unable to form meaningful relationships, community remains even if differently constituted from the historical model.[33] In the face of society's increasing individualisation, the individual

[26] Milton C Regan, *Family Law and the Pursuit of Intimacy* (New York University Press, 1993), 68.
[27] Okin, 'Justice', above n 23, 123; Alan MacFarlane, *Marriage and Love in England 1300–1840* (Basil Blackwell, 1986), 176–9.
[28] Helen Reece, *Divorcing Responsibly* (Hart, 2003).
[29] Okin, 'Justice', above n 23, 123–4.
[30] See discussion in John Eekelaar, *Family Law and Personal Life* (Oxford, 2006).
[31] Regan, above n 26.
[32] Eva Illouz, *Cold Intimacies: The Making of Emotional Capitalism* (Polity Press, 2007), 37.
[33] Lee Rainie and Barry Wellman, *Networked: The New Social Operating System* (MIT Press, 2012).

remains part of an interconnected whole.[34] Individuals remain part of the social fabric because individualisation occurs within a framework of institutional regulation and is thus strongly networked and circumscribed.[35]

Community relations therefore continue, even as society is increasingly individualised. Marriage and marriage-like relationships likewise continue[36] as an expression of trust and confidence,[37] themselves concomitant with intimacy. At the same time however, intimate relations are no longer status-based, necessarily inscribing the parties with a single undifferentiated identity.[38] They may be constitutive of self-identity, but they are not determinative.[39] It is thus false to categorise intimate partners as either couple or individual: they are both[40] and this duality has implications for the law.

2. Intimate Partners as Both Couple and Individuals

The limits of individualism as it manifests in the law arise at least in part due to the liberal premise that individuality is antecedent to community, establishing a hierarchy that denies the possibility of individual and community co-constructing identity. As Sandel points out, in the liberalism of both Rawls and Nozick there is 'no social entity existing above the individual.' Both subscribe to the 'plurality and distinctness of persons…[and] the fact of our separate existences.'[41]

The communitarian argument seeks to surmount the separateness, and therefore the limits, of individualism. While not negating the importance of self — in fact selfhood and self-determination remain central — communitarians see a more 'expansive self-understanding' wherein community is understood 'in a constitutive sense.'[42] MacIntyre thus calls for human autonomy to be 'rescued' from its 'individualist formulation' that has resulted in the alienation of the self.[43] To do so, he argues, will restore the self to the 'arena of social relationships in which…virtues function.'[44] Such arguments illuminate the limits of the discrete transaction as an explanation of human encounters. Instead they suggest that social engagements, presumably including the intimate relationship and exchange relations, form the foundation of society. A communitarian approach to resolving the distribution of domestic proprietary interests would require rethinking the liberal context of atomistic individuals who function to maximise utility — and the law's transactional emphasis.

Nedelsky too identifies the limits of the atomistic individual as the subject of law. Yet while aspects of her theory align with communitarianism, she differentiates her relational approach. Citing MacIntyre, she suggests that communitarians 'understate

[34] See generally Beck and Beck-Gernsheim, above n 25.
[35] Ibid 11.
[36] Carrie Yodanis and Sean Lauer, 'Is Marriage Individualized? What Couples Actually Do' (2014) 6(2) *Journal of Family Theory & Review* 184.
[37] Simone Wong, 'Shared Commitment, Interdependency and Property Relations: A Socio-Legal Project for Cohabitation' (2012) 24 *Child and Family Law Quarterly* 60; Simon Gardner and Katharine Davidson, 'The Future of *Stack v Dowden*' (2011) 127 *Law Quarterly Review* 13.
[38] See eg overview in MacFarlane, above n 27.
[39] See eg Nedelsky, above n 8, 31.
[40] Beck and Beck-Gernsheim, above n 25, Chapter Five.
[41] Sandel, above n 19, 66.
[42] Ibid 63.
[43] Alasdair MacIntyre, *After Virtue: Study in Moral Theory* (Duckworth, 1981), 242–3.
[44] Ibid 191.

the nature of our dependence and interdependence'[45] which she sees not as episodic — when we are very young and very old — but as a condition of life itself.

Further, and related to this first point, Nedelsky suggests that communitarian views posit only a partial expression of human agency that 'cannot encompass … interdependence or community' because their focus on care relationships ignores other non-care relationships.[46] Nedelsky's view, by contrast, extends to what she calls 'nested relations,' recognising that individuals are constituted not only by personal relationships, but also by 'wider relational patterns.'[47]

This relates to Nedelsky's third divergence from a communitarian approach: the importance of autonomy in her relational theory. While communitarians — and others — reject the central role of autonomy within liberalism, Nedelsky remains resolute as to its importance. Her theory differs significantly, however, from the way in which communitarians frame autonomy. She sees autonomy as 'the core of a capacity to engage in the ongoing, interactive creation of our selves — our relational selves, our selves that are constituted, yet not determined, by the web of nested relations within which we live.'[48] In other words, individuals are constituted through their (nested) relations as an expression of their autonomy. Without relations, she argues, the (autonomous) independence of the liberal self-making and self-made person holds no meaning.

In this way Nedelsky avoids the essentialism levelled by some at cultural feminism,[49] allowing the context of our lives and relations to inform how we create ourselves and how our environment is itself created. Beyond our immediate environment, nested relations encompass the broader context of our lives — wider community, state, and global influences. Thus, for example, women's structural disadvantage arises from relations beyond the personal, including with employers and the state, and as with all relations they inform the extent of women's autonomy. Context however, is never a 'pre-condition' for autonomy or self-determination.[50]

While retaining the core liberal ideals of autonomy and equality, and the communitarian emphasis on the situated being, Nedelsky's work identifies the limits of both approaches. Of particular interest is her emphasis on relations and the possibilities they hold for the law itself. Nedelsky's method first identifies how existing law creates a particular problem. She then identifies the values at stake, and what kinds of relations promote such values. She argues that it is then possible to see 'what kind of shift in the existing relations would enhance rather than undermine the values at stake.'[51]

Adopting a binary of individual/community seems to demand prioritisation of one over the other — reminiscent of the liberal/communitarian debate.[52] By contrast,

[45] Nedelsky, above n 8, 27.
[46] Ibid 43.
[47] Ibid 20.
[48] Ibid 45.
[49] Ibid 31.
[50] Ibid 46.
[51] Ibid 74.
[52] Richard Dagger, 'Individualism and the Claims of Community' in Thomas Christians and John Christman (eds), *Contemporary Debates in Political Philosophy* (Oxford, 2009) 303; Charles Taylor,

Nedelsky acknowledges the importance of relations but challenges whether the scope of the communitarian conception of relationships is broad enough to reflect the human condition. She offers an alternative expression of self — of individual — that coalesces with community in its broadest sense, potentially bridging the apparent dichotomy of individual and community within the law of intimate partner trusts.

B. (Public) Market Economy v (Private) Virtuous Home

On a communitarian critique, liberalism's prioritisation of the individual is accompanied by prioritisation of justice above other virtues.[53] While liberalism imagines a social world bound by the virtue of justice where 'political institutions exist to provide the degree of order that makes [individual pursuit of the good life] possible,'[54] communitarians advocate a role for more extensive virtues. Both alternatives have implications for the law of trusts.

The law's liberal tendency is to scrutinise parties' behaviours according to the benchmark of market transactions, which demand justice as a feature of their (relatively) public status. This conception *prima facie* fails to fit the community of intimate relations. However, it is likewise a liberal tendency to associate activity within the home solely with virtues such as love and altruism — and this is similarly problematic. Such an analysis relegates that which is private, occurring in the intimacy of the home, beyond the realm of justice, and omits the home from consideration in political institutions, including at law. The imposed contrast between the public (market) realm of justice imagined by liberal individualism and the private (intimate) realm of what I call here *virtue*, is a consequence of the doctrine of separate spheres or the public/private divide.[55]

In contrast with the 'negative reciprocity' of utility-maximising exchange transactions, domestic exchanges are said to be founded on emotions such as love, altruism, and nurture.[56] Demonstrating its communal nature, within public discourse, 'family' is a single economic unit, implicitly headed by a man[57] — yet the ostensibly unitary family is simultaneously populated by individuals.[58] At law these individuals are gendered subjects who might exchange emotionally or 'virtuously', but not according to 'rational' market imperatives.[59] Liberalism thus contrasts rational self-interestedness with caring altruism according to the dichotomy of the (market)

'Cross-Purposes: The Liberal-Communitarian Debate' in Derek Matravers and Jonathan Pike (eds), *Debates in Contemporary Political Philosophy: An Anthology* (Routledge, 2003) 195; Elizabeth Frazer and Nicola Lacey, *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate* (Harvester Wheatsheaf, 1993); Michael Walzer, 'The Communitarian Critique of Liberalism' (1990) 18(1) *Political Theory* 6.

[53] See eg MacIntyre, above n 43.

[54] Ibid 182.

[55] Discussed above, n 22.

[56] Michael Walzer, *Spheres of Justice* (Martin Robertson & Company, 1983) ('Spheres of Justice'); Sandel, above n 19; Silbaugh, above n 18.

[57] See generally: Martha Albertson Fineman, *The Neutered Mother, the Sexual Family* (Routledge, 1995) ('Neutered Mother').

[58] See eg discussion in Estin, above n 23.

[59] See discussion in Elizabeth Mayes, 'Private Property, the Private Subject, and Women: Can Women Truly Be the Owners of Capital?' in *Feminism Confronts Homo Economicus* (Cornell University Press, 2005) 117; Fineman, 'Neutered Mother', above n 57.

transaction and (domestic) relations.[60] In the market therefore, work is economic, and is exchanged for money. By contrast courts frequently construe labour in the home as part of a necessarily non-economic, altruistic exchange,[61] evidenced by their reference in the trust cases to 'ordinary domestic duties'[62] that attract no legal consequences[63] under the general law. The distinction illustrates the doctrine of separate spheres in practice.

To address the diverse experiences of intimate partners as intimates — and not as atomistic market actors — the law must navigate parties' multiple identities as part of the 'virtuous' community of the couple, and as individuals marked by and through their property holdings.[64] As a couple, the parties may have no immediate need to invoke rights to property because they enjoy a community of trust, 'cherish[ing] the idea that individual income pertains to the unit: "our money".'[65] However, individuating oneself for the purpose of defending rights against third parties or at the end of a relationship requires that property rights be distinguished. There may have been virtues extant in their exchanges within the continua of relations, but individuation brings with it the need for a declaration of severable interests. The claim then is generated at the intersection of the virtues of community, and the justice of the individual as conceived in market terms — addressed in turn.

1. *The Limits of Virtue*

Sandel[66] distinguishes between values in the public sphere and those within the family. He suggests that in the intimate context, we can imagine 'a range of more intimate, solidaristic associations in which the values and aims of participants coincide closely enough that the circumstances of justice prevail to a relatively small degree.'[67] Yet Sandel's argument constitutes family as an unindividuated whole dependent on virtues other than justice — exposing the limitations of his *c*ommunitarian approach in understanding familial relations. As Pahl points out, 'it is misleading to see the household as a single unit whose members are in the same structural position.'[68]

Sandel expresses his assumptions of the unitary household through citing Hume:

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[60] Frances E Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96(7) *The Harvard Law Review* 1497.
[61] See eg Michele M Moody-Adams, 'The Social Construction and Reconstruction of Care' in David M Estlund and Martha C Nussbaum (eds), *Sex, Preference and Family: Essays on Law and Nature* (Oxford University Press, 1997) 3.
[62] See eg *Pettitt v Pettitt* [1970] AC 777, 826; *Lankow v Rose* [1995] 1 NZLR 277, 285. See also Silbaugh, above n 18; Kessler, above n 22, 373.
[63] The context for this is the absence of intention to create legal relations through exchange occurring in the intimate context. See eg *Balfour v Balfour* [1919] 2 KB 571, affirmed in *Ashton v Pratt* (No 2) [2012] NSWSC 3 (16 January 2012). The latter was upheld in *Ashton v Pratt* [2015] NSWCA 12 (16 February 2015) though without citing *Balfour*. Note however that the law attributes value to 'domestic' labour in diverse contexts, see discussion in Reg Graycar, 'Women's Work: Who Cares?' (1992) 14 *Sydney Law Review* 86.
[64] Deech, above n 23.
[65] Jan Pahl, 'The Allocation of Money within the Household' in Michael D A Freeman (ed), *State, Law and the Family: Critical Perspectives* (Sweet & Maxwell, 1984) 36 ('Allocation of Money').
[66] Sandel, above n 19. See also Walzer, 'Spheres of Justice', above n 56.
[67] Sandel, ibid 31.
[68] Pahl, 'Allocation of Money', above n 65, 47.

> Stronger mutual benevolence between individuals nearer approaches til all distinction of property be lost and confounded among them. Between married persons, the cement of friendship is by the laws supposed so strong as to abolish all division of possessions and has often in reality, the force ascribed to it.[69]

These arguments assume that justice is only required where there is a deficit in other values such as benevolence, affection, or fraternity. Justice serves a remedial function rather than necessarily offering a foundation value. Indeed Sandel notes that in the family, the circumstances of justice occur to only a small degree.

> Individual rights and fair decision making processes are seldom invoked not because justice is rampant, but because the appeal is pre-empted by a spirit of generosity in which I am rarely inclined to claim my fair share. The point being that the question of what I get and what I am due do not loom large in the context of this way of life.[70]

The question of distribution of economic resources within the family has traditionally been the province of the head of the household — the father or eldest son. This was supported by the law in the guise of the doctrine of coverture, and through Biblical precepts (also reflected in the law) on the moral duty of the husband or father to provide other than 'the necessaries of life'.[71] The duty was not however, reflected in an enforceable right vested in women or children as against the husband or father.

Some continue to see husband as a provider and wife as submissive dependant[72] and might argue that despite legal changes, the 'fundamental structure of marriage and family…is premised on women's economic dependency on men.'[73] Against these deeply embedded institutional norms it is no wonder that debates continue to exclude family and the intimate from considerations of justice in favour of the proclaimed greater virtue of benevolence and affection.[74]

In light of the incidence of violence within the home,[75] and of the unequal distribution of financial resources within the family[76] — even where spouses profess to believe in equality[77] — the assumption of a 'spirit of generosity'[78] and affection appears unsound as a basis for substantive equality in the distribution of economic resources.

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[69] Sandel, above n 19, citing David Hume, *An Inquiry Concerning the Principles of Morals* (1777).
[70] Sandel, ibid 33.
[71] William Blackstone, *Commentaries on the Laws of England* (1765–1769), Book 1, Chapter 15, III.
[72] David Blankenhorn, Don S Browning and Mary Stewart Vanleeuwen, *Does Christianity Teach Male Headship? The Equal-Regard Marriage and Its Critics* (Wm B Eerdmans Publishing Co, 2004).
[73] Carol Smart, 'Marriage, Divorce and Women's Economic Dependency: A Discussion of the Politics of Private Maintenance' in Michael D A Freeman (ed), *The State, the Law and the Family: Critical Perspectives* (Sweet and Maxwell, 1984) 9, 11; Fineman, above n 22.
[74] Okin, 'Justice', above n 23; Jean Bethke Elshtain (ed), *The Family in Political Thought* (University of Massachusetts Press, 1982).
[75] Janet Phillips and Penny Vandenbroek, 'Domestic, Family and Sexual Violence in Australia: An Overview of the Issues' (Australian Parliamentary Library, 14 October 2014) <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/ViolenceAust>; Australian Bureau of Statistics, '4906.0 Personal Safety, Australia' (2012).
[76] See eg Carolyn Vogler and Jan Pahl, 'Money, Power and Inequality within Marriage' (1994) 42(2) *The Sociological Review* 263; Jan Pahl, *Money and Marriage* (MacMillan, 1989) ('Money and Marriage').
[77] See eg Fran Bennett, 'Researching within-Household Distribution: Overview, Developments, Debates, and Methodological Challenges' (2013) 75(3) *Journal of Marriage and Family* 582.
[78] An assumption also found in eg Gary S Becker, *A Treatise on the Family* (Harvard University Press, 1981).

That a spouse might not question the distribution, or that she may believe that it represents equality (even where on other reckonings it does not) indicates an embedded gendered standpoint. That standpoint seems to accept that women are to receive a lesser share of resources, that they are to contribute a disproportionately large share to unpaid domestic labour (or otherwise), and that this skewed apportionment is just or on Sandel's argument, beyond justice. Omitting justice from the account of intimate relations because of 'virtues' attributed to the private sphere, simply entrenches structural inequality between men and women, calling into question the capacity of communitarianism to answer fully the critique of liberalism.

2. *The Limits of 'Strict Equality'*

Despite the limits of virtue in the private sphere, Sandel does however make an important observation about 'strict equality' in an intimate context that hints at courts' reluctance to impose legal requirements on spouses' intimate behaviours.[79] He uses the example of a friend who insists on scrupulous calculation of the cost of shared meals so that I feel compelled to reciprocate. In doing so, I feel that my friend has misunderstood the nature of our relationship. Sandel observes that in this case, the 'circumstances of benevolence will have diminished and the circumstances of justice have grown — but the new justice cannot replace the old spontaneity.'[80] He considers that the exercise of justice in 'inappropriate conditions' (such as these) would result in an overall decline in the moral character of the association, rendering justice a vice rather than a virtue.

The reality of intimate exchanges means that imposing formal transactional requirements on a couple — such as scrupulous calculation of each contribution, or 'strict equality' — will not answer the problem of inequality in distribution.[81] Like Ms Oxley who trusted her partner enough to decline advice to take a security interest over his sole legal estate,[82] parties are instead likely to exchange relationally within their norms of trust. Contrary to Sandel's argument however, this does not justify rejecting justice. Instead it requires a method of recognising a couple's sense of community and shared purpose while they are together, but so that their exchange can be located from the vantage point from which they seek to separate their interests. While recognising the intimacy of the relationship, such a method still requires justice despite the intimate context. Without it, inequality will persist.

One consequence of identifying the primacy of virtues through intimacy is the call for a return to a status-based appreciation of marriage. Regan for example rejects the contractual approach to marriage in which parties negotiate the terms of their union, in favour of constituting marriage intrinsically as a communal endeavour.[83] But while the goal of enhanced intimacy is worthy, like Sandel, Regan fails to appreciate the standpoint of marriage as patriarchal — and further that it represents a contract not

[79] See eg comments by Kirby P in *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 417; and Lord Morris in *Pettitt v Pettitt* [1970] AC 777, 799.
[80] Sandel, above n 19, 35.
[81] Thus Baroness Hale's suggestion concerning a declaration of trust on a land title form is no answer to equality in distribution. Her observation that intimate partners can or should avail themselves of the prescribed form to identify their beneficial interests assumes conditions of strict equality that are at odds with the closeness and tacit assumptions of sharing that are implicit in intimate relations. *Stack v Dowden* [2007] 2 AC 432, 453.
[82] *Oxley v Hiscock* [2005] Fam 211, discussed in Chapter One above.
[83] Regan, above n 26.

between the parties, but as between a couple and the state.[84] Regan does note feminist objections, suggesting in passing that relational feminism can resolve these issues.[85] However, his analysis fails to engage more fully with broader feminist critique that identifies women's structural disadvantage within a raft of institutions, and the role of marriage in creating and upholding that inequality.[86]

The idealised intimacy Regan envisages as embedded within the institution of marriage has gone hand in hand with disenfranchisement from participatory citizenship and dispossession from property of women in general, and married women in particular.[87] Likewise, Sandel's account of benevolence in familial relationships is a hollow foundation for women's full and equal engagement in wider society including the economy. Like Regan, he omits the gendered nature of justice, property, social institutions, and ultimately of the legitimacy of expectations. In short, in failing to account for the gender dynamic in the domestic sphere, women's expectations are not seen as legitimate but are instead subordinated to those of men, entrenching inequality.

For a thesis concerned with assessing the capacity for substantive equality in the distribution of domestic proprietary interests, the communitarian preference for virtues over justice in family dealings appears to be of little assistance. A more hopeful approach is to reject the appeal to justice only as a remedial last resort, in favour of more extensive understanding of the parties' exchange that promotes equality — and therefore justice — from the outset. This involves re-imagining the exchange that is the purview of the law in terms of relations, instead of the all-encompassing transaction.

II. RELATIONS

So long as the law analyses intimate partner claims through a transactional lens it will fail to recognise that intimate partners engage in exchange relations, necessarily imposing an atomistic liberal construction on the claim. Construing the exchange as transaction views the parties as wholly separate entities, downplaying or denying their exchange relations. So long as courts prefer the separateness of transaction that assumes parties behave as rational arms-length strangers, while ignoring the community of relations, judicial analysis will tend to represent embedded gender norms. These norms will uphold structures of inequality within the law itself.

While Nedelsky's relational theory[88] is useful to establish the inadequacy of the liberal construction of the individual and likewise the limits of communitarianism for intimate partner trusts, Ian Maneil has catalogued the contradictions between private law's abstracted transactions and the reality of exchange relations.[89] This part draws

[84] Smart, above n 73, 17.
[85] Regan, above n 26, 155.
[86] See eg Okin, 'Justice', above n 23; Fineman, 'Neutered Mother', above n 57; Alison Diduck and Katherine O'Donovan (eds), *Feminist Perspectives on Family Law* (Routledge-Cavendish, 2006).
[87] A state of affairs identified even by early feminist writers — see eg Mary Wollstonecraft, *A Vindication of the Rights of Woman* (Penguin, Revised Edition ed, 2004); John Stuart Mill, *The Subjection of Women* (Longmans Green Reader & Dyer, 1869).
[88] Nedelsky, 'Law's Relations', above n 8.
[89] See eg Macneil, 'Many Futures', above n 1; Ian R Macneil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law' (1978) 72 *Northwestern University Law Review* 854; Ian R Macneil, 'Values in Contract: Internal and External'

on Macneil's relational contract theory advancing the theorisation of a relational exchange as the foundation for implied trust cases, as a means to reconcile individuals' beneficial interests derived from within their community relations. It outlines a framework to locate the requisite elements of exchange within intimate relations, to be applied in the detailed case analyses in the following chapters.

Relational contract theory challenges classical contract theory as a unitary explanation of exchange, and analogously it provides the framework to challenge the construction of exchange within intimate partner trusts. Exchange forms the basis of social interaction, but contrary to the law's assumptions, almost no exchanges occur as discrete and bounded incidents. Rather, exchange occurs as part of ongoing relations: 'contractual relations, not discrete contract, always have and always will be the dominant form of exchange behaviour in society.'[90] Despite this, contract law — and, I argue, the law of intimate partner trusts — continues to represent 'doctrine, theory [and] prevailing spirit favouring transactionizing' which Macneil refers to as transactionism.[91] Macneil's critique of transactionism aims to 'articulate more precise, intellectually coherent principles which are nevertheless sufficiently open-textured for effective use in the law of modern contractual relations.'[92] His theory therefore provides a useful foundation from which to challenge the capacity of the existing transactional framework of *property* law to cater for the more 'open-textured' relational context of intimate relationships.

Some observe that classical contract theory has evolved at least somewhat, to recognise relations undergirding contractual exchange.[93] Similarly in intimate partner trusts, property law has 'familialised', integrating family law concepts into the exercise of judicial discretion.[94] However, in trusts, as is the case with contract law, there is no coherent theorising around relations themselves and the role they play in the distribution of property in intimate relationships. Adapting relational contact theory provides a means of interpreting the parties' actions to explain the (non-transactional) exchange that has occurred. Its potential lies in its explanatory force through analogy, elevating the parties' relations to explain their property distribution, rather than simply as a background context to the foreground of a requisite property transaction.[95]

This part of the chapter adapts Macneil's indicia of exchange, expressed along transactional and relational axes,[96] and in the first section uses these indicia to analyse typical intimate partner relations. This highlights the limits of transactionism in the

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(1983) 78 *Northwestern University Law Review* 340; Ian R Macneil, 'Exchange Revisited: Individual Utility and Social Solidarity' (1986) 96(3) *Ethics* 567 ('Exchange Revisited').

[90] Ian R Macneil, 'Reflections on Relational Contract' (1985) 141(4) *Journal of Institutional and Theoretical Economics* 541 ('Reflections'), 541.

[91] Macneil, 'Many Futures', above n 1, 693, in footnote 4.

[92] Ian R Macneil, 'Reflections', above n 90, 545.

[93] See eg Alice Belcher, 'A Feminist Perspective on Contract Theories from Law and Economics' (2000) 8 *Feminist Legal Studies* 29.

[94] See eg Andrew Hayward, 'Family Property and the Process of 'Familialisation' of Property Law' (2012) 24 *Child and Family Law Quarterly* 284.

[95] Such as occurs in *Stack v Dowden* [2007] 2 AC 432 and as illustrated in the familialisation thesis see eg ibid.

[96] For example, Macneil, 'Many Futures', above n 1; Ian R Macneil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law' (1978) 72 *Northwestern University Law Review* 854.

cases, but also importantly characterises spousal behaviours as exchange, generating a new understanding of intimate relations that can be read in terms of property distribution.

The 'moment of contract' in a transaction serves the important purpose in trust cases of establishing the requisite nexus between intention and contribution, and the vesting of a beneficial interest. For claimants in the intimate partner trust cases, lacking this moment of contract is therefore a significant barrier to proving a distribution of the beneficial interest at odds with the legal title. To address this barrier, this part of the chapter secondly articulates the role of the parties' shared purposes[97] in understanding relational exchange — as diffuse as this exchange may be — as comprising sufficient coherence to support a beneficial interest. Together the indicia of exchange and the shared purposes that bind individual exchanges together, provide a means of charting a course through the tensions between individual and community, and implicitly also, public and private spheres. Further, and importantly, they connect the parties' intention and contribution with the claim for property.

A. Indicia of Exchange

Key to understanding the exchange that underpins property, and to characterising the nature of the factual matrices in the intimate partner trust cases, is to perceive transactions and relations as two ends of a spectrum of possible exchanges. At one end of the spectrum is the 'pure' transaction (if it is indeed possible to transact without any relationship at all[98]), and at the other is the completely relational exchange. This idea releases the notion that exchange is necessarily evidenced by a 'moment of contract' — a deliberate handing over of an item of value with an articulated expectation of receiving another in return — wherein the parties seek to maximise personal utility and execute it on pain of enforcement by law. When courts speak of 'intention' and of 'contribution' in the trust cases, this is the model in mind: a transaction involving a direct quid pro quo as evidence of the meeting of the parties' minds.

Exchange need not, however, be characterised in this way. Instead the parties' minds may meet through their interaction over time, where their knowledge of each other and the dynamic of their relations either obviates the need for direct communication or predicates against it. Their bargain may not be clearly articulated, but each undertakes responsibilities and, through their relations, affords to the other the benefit of their contribution. While this may describe relational exchange in general, where the parties make plans to acquire a home and the incidents of a shared life together, there is a potential object of exchange beyond incremental benefits each receives from the other's daily emotional, physical, and financial contributions.

In the law of intimate partner trusts, differentiating transactional from relational exchange affords the capacity to reveal both intentions and contributions that would otherwise be ignored. Once relations are understood as embedding exchange, they hold potential to evidence the parties' distribution of the beneficial interest, shifting

[97] 'Shared purposes' reflects the 'joint venture' of *Muschinski v Dodds* (1985) 160 CLR 583, 611 and the 'joint family venture' in *Kerr v Baranow* [2011] 1 SCR 269. Macneil sees such shared purposes as representing 'social solidarity', or putting the community above individual concerns. Macneil, 'Exchange Revisited', above n 89.
[98] See discussion in Macneil, 'Many Futures', above n 1.

the focus of inquiry from a 'moment of contract' to the diffuse give-and-take of relationships over time.

The indicia of exchange might appear different as between transactions and relations — and this is Macneil's point — yet in each case they nonetheless signal that exchange has occurred. I focus on five of Macneil's dozen or so indicia of exchange[99] that broadly reflect the central arguments in the trust cases. These indicia manifest as foundation characteristics of relations — informal communication, non-transferability of the subject matter, the importance of personal satisfactions, the role of time, and the sharing of benefits and burdens — that situate exchange within the fabric of the relationship rather than something additional or external to it. These characteristics are emblematic of exchange at the relational end of the spectrum and this analysis demonstrates how exchange might be understood as a feature of intimate relations in contrast to courts' transactional interpretation.

1. Communication

Communication is integral to the intention at the heart of exchange, particularly where it relates to a present commitment to future actions.[100] But this element of exchange manifests differently in transactions and relations, particularly in the primary relations of the family.

In primary relations communication is 'deep and extensive', and relates to the 'unique and whole person.'[101] Frequently informal, it faces an evidential challenge in proving intention as to the distribution of beneficial interests, even as courts recognise the unlikelihood of formality.[102] Couples' tendency not to communicate formally about property is borne out by empirical studies, which indicate a social taboo on open and formal discussion about property and finances within marriage.[103] Despite these acknowledged hallmarks of intimate relationships, courts still tend to focus on intention as though it occurs within the more formal context of communication in the non-primary relation or transactional exchange.

It is easier for a court to understand an intention to transfer property that is communicated in writing,[104] or that occurs in the context of obtaining legal advice about property,[105] or even that is expressed verbally in clear and verifiable terms.[106] By contrast the long-term aspirations of a couple to home ownership generally, or to their future mutual comfort,[107] are communications that are often implicit, personal, and contextual, and may even be understood differently by the parties as a

[99] Ibid; Macneil, 'New Social Contract', above n 15.
[100] Ibid 'Many Futures', 715.
[101] See explanation in ibid 721–2.
[102] See eg *Pettitt v Pettitt* [1970] AC 777, 799; *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 416 and in the case of cohabitants in particular, *Stack v Dowden* [2007] 2 AC 432, 451.
[103] Carolyn Vogler, 'Managing Money in Intimate Relationships: Similarities and Differences between Cohabiting and Married Couples' in Joanna Miles and Rebecca Probert (eds), *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (Hart, 2009) 61, 64.
[104] As occurred in *Turton v Turton* [1988] Ch 542, albeit silent as to the parties' shares.
[105] See eg *Muschinski v Dodds* (1985) 160 CLR 583.
[106] Intention was clearly communicated in *Draper v Official Trustee in Bankruptcy* [2006] FCAFC 157.
[107] See eg *Baumgartner v Baumgartner* (1987) 164 CLR 137.

consequence of their vague expression[108] and where parties hold different tacit assumptions.[109]

Tacit assumptions are the 'uncommunicated basic assumptions below the threshold of mutual consciousness.'[110] Particularly where communication is informal or lacking, tacit assumptions play an important role in establishing the parties' expectations from the exchange, and their role in relations is borne out by research. Pahl for example describes 'his' marriage and 'her' marriage[111] reflecting each party's tacit understandings of the relationship and associated exchange. Men and women, it seems, experience marriage differently and this difference is both based on their different economic circumstances, and contributes to it. For example in her studies of marital finances, Pahl found that both men and women described the husband's income as earmarked for collective expenditure.[112] Yet men often did not make all their income available. Women's income on the other hand tended to be defined — especially by men — as earmarked for personal expenditure. However it was mostly used to make family purchases. Pahl suggests that while financial arrangements within marriage may take an economic form, their significance cannot be understood without taking account of social structures, processes, and meanings.[113] These are indicative of the 'tacit assumptions' of relational exchange.

While it may be difficult to ascertain the precise terms of intention as to property through informal and intimate communication replete with tacit assumptions, it does not follow that intention does not exist or that the parties have not engaged in exchange within their relations. Communication will still exist as an indicium of exchange — though in relations it will occur through different means than it would in a transaction.

2. *Transferability*

Market transactions theoretically involve a transfer of wealth between arms-length, rational, utility-maximising strangers. Such an exchange could occur between any two parties on the open market: items of value not only are, but should be, fully transferable so that it matters not who becomes a party.[114] Exchange in a transactional sense is thus characterised in terms of the transferability of the transaction. Primary relations however involve unlimited and unique personal involvement that is either not transferable, or is not appropriately transferable.[115]

In the first place, the reward for an intimate couple of their exchange relations is perceived to be social and therefore non-exchangeable:[116] 'personal satisfactions are paramount.'[117] Attending to home making and familial caring is an obvious example

[108] This is illustrated by the parties' differential interpretations of their property arrangements in eg *Cossey v Bach* [1992] 3 NZLR 612; *Fowler v Barron* [2008] EWCA Civ 377.
[109] Macneil, 'Many Futures', above n 1, 773–4.
[110] Ibid 717, footnote 76.
[111] Pahl, 'Money and Marriage' above n 76, 5.
[112] Ibid 130–1.
[113] Ibid 168.
[114] Macneil, 'Many Futures', above n 1, 791.
[115] See generally Michael J Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Farrar, Straus and Giroux, 2012).
[116] Macneil, 'Many Futures', above n 1, 720.
[117] Ibid 722.

of exchange offering particularised social benefits. Even if a court were able to calculate a primary caregiver's in-kind contribution in dollar terms, it is deemed insufficient to describe the parties' satisfactions in the real property that is their home.[118] The source of satisfactions for caring is virtue-based, but real property is economic — the two appear not to align.

This aspect of relational exchange is a barrier to claimants in the trust cases. The courts perceive the parties' relations as solely affording personal rather than economic satisfaction, and this precludes characterising relations as economic or transactional. Yet as Macneil points out,[119] and as the history of marriage relations shows,[120] such primary relations necessarily include the economic.

Additionally however, in intimate relations there is only one other with whom exchange might occur. This is clearly the case for each party's day-to-day engagement in the relationship, but it is also the case for exchange involving the real property that is the couple's home. While many of a couple's activities (house work, child caring) might be contracted out to a third party — a cleaner, nanny, handyman, etc — the relations themselves that constitute the sum of these activities are 'not reducible to [their] individual components.'[121] Attention to the home likewise is not transferable, unlike the way that an independent contractor (such as a cleaner) would clean any premises. Non-transferability of exchange exists both as to the exchange itself, and to its subject matter.

The marriage exchange in particular is non-transferable. 'The marriage contract is the only remaining example of the domestic labour contract — a conjugal relationship remnant of the pre-modern domestic order.'[122] The woman who labours unpaid in the home, such as Ms Burns or Ms Rosset,[123] cannot improve her wealth through working harder. She can build her home-making skills, but will find no market for what are effectively conjugal services. Even a new marriage will require a new skill-set dependent on its own dynamic. Exchange in a male-breadwinner model of relationship — where the man engages in paid work outside the home as the primary source of the family income, and the woman cares unpaid for the family — will render her economically dependent upon her partner regardless of her effort.[124] While the exchange may be strategic for the couple,[125] building its net worth ('ours'),[126] the paid worker as an individual builds transferable skills ('his') and the unpaid labourer within the intimate relationship does not ('hers'). She thus compromises her future

[118] As occurred, for example, in *Burns v Burns* [1984] Ch 317 and *Lloyds Bank Plc v Rosset* [1991] 1 AC 107.
[119] Ibid 723.
[120] See eg Lawrence Stone, *The Family, Sex and Marriage in England 1500–1800* (Penguin, 1979); Fineman, 'Neutered Mother', above n 57.
[121] Mary Lyndon Shanley, 'Just Marriage: On the Public Importance of Private Unions' in Alison Diduck (ed), *Marriage and Cohabitation: Regulating Intimacy, Affection and Care* (Ashgate, 2008) 285, 295.
[122] Carole Pateman, *The Sexual Contract* (Polity Press, 1988) ('Sexual Contract'), 118. The legal marriage is by definition for life — therefore its attendant exchanges remain non-transferrable.
[123] *Burns v Burns* [1984] Ch 317; *Lloyds Bank Plc v Rosset* [1991] 1 AC 107.
[124] Pateman, 'Sexual Contract', above n 122, 129.
[125] As argued in Becker, above n 78.
[126] See eg Pahl, 'Allocation of Money', above n 65, 37.

earning potential in the market[127] without the benefit of improving her marketability as a wife. This goes to the heart of the maldistribution of economic resources that contributes to substantive inequality.

Despite the personal satisfactions of relations, the economic stakes are high for the intimate partner who invests their labour in the relationship rather than the market. The stakes arise from the presumption of transferability as a feature of transaction but not of relations.[128] However, simply because exchange cannot occur in a market context, or it cannot occur without regard to the parties' identity, it does not follow that exchange has not occurred.

3. Source of Obligation

Parties' intention to be bound by their indications of future performance is necessarily informed by a sense of obligation.[129] For the pure transaction, this obligation is driven by sources external to the parties — such as adversarial profit motive, or through compulsion by law. By contrast, intimate partners are motivated to contribute from the fact of their relations. This applies in the context of contract, but might also represent intention as to the distribution of property.

The domestic exchange of labour and finances, including in the context of the acquisition and holding of the family home, arises from norms established within the parties' relations. It is not until relationship breakdown that there is a cessation of the 'existing and future exchange going on constantly between the [parties].'[130] Thus Eekelaar and Maclean have found a significant perceived source of responsibilities between partners to be 'embedded in the relationship' as it grows over time. The obligations are 'coterminous with the relationship and behaviour follows from the nature of the circumstances.'[131]

The implication of this for determining property interests is misalignment between courts' expected source of obligation within the law, and the reality of exchange arising from the parties' commitment to each other.[132] Their exchange, through mutually beneficial actions performed as part of their relations, is not a commitment imposed by the law — a duty imposed on husbands to provide for their wives, for example — and it is not an institutional obligation that can be assumed because of the legal or social fact of a marriage or similar union.[133] Instead it is truly relational: it

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[127] Jacqueline Scott and Shirley Dex, 'Paid and Unpaid Work: Can Policy Improve Gender Inequalities?' in Joanna Miles and Rebecca Probert (eds), *Sharing Lives, Dividing Assets* (Hart, 2009) 41, 55. Becker, above n 78, sees this as natural concomitant to women's role as mother and justifies the rational choice to specialise her labour within the home while the man leverages his higher earning capacity in the market.

[128] Contrast the decision in *Kerr v Baranow* [2011] 1 SCR 269.

[129] Macneil, 'Many Futures', above n 1, 785.

[130] Ibid 747.

[131] John Eekelaar and Mavis Maclean, 'Marriage and the Moral Bases of Personal Relationships' in Alison Diduck (ed), *Marriage and Cohabitation: Regulating Intimacy, Affection and Care* (Ashgate, 2008) 91, 105.

[132] See eg the High Court's analysis in *Muschinski v Dodds* (1985) 160 CLR 583 where the Court searched for juristic reasons for the property transaction, rather than exploring the norms of the parties' own relations.

[133] The Court assumed this to be the case in *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 which ignored the parties' assumption of responsibilities arising from their relations, preferring instead to find the normative foundation of their actions within the fact of marriage.

arises from these individuals in their relations according to their own experiences and context.

4. Time

Time features frequently in characterising exchange as relational or transactional, appearing in many guises in a number of indicia. Thus relational exchange is performed over time, with no sharply defined or finite beginning, and no certain end.[134] By contrast, participation in transactional exchange 'is identical to the duration of the transaction itself:'[135] it is a 'moment of contract.' The instant of transaction is what tends to characterise exchange for the purpose of determining the parties' beneficial interests, leaving long-term relations outside the norm.

The cases however, do acknowledge the lack of certain commencement and variable duration of a couple's exchange through the 'ambulatory' constructive trust.[136] Implicit in the term is an appreciation of the gradual commencement of the acquisition of the beneficial interest over time. The ambulatory trust contrasts with the original framing of the resulting trust, which demanded a sharp entry into discrete exchange ie through a discrete capital contribution upon acquisition.[137] The circumstances may point to an ambulatory trust where 'whatever the parties' intentions at the outset, these have now changed.'[138] Lady Hale provided an example whereby the intentions may alter: 'where one party has enhanced (or constructed himself) an extension or substantial improvement to the property, so that what they have now is significantly different from what they had then.'[139]

Lady Hale's example is perhaps at odds with the concept of intention, focussing as it does on the ostensibly altered subject matter over time rather than the state of mind of the parties. Her example could however, point to a reason behind an altered intention. More pertinently, the facts in *Jones v Kernott* lend themselves to an understanding of how that altered intention might manifest as 'ambulatory'. The parties had originally cohabited in a house purchased in joint names in law. After Mr Kernott moved out, Ms Jones alone repaid the mortgage for over 14 years. This freed up Mr Kernott to afford to purchase his own home. Mr Kernott subsequently claimed his half interest in the former home.

This scenario illustrates how, over time, the parties' intentions may alter. In this case, there does not seem to have been any 'crystallising' express discussion about who owned what. Yet it can be deduced from the circumstances and the parties' division of responsibilities that intention as to property distribution is likely to have evolved over time. These circumstances differ significantly from a discrete transaction where the rights and obligations converge with intention expressed or evinced at the precise moment of exchange. In other words, time plays a very different role as between a transaction (now), and within relations (into the future). While the courts have not unanimously reconciled with the ambulatory trust,[140] use of the term from time to

[134] Macneil, 'Many Futures', above n 1, 739, 750.
[135] Ibid 750.
[136] Discussed, for example, in *Jones v Kernott* [2010] 1 WLR 2401.
[137] See eg discussion in *Baumgartner v Baumgartner* (1987) 164 CLR 137.
[138] *Stack v Dowden* [2007] 2 AC 432, 459.
[139] Ibid.
[140] See eg ibid 456.

time illustrates that the law recognises the potential for contribution to occur over an extended period.

Different constructions of time as a function of exchange are no barrier to conceiving of exchange in relational terms. As the ambulatory trust indicates, courts seem to struggle with the reality of extended relations in the face of expectations of a discrete moment in time. However, this is no reason to reject relations as a source of exchange and thus of property distribution. Instead, on the basis that exchange might exist other than transactionally, it calls for a reframing of the law's perception of exchange.

5. *Benefits and Burdens*[141]

Implicit in the nature of transaction is the allocation of benefits and burdens between the parties. This goes to the heart of the character of transfer, including a transfer of property. By contrast, the nature of intimate relations is such that the parties are more likely to share jointly the benefits and burdens[142] — a feature of relational exchange. This aspect of spousal relations is what made the women's behaviour in *Stack* and *Lankow* remarkable, supporting their respective claims for a beneficial interest.[143] These women's record keeping ran counter to the diffuse sharing expected of relations, pointing instead to the assigned benefits and burdens of transaction. On the other hand, these cases emphasise that where the parties do share jointly without differentiation, such relational indicia are unlikely to suffice to show an intended differential distribution of the beneficial interest.

The joint sharing emblematic of relations highlights the artificiality not only of ascertaining discrete intention as to a severable beneficial property interest, but the determination of that interest through differentiated contribution. Consequently in many cases without evidence of agreement as to proportion, the court is left to 'do what is fair'[144] between the parties. Undivided sharing, especially where it is denied[145] or challenged,[146] is arguably what makes it so difficult for courts to ascertain the extent of an undeclared interest. Identifying the source of intention within relations rather than a transaction is a crucial first step in reorienting the basis of the distribution of domestic proprietary interests from assumptions of atomistic individualism to the reality of a community of interests.[147]

In the context of contract law, transactionism fails to capture the essence of relational exchange, illustrated through the contrasting application of these indicia of exchange. By extension, where relational exchange underpins distribution of domestic proprietary interests, so too are transaction-based property principles insufficient to explain the true foundation of the exchange. The law's privileging of the transactional at the expense of the relational, especially where the character of exchange aligns with the structures of gender, holds implications for substantive equality.

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[141] Ibid 782.
[142] Ibid 739.
[143] *Stack v Dowden* [2007] 2 AC 432; *Lankow v Rose* [1995] 1 NZLR 277.
[144] See eg *Jones v Kernott* [2010] 1 WLR 2401.
[145] *Pettkus v Becker* [1980] 2 SCR 834; *Baumgartner v Baumgartner* (1987) 164 CLR 137.
[146] *Lankow v Rose* [1995] 1 NZLR 277.
[147] Pahl, 'Allocation of Money', above n 65, 37.

These insights are relevant in three ways. First they explain courts' approach to determining the existence and extent of a beneficial property interest. Secondly, they recognise that there has been an exchange on foot by virtue of the parties' relations,[148] and thirdly, they offer an alternative understanding of that exchange, potentially supporting the equitable determination of domestic proprietary interests.

Despite clarifying that couples engage in exchange, there is still no 'moment of contract' at which point the indicia converge in a transactional sense — a convergence that necessarily associates the requisite intention and contribution with the property itself. Accordingly, there remains the need to establish the nexus between a couple's continuum of exchange and the distribution of a beneficial property interest. Thinking relationally, a concept useful in giving cohesion to diverse and diffuse exchanges over time is that of the shared purpose of the couple's relations themselves.

B. Shared Purpose

Establishing that intimate partners engage in exchange over time is necessary but not sufficient to justify an interest in property. In a property transaction at law, it is the transferee's investment in, or payment of the price for, property that supports their interest. In a direct exchange, both the intention as to distribution and the contribution to uphold the interest work together to link the exchange to the acquisition of property rather than to some other purpose. In the diffuse exchange of relations however, there may not be such a clear connection.

In contrast to a discrete transaction, a spousal division of labour for example, 'presupposes exchange' not through quid pro quo, one task for another. Instead, each party depends on the other, over time, to fulfil the complement of household or family responsibilities that they do not perform themselves.[149] As each spouse carries out the tasks nominally allocated or assumed in their household role, each theoretically generates an overall 'exchange surplus' that they share with the other.[150] The sole breadwinner thus provides income that is surplus to their personal requirements, while benefitting from the 'surplus' of care that their partner provides the couple's child and their home. The fact of long-term, diffuse exchange such as this, raises two challenges for intimate partner trusts.

In the first place, that exchange consists along a continuum is generally obscured by courts' search for discrete transaction, and in particular by their (acknowledged) artificial search for intention.[151] As exchange, these activities transgress the individualistic assumptions of rational utility-maximisation and profit implicit in contract and property law. Instead, they '[take] place in the context of relations more extensive than the exchange itself…'[152] where the parties expect 'future harmonious affirmative cooperation.'[153] Single instances of 'contribution' are therefore not necessarily relevant in ascertaining a property interest. Instead the sum total of the couple's exchange, and their expectation of ongoing cooperation and

[148] See eg analysis in Becker, above n 78; Macneil, 'Many Futures', above n 1, 696–701.
[149] Macneil, 'Many Futures', above n 1, 696–7.
[150] See explanation in Macneil, 'Exchange Revisited', above n 89.
[151] See eg *Pettitt v Pettitt* [1970] AC 777, 799.
[152] Macneil, 'Exchange Revisited', above n 89, 577.
[153] Ibid 572.

interdependence, reflects the shared purpose of *intimate relations* rather than a discrete intention as to property.

Secondly, there is a lack of direct exchange comprising contribution (in money or otherwise) for property. According to the transactional view, one party might expressly undertake the obligation to pay mortgage repayments — which would connect their contribution and property — the other party, bearing day-to-day household costs, has no such connection to property acquisition. If the claimant cannot establish a nexus between their contribution and property, they will not satisfy the doctrinal elements for a finding of a beneficial interest. I suggest however, that the requisite nexus may exist, albeit in the parties' shared purpose of a materially and emotionally entwined relationship.

In contrast to utility-maximisation which might be measured in a direct exchange, intimate partners are utility enhancers who are prepared to give their surplus now to the shared purpose of their relations, in anticipation of the long-term gain of the relations themselves.[154] The shared purpose connects the day-to-day decisions and actions of one individual with the other, in the interest of the couple as a long-term proposition — including as to their property. Once the shared purpose is understood as the basis for their relational exchange, it accounts for smaller components of exchange (such as mortgage payments, daily caring, paying for household expenses) as part of an integrated whole, providing the justification for property interests within the overall relational network of exchange.

As it stands the law upholds exchanges having the appearance of discrete transaction — and these are more frequently undertaken by men who tend to be the party better equipped, through structural advantages, to do so.[155] Intimate partners who invest in the couple's material and emotional wellbeing to advance their shared purpose will frequently struggle to satisfy the market benchmark of discrete transaction. The couple's diffuse, informally communicated, long-term exchange frequently leaves women without a property interest that reflects what they have (tacitly) understood as an object of exchange: what *Kerr v Baranow* described as the 'joint family venture.'[156] With little express, direct connection between her actions and the property, there is little in the way of transaction to support her claim. By contrast, comprehending the intimate relationship in terms of the couple's shared purpose and consequently recognising the exchanges that ensue with this overarching purpose in mind, would see a 'shift in the existing relations [that] would enhance rather than undermine the values at stake.'[157]

Apart from *Kerr v Baranow*, the shared purpose approach has some resonance in the cases, pointing to the possibility of its uptake by the courts. In *Muschinski* for example, Deane J described the parties' acquisition of the property as a 'joint venture.'

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[154] Ibid 576.
[155] Although note eg *Stack v Dowden* [2007] 2 AC 432; *Lankow v Rose* [1995] 1 NZLR 277; *Pettkus v Becker* [1980] 2 SCR 834, where in each case the woman claimant demonstrated sufficiently transactional behaviour to succeed in her claim. The implications of this are explored in Chapter Four.
[156] *Kerr v Baranow* [2011] 1 SCR 269.
[157] Nedelsky, 'Law's Relations', above n 8, 74.

> Mrs Muschinski's intention was that her own and Mr Dodds' interest … in the whole venture should be equal: it should be a 'joint venture', a 'partnership'. The explanation of that intention lay in her expectation of Mr Dodds' future financial contributions and in her desire to *use the arrangements in relation to the purchase and development of the property as a means of strengthening the stability of her relationship with him*.[158]

While reflecting some of the shared purpose argument here, this interpretation has a somewhat commercial flavour whereby 'the general principle underlying the proportionate repayment of capital contributions to joint venturers on the failure of a joint venture is wide enough to support this aspect of the constructive trust.'[159] The interpretation therefore goes some way to appreciating the nature of relational exchange, but continues to impose a market construct (the joint venture) upon its interpretation of that shared purpose.

Cummins too, effectively embraces the shared purpose approach, affording a nexus between the parties' overall, undifferentiated exchange, and the acquisition of property. The Court found that '[i]t is often a matter of chance whether the family expenses are incurred and discharged or services are rendered in the maintenance of the home before or after the purchase.'[160] Further, and as a consequence, the Court inferred a joint beneficial interest regardless of the parties' contributions.[161]

Despite the parallels, the shared purpose approach suggested here differs from the *Cummins* presumption. Shared purpose is dependent upon the parties' relations, where the *Cummins* approach instead is ascribed as a consequence of the parties' marital status. Status, on the whole, fails to speak to *relations* and instead simply enacts rights consequent upon the fact of *relationship* — it points to externally imposed norms[162] rather than those derived internally to the parties' own relations, which is a feature of relational exchange. Such norms are more likely to be ascertained according to the type and extent of the inquiry spelled out in *Stack*[163] and in *Kerr v Baranow.*[164]

Conceptualising exchange as integral to the shared purpose of intimate relations differs also from a status-based property right such as community property. It might seem logical, as occurred in *Cummins,* to align the interdependent endeavour of intimate relationships with necessarily joint property. However, while accommodating a version of community, this approach fails to account for the individual. Likewise, the doctrine of coverture should make us wary of the implications of a merger of estates. Hayward might observe that 'English law has never been able to take hold of the idea that ownership of land might be determined by a relationship'[165] but this fails to recognise the historical limits placed on married women's property and how they continue to resonate.[166]

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[158] *Muschinski v Dodds* (1985) 160 CLR 583, 611 (emphasis added).
[159] Ibid 599.
[160] *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278, 302.
[161] Ibid 302–3.
[162] Smart, above n 73, 17.
[163] *Stack v Dowden* [2007] 2 AC 432, 459.
[164] *Kerr v Baranow* [2011] 1 SCR 269, 315–9.
[165] Hayward, above n 94, 285.
[166] See eg Deech, above n 23.

There may be an argument that introducing community property benefits women's economic equality. It guarantees a property interest for both parties, leaving nothing to chance for a partner, more likely to be a woman, who is unable to demonstrate the requisite intention and contribution. It may thus serve as a safety net, upholding women's economic independence from their partners, and promoting economic equality through a more equal property distribution. This argument, however, is beyond the scope of this thesis, which is concerned not with government redistribution of property, as valuable as that may be, but rather with property distribution between intimate partners as a function of private law.

Lastly, there is evidence that courts increasingly pay attention to relationships — and thus potentially also to the couple's shared purpose — through discretion that accommodates the parties' domestic context.[167] Following Dewar,[168] Hayward refers to this as 'familialisation' of trusts law. He observes that the bright line laws of property (and their expression in trusts) have softened through the adoption of family law concepts, allowing courts to be cognisant of the parties' relationship. 'Familialisation' is thus more nuanced than the 'traditional' direct application of commercially oriented law in an intimate context. The comments by Baroness Hale in *Stack v Dowden*[169] are a strong signal of the contemporary and undoubtedly more contextual approach — at least in the English context.[170]

The shift that Hayward analyses certainly better suits the context of the intimate relationship within the existing transactional framework of the law. Discretion becomes a valid means of 'accommodating the nature of the acquisition of property by parties in an intimate relationship without irreparably undermining the concerns of modern property law.'[171] As Hayward points out, 'the courts are using discretion to ameliorate the implied trusts framework.'[172]

Despite these advances, familialisation fails to engage with the relational context of exchange in furtherance of the couple's shared purpose. Instead, the transactional approach of trusts remains — evidenced by the need in the first place for discretion in dealing with evidential issues. In particular, courts continue to search for transactional intention despite acknowledging that the parties are unlikely to formulate one. Similarly, they generally ascertain contribution concerned particularly with the property itself. As a means of addressing the domestic context of intimate partner trusts, familialisation of the law is quite different from an alteration of the transactional anchors of property. While ameliorating the existing framework, it cannot be said to connect the couple's diffuse exchange over time, with the possibility

[167] Andrew Hayward, *Judicial Discretion in Ownership Disputes over the Family Home* (PhD Thesis, Durham University, 2013) <http://etheses.dur.ac.uk/8489/> ('Judicial Discretion').
[168] J Dewar, 'Land, Law, and the Family Home' in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press, 1998).
[169] *Stack v Dowden* [2007] 2 AC 432, 459.
[170] A similar trend can be seen in Canada: see *Kerr v Baranow* [2011] 1 SCR 269. In contrast, see *Harvey v Beveridge* [2013] NZHC 1718 which took a less holistic approach, focussing on subjective intention. In Australia, 'justice and fairness as abstract morality' continues to be rejected. Relevant circumstances are predominantly those existing at the time of acquisition although intention is irrelevant. On the other hand, the care of children is 'a matter of considerable importance in doing justice between the parties.' See eg *Sui Mei Huen v Official Receiver for and on Behalf of the Official Trustee in Bankruptcy* [2008] FCAFC 117, [80].
[171] Hayward, 'Judicial Discretion', above n 167, 251.
[172] Ibid 33.

of property as a consequence of their shared purpose. Unlike familialisation, and as this thesis will show, the aim of the shared purpose approach is to address the deficiencies of the transactional framework itself.

Conclusion

The law of intimate partner trusts contains unresolved tensions between individual and community, and the norms of market and home. These dichotomies reflect the liberalism of the law that prioritises the atomistic individual of the market at the expense of that which is communal and intimate. Market liberalism promotes discrete transactions as the purview of private law, consequently masking exchange relations, especially where they occur in the intimate context. Where these priorities reflect gendered social structures, it follows that the law itself enforces and reinforces a gendered approach to property.

Relations offer an alternative analytical framework both to assess claims for a beneficial interest, and also to analyse the gendered implications of the law. Relational contract theory affords a language of exchange that accommodates the intimate context, establishing the activities of domestic partners as processes of exchange. Further, a relational approach bridges the gap between the atomistic individual of the law, and the community of intimate relations. The parties' shared purpose connects the long-term and diverse contributions of each individual both with the parties' relations and with the possibility of property. Their relational exchange is thus undertaken with the purpose of sustaining community relations, including as to their estate, into the future. It affords a framework, even from the vantage point of separation, for evaluating the exchange and the consequences for property that might ensue.

Unlike a communitarian approach, relational theory holds analytical capacity to accommodate justice within the intimate context as a foil to the gendered structures of inequality that might otherwise preclude a party's relational experiences. A relational approach also works beyond principles of community of title or status-based redistribution, both of which are important within their own sphere, but neither of which addresses the structures of inequality within property law itself. Finally, relational theory offers an alternative to familialisation of the law. While familialisation looks towards relations, it does not search within them for the requisite exchange. Like community title and status-based approaches, it is remedial only without addressing the tensions within the law.

This thesis grapples with the common law within the liberal framework of separate estates. Investigating the capacity of the law to promote substantive equality in property distribution, the following chapters first identify the transactional focus of key elements of the law, before drawing on relational theory to expose the limitations of atomistic individualism, and the possibilities in the law of a situated self. I propose that this offers a way to navigate through the tensions inherent in the law, to promote substantive equality in the distribution of property.

Each of the next three chapters analyses intention, contribution, and home, respectively. The former two concepts arise directly from the liberal roots of property, and are closely tied to the concept of exchange represented through transaction. In analysing these concepts and their application in the cases, I will both highlight their

doctrinal role in upholding liberal property norms, while demonstrating how their interpretation results in inequality. Conversely, I canvass ‘home’ as a concept that is clearly relevant in all the cases but which is excluded through the application of the liberal framework — a framework that tends to devalue and ignore that which is intimate. In familiar gender binaries, ‘home’ is implicitly constructed as the domain of women. Ostensibly therefore, the fact that it is irrelevant to proving a beneficial interest in that very home, at the very least signals the possibility of gendered inequality.

Together, these three elements form the basis of the problems with — the limitations of — transactions, but they might also be interpreted through the parties’ relations. In so doing, the following chapters offer a principled framing of the existing foundations of intimate partner trusts, while seeking to address the problem of inequality.

CHAPTER 3 — INTENTION

> It is not a fortunate accident, nor a detachable advantage, that men [sic] have a language adequate to express their intentions and that that which might otherwise have existed unknown, locked inside them, in fact becomes known. It is another aspect of the fact that they are social animals, capable of that kind of co operation that is the observance of promulgated rules and of recognition of mistakes in the observance of the rules.[1]

Emblematic of the expression of individual will, intention is central to the law of property which demands evidence of willing divestment of the object of rights before it recognises the vesting of an interest in another. Hampshire's characterisation of 'men' as social animals also encapsulates the individual's capacity for relations — yet his observation fails to acknowledge the diverse social contexts that inform the mode of expression of intention.[2] Recognising only express intention as to property in the way Hampshire envisages will necessarily limit the potential to discern interests arising in contexts of implicit or tacit communication reflecting a relational dynamic.

The express intention envisaged by Hampshire is typical of the market transaction. Private law's presumption of human interaction in the model of market transaction generally assumes that there is no existing relationship between the parties.[3] But the means of communication within a relationship, particularly for those in primary relations such as the intimate partnership, differs from that of the abstracted discrete transaction. There is therefore likely to be dissonance where intimate partner trust cases measure 'intention' according to transactional norms.

This chapter argues that in ascertaining the distribution of the beneficial interest in intimate partner trust cases, courts inquire into the parties' intention as to beneficial ownership through a transactional interpretation of their actions. It analyses doctrine across the four jurisdictions, ascertaining courts' transactional frame of reference for intention as to the beneficial interest. The chapter then analyses the limits of this transactional approach to intention. It highlights the relational features of the parties' expressions of intention, demonstrating the shortfall in courts' construction of intention and suggesting that the requisite intention might be located within the fabric of relations themselves. It then critiques assumptions the courts draw from their examination of spousal financial dealings, contrasting courts' assumptions and conclusions with empirical evidence about financial dealings within intimate relations. Finally, it analyses how the exercise of power, largely unremarked in the case law, undermines the interpretation of transactional intention as an expression of will.

I. FRAMING INTENTION

As we saw in Chapter One, intention in trusts is crucial to invoking courts' jurisdiction to declare the distribution of the beneficial interest. Common law courts do not have the power to redistribute property: this is the preserve of Parliament, and courts may only declare the parties' interests as determined by the parties themselves. This requires an inquiry into the parties' exercise of will as to the creation of property

[1] S Hampshire, *Thought and Action* (Viking, 1967) 98–9, cited in Ian R Macneil, 'The Many Futures of Contracts' (1974) 47 *Southern California Law Review* 691 ('Many Futures'), at footnote 59.
[2] See eg discussion in Macneil, 'Many Futures', above n 1, 711–2 .
[3] Ibid 693.

— in this case a beneficial interest — reflecting liberalism's justification for property in the consent of the individual. Intention as an element of the trust evidences this exercise of will.

This part considers two ways in which courts ascertain the parties' will as to the beneficial distribution of property. The first, representing broadly the approach in England and Australia, views the parties' common intention as indicating the requisite state of mind to an allocation of property. The second considers the Canadian and New Zealand approaches, which investigate the parties' expectations as to property to establish their intention as to the beneficial estate.

The cases discussed demonstrate how successful claims involve the court's characterisation of the requisite intention as transactional and omit intention framed according to the norms of the relations in question.

A. Common Intention

Claims to a beneficial interest in the absence of an express distributive intention challenge the common law's perception of a validly derived interest in property. Courts in England and Australia therefore resort to implied or imputed intention as to beneficial ownership to fulfil the requirement for an exercise of will as to property disposition. Lord Diplock for example indicated that finding common intention is akin to finding an implied term in a contract.[4] A court can therefore infer a common intention where:

> [it is] satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or another.[5]

The problem for trusts has been that transactional markers of intention,[6] if they exist, are difficult to locate in a relational context. As evidence of this, English decisions have vacillated between a strict transactional approach where the easily identifiable financial contribution to property acquisition demonstrates intention, and a broader one purporting to account for the relationship context. As discussed in Chapter One, following earlier, more transactional cases,[7] *Grant v Edwards*[8] marked a shift in approach whereby the claimant's lack of financial contribution to the property acquisition left the Court to look at the parties' conduct to determine their intention as to the beneficial interest.

Mr Edwards purchased a home jointly with his brother, having told his partner that putting her name on the title would prejudice her divorce proceedings with her ex-partner. While he made the mortgage repayments she contributed to general household expenses, subsequently claiming a beneficial interest in the property on the basis that her household contributions evinced an intention as to a shared interest. The Court found that the circumstances required a broader range of considerations than

[4] *Pettitt v Pettitt* [1970] AC 777, 823; cited also in *Stack v Dowden* [2007] 2 AC 432, 443.
[5] *Gissing v Gissing* [1971] AC 886, 909.
[6] Such as that described by Hampshire, above n 1.
[7] Eg: *Pettitt v Pettitt* [1970] AC 777; *Gissing v Gissing* [1971] AC 886.
[8] [1986] Ch 638.

simply the repayment of the mortgage, to ascertain the parties' intention. Nourse J went beyond locating the language of intention as to property, to find that the claimant must 'establish a common intention between her and the defendant, *acted upon by her*, that she should have a beneficial interest in the property.'[9] On this approach the facts indicated a 'clear inference that there was an understanding between the plaintiff and the defendant, or a common intention, that the plaintiff was to have some sort of proprietary interest in the house.'[10]

Subsequently however in *Lloyd's Bank v Rosset*[11] the Court distinguished between cases in which there was evidence of discussion — 'making [the parties'] intention known' — and those where there was none. The Rossets had purchased a house but unbeknownst to Ms Rosset, Mr Rosset acquired it in his own name. When the mortgagee sought to exercise its power of sale, Ms Rosset claimed an interest based on her in-kind contribution to the home renovation. There had been in this case no evidence of discussion as to the beneficial interest and the Court's view was that 'it is at least extremely doubtful whether anything less will do' to show the relevant intention.[12] In other words, echoing the comments of Hampshire above, an intention that might otherwise have been known, according to the way the Court construed the evidence, remained 'locked inside them' and was therefore effectively 'unknowable'.[13]

The court again turned to the parties' conduct in ascertaining intention, in *Oxley v Hiscock*.[14] Chadwick LJ found that the search for common intention would start with the parties' conduct at the time of property acquisition — an initial focus on intention pertaining to a discrete transaction about property. If there were no evidence of discussion about beneficial interests, the court would do what it thought fair in light of the whole conduct of the parties. In this case, the parties' words and conduct were sufficient to indicate the differential beneficial interest through inference. Relevantly, before Mr Hiscock used Ms Oxley's capital to contribute to the purchase of the property in his sole name, the parties had discussed the distribution of the legal estate. Mr Hiscock had advised Ms Oxley against having her name on the title in case her former husband might be tempted to claim her interest. Chadwick LJ found that the parties' discussion could only be explicable if they both intended the claimant to have a share, warranting an inference as to the beneficial interest.[15]

Although the Court expressly considered the parties' conduct over time, the relevant conduct was that directly related to language concerning the acquisition of the property. The Court's interpretation, although considering a broader timeframe than the moment of purchase, reverted to a direct and communicated exchange between the parties ie intention pertaining to a discrete property transaction.

Confirming and developing a focus on conduct, *Stack v Dowden* considered Ms Dowden's claim for a full beneficial interest in jointly owned property based on her disproportionate financial contribution towards the property's acquisition. Baroness

[9] Ibid 646–7 (emphasis added).
[10] Ibid 649.
[11] [1991] 1 AC 107.
[12] Ibid 133.
[13] Hampshire, above n 1.
[14] [2005] Fam 211.
[15] Ibid 218.

Hale identified that the law had 'moved on in response to changing social and economic conditions'[16] namely from early requirements of 'crude factors of money contribution.'[17] Instead, '[t]he search is to ascertain the parties' shared intentions, actual, inferred or imputed, *with respect to the property* in the light of their whole course of conduct *in relation to it.*'[18] While a more nuanced approach and ostensibly acknowledging the relationship, the intention must nonetheless pertain directly to the property with the specificity inherent in transaction.

Stack did recognise that the 'interpretation to be put on the behaviour of people living together in an intimate relationship may be different from the interpretation to be put upon similar behaviour between commercial men [sic]';[19] and that 'the domestic context is very different from the commercial world.'[20] Despite this assurance, the framing of the quest for intention revolved around the unusually transactional nature of the parties' behaviours. Ms Dowden had been a meticulous record keeper,[21] providing a paper trail of her financial dealings with respect to the property. Unlike the usually informal communications of primary relations, this was an instance of formality recognisable as market-like behaviour. Baroness Hale attempted to highlight factors 'relevant to divining the parties' true intentions'[22] that illustrate the importance of the domestic context, however the exceptional evidence simply reinforced the law's transactional framework.

Australia also adopts a transactional approach to intention as to the beneficial interest, 'proceed[ing] by reference to the same English base in relation to common intention trusts, namely *Gissing v Gissing* and *Eves v Eves*.'[23] In *Muschinski v Dodds* Ms Muschinski claimed a beneficial interest in her partner's half share of the legal title, based on her substantial financial contribution relative to his.[24] Deane J's judgment is dominated by discussion as to the parties' intention directed to their land purchase, despite finding that a constructive trust may arise 'regardless of intention' [as to the beneficial interest].[25] Gibbs CJ focussed on discovering Ms Muschinski's actual intention[26] as to the beneficial interest at the time the legal title was purchased. The emphasis on this moment in time indicates the search for a discrete transaction, rather than an intention informed according to the longer-term context of the parties' ongoing communication, assumptions as to their material interdependence — features of relational exchange — and the power acting on their exercise of free choice. Brennan J likewise considered Ms Muschinski's intention alone, but subsequently found a *shared* intention at the time of purchase, that Mr Dodds acquire a beneficial interest at home with his legal estate.[27] This was sufficient to rebut the presumption of a resulting trust in Ms Muschinski's favour.

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[16] *Stack v Dowden* [2007] 2 AC 432, 455.
[17] Ibid, citing Kevin Gray and Susan Francis Gray, *Elements of Land Law* (4th ed, 2005), 864.
[18] Ibid 455 (emphasis added).
[19] Ibid 449.
[20] Ibid 459.
[21] As indicia of a transactional exchange, according to Macneil, 'Many Futures', above n 1.
[22] *Stack v Dowden* [2007] 2 AC 432, 459.
[23] *Harvey v Beveridge* [2013] NZHC 1718.
[24] (1985) 160 CLR 583.
[25] Ibid 613.
[26] Ibid 593.
[27] Ibid 598 (Mason J); 609 (Brennan J); 611, 617 (Deane J). Dawson J concurred with Brennan J.

The approach in *Muschinski* clearly arises from market norms. In the Court of Appeal Hope JA had described the parties' relationship as a 'joint venture',[28] usually conceived of as a transaction performed in common for profit. While indicating a relational dimension, as discussed in Chapter One, the law tends to conceive of the conduct of parties in a commercial arrangement as that of the rational man of the market. Like Baroness Hale subsequently in *Stack,* Deane J recognised the importance of the domestic context, but found:

> That does not mean … that particular rules applicable to regulate the rights and duties of the parties to a failed partnership or contractual joint venture might not be relevant in the search for some more general or analogous principle applicable in the circumstances of the collapse of the consensual commercial venture and personal relationship in the present case.[29]

An analogous principle, relevant to the shared purpose of the parties, may indeed effectively represent the relational context of intimate partner property distribution. However, the approach in *Muschinski* appears to have adopted a transactional approach. The Court's emphasis on the business aspects of the transaction were perhaps disproportionate in light of Ms Muschinski's evidence that it should be a 'joint venture', a 'partnership' as *'Mr Dodds was going to provide a home for me, no matter what…*'[30] The Court reframed Ms Muschinski's description of the material dimensions of their intimate relations, referring instead to a joint venture suggestive of a commercial transaction. This affected the way in which the law was applied. It upheld the distribution of beneficial interests at home with the legal title, based on an intention to do so measured through a discrete transaction.

In *Baumgartner*[31] intention was central to the New South Wales Court of Appeal's decision[32] but in the High Court decision, intention played a more ambiguous role. Mr Baumgartner had used the parties' shared finances to acquire the couple's home in his sole name, and Ms Baumgartner claimed a beneficial interest based on an intention evidenced by her financial contributions.

The Court of Appeal considered the relevant intention to be that of creating a trust, and Priestley JA found there to be ample evidence from which to infer an actual common intention to create a trust or hold the land as trustee.[33] Kirby P on the other hand, observed that the last thing on the minds of a couple acquiring land is the law of trusts.[34]

The High Court disagreed with the Court of Appeal on two counts relating to intention. First it found that the Court of Appeal had ignored conflicts in evidence about intention found by the judge at first instance. It was therefore not entitled to make a finding based on a common subjective intention.[35] In addition, citing *Muschinski*, it found that the 'constructive trust serves as a remedy which equity

[28] *Muschinski v Dodds* (1982) 8 Fam LR 622, 627.
[29] *Muschinski v Dodds* (1985) 160 CLR 583, 618.
[30] Ibid 611 (emphasis added).
[31] (1987) 164 CLR 137.
[32] *Baumgartner v Baumgartner* (1985) 2 NSWLR 406.
[33] Ibid 446.
[34] Ibid 417.
[35] *Baumgartner v Baumgartner* (1987) 164 CLR 137, 146.

imposes *regardless of actual or presumed agreement or intention*.'[36] On this basis it was not intention as to distribution, but rather the unconscionability of Mr Baumgartner's denial of Ms Baumgartner's interest that justified a constructive trust.

Despite ostensibly rejecting intention as evidencing the exercise of the parties' wills, Mason CJ, Wilson and Deane JJ found that

> The land at Leumeah was acquired and the house on it was built in the context and for the purposes of that relationship. Together they planned the building of the house. Together they inspected it in the course of its construction. Together they moved out into it and made it their home after it was built. …
>
> The case is accordingly one in which the parties have pooled their earnings for the purposes of their joint relationship, one of the purposes of that relationship being to secure accommodation for themselves and their child. Their contributions, financial and otherwise, to the acquisition of the land, the building of the house, the purchase of furniture and the making of their home, were on the basis of, and for the purposes of, that joint relationship.[37]

Together, these statements indicate that the parties shared an intention as to joint acquisition of the home. Thus although *Baumgartner* apparently rejects the role of intention in evidencing the exercise of the parties' wills, locating the parties' intention as to the beneficial interest nonetheless informed the Court's approach. And it has continued to do so since.[38] *Parsons v McBain* for example, referred to a 'common intention constructive trust' in recognition of the parties' agreement that their home be 'equally owned'.[39] Indeed the parties' respective intention was so clear, that the Court held that '[t]he facts may have justified a finding of an express trust by declaration notwithstanding the courts' reluctance to hold that such a trust exists'.[40]

Subsequently, in *Sui Mei Huen*, the Court focussed on intention at the time of the property purchase 'however, that is not to say that evidence of subsequent conduct is irrelevant to ascertaining the intention of the parties at the critical date.'[41] More recently the ACT Supreme Court confirmed that the onus is on the claimant to prove the parties had a 'common intention as to ownership of the beneficial interests'[42] usually found at the time of the purchase transaction.

In each case the requisite intention relates to a sharp entry point, a 'moment of contract', which determines the distribution of beneficial interests between the parties and indicates transactional exchange. Where claimants can identify intention on these terms, the point at which the parties' minds were *ad idem*, exchange will be sufficiently transactional to satisfy the law, and the requisite element of individual consent is likely to be satisfied. Conversely, while the claimant might secure a remedy

[36] Ibid 148 (emphasis added).
[37] Ibid 149.
[38] More recently, see eg: *Draper v Official Trustee in Bankruptcy* [2006] FCAFC 157; *Sui Mei Huen v Official Receiver for and on Behalf of the Official Trustee in Bankruptcy* [2008] FCAFC 117 ('*Sui Mei Huen'*); *Hillman v Box (No 4)* [2014] ACTSC 107.
[39] *Parsons v McBain* [2001] FCA 376, [2], [3].
[40] Ibid [2].
[41] [2008] FCAFC 117, [53].
[42] *Hillman v Box (No 4)* [2014] ACTSC 107, [316].

to recover their investment,[43] where they cannot show the indicia of transactional intention they are unlikely to succeed in demonstrating a beneficial estate.

B. Expectation

The Canadian unjust enrichment approach is informed by the 'mutual or legitimate expectations of both parties'[44] as to property. Where the legal titleholder allows such an expectation and takes the benefit arising from actions in reliance on that expectation, the elements together evidence the exercise of will that lies at the heart of property.

In *Pettkus v Becker* the majority relied on findings of fact at trial that Ms Becker's intention in contributing to the couple's home and beekeeping business was in the nature of 'risk capital aimed at seducing a younger man into marriage.'[45] This was not a common or implied intention sufficient to support a resulting trust,[46] but left open the possibility of a constructive trust. In contrast, Martland and Ritchie JJ found that the trial judge's statement confirmed Ms Becker's intention to benefit her partner. Further, establishing a meeting of minds, it was clear that Mr Pettkus had 'acquiesced in and freely accepted' the benefits she afforded him, applying them to the joint household.[47]

> [W]here one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he *knows or ought to have known of that reasonable expectation*, it would be unjust to allow the recipient of the benefit to retain it.[48]

In contrast to English and Australian inquiries, intention here as to the distribution of the beneficial interest occurred in the mind of the donee (Ms Becker) rather than that of the donor also. Indeed Mr Pettkus denied he intended his partner to take a beneficial interest. Yet the expectation arising in the donee under unjust enrichment is not a uni-directional state of mind. It exists where the donor 'acquiesc[es] in and freely receiv[es] a benefit,'[49] aware also of the detriment suffered by the donee.[50] The state of mind of the donor is thus also addressed, albeit indirectly. Their acquiescence, *knowing of the detriment*, together link their state of mind with the expectation of the donee and, relevantly, with the object of the exchange — the property.

Subsequently the Court in *Seguin v Vanasse* included 'actual intent' as to property distribution in its analysis of the parties' relationship as a 'joint family venture'.[51] Ms Vanasse brought a claim against her partner for a beneficial interest in the family home. She had given up her career to follow him across the country to live, and she

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[43] *Muschinski v Dodds* (1985) 160 CLR 583.
[44] *Kerr v Baranow* [2011] 1 SCR 269, [124].
[45] [1980] 2 SCR 834, 845.
[46] Canada for a long time upheld the 'uniquely Canadian invention' of the common intention resulting trust. This type of trust 'no longer has a useful role to play in resolving property and financial disputes in domestic cases' — *Kerr v Baranow* [2011] 1 SCR 269, 285–92.
[47] Ibid 862.
[48] Ibid 849 (emphasis added).
[49] Ibid 849, 862.
[50] Ibid 849.
[51] [2011] 1 SCR 269 ('*Seguin*').

had cared for the couple's children while he worked to build up a portfolio of assets. She successfully claimed a share of the assets based on the Court's characterisation of the relationship as a mutual venture, involving sharing its benefits and burdens in common.[52] Unusually, this relational finding was sufficient to support her claim.

The Court upheld the unjust enrichment approach. Mr Seguin's promises and reassurances contributed 'to a reasonable expectation [by] Ms Vanasse that she was to share in the increase of his net worth', a reflection of a joint family venture[53] — a shift in the focus of intention from that in the earlier decision in *Pettkus*. It retains the concept that an evinced state of mind supports *wealth distribution* but dispenses with the requirement of intention as to a *property interest*. In *Pettkus*, the focus was on whether Ms Becker's contributions to the business evinced an expectation of a beneficial interest in property, indicating a direct, specific, and discrete correlation between the property and her actions. By contrast, the intention in *Seguin* did not need to correlate as between contribution and the acquisition of property. Instead the Court accepted the more diffuse, informal, and imprecise conduct relating to the benefits and burdens of the domestic economy generally.

Seguin focuses on the parties as an undivided economic unit, without necessarily inquiring into the distribution of property between them as individuals. The rights did not attach to particular property, but divided the overall common asset value. In other words, the result could be achieved with a cash payment. The decision is enticing in its holistic consideration of the parties' relationship and circumstances, and to this extent exemplifies the familialisation of property law.[54] Yet as with family law processes, familialisation does not address the possibility of a property interest arising out of exchange within intimate relations. In failing to do so it offers compensation for women who have contributed to the family economy and hold no property, but it does not provide the means by which women might claim property itself. The result is a denial of property for women, entrenching the inequality of opportunity to become a property owner.

In New Zealand, most recently the High Court has found it inappropriate to treat 'contribution, detriment or conduct in reliance as a necessary ingredient of a common intention constructive trust.'[55] However it has not ruled them out, and the court may still look to intention.[56] In the leading case of *Lankow v Rose*,[57] Ms Rose contributed significantly in kind to the business arrangements of her partner Mr Lankow, resulting in his substantial financial gain. She claimed a half interest in the couple's home, owned solely in his name.

The Court found that the two requirements for a constructive trust were contribution resulting in the acquisition, preservation or enhancement *of the property*; and that the parties expected that *the plaintiff would share in the property* as a result.[58] The requisite state of mind must relate directly to the property itself, reflected in actions

[52] A feature of relational exchange: see Macneil, 'Many Futures', above n 1, 773.
[53] *Kerr v Baranow* [2011] 1 SCR 269, [151].
[54] Described in Andrew Hayward, 'Family Property and the Process of 'Familialisation' of Property Law' (2012) 24 *Child and Family Law Quarterly* 284.
[55] *Harvey v Beveridge* [2013] NZHC 1718, [51].
[56] Ibid.
[57] [1995] 1 NZLR 277.
[58] Ibid 282.

arising from the expectation of a beneficial interest. Again this approach precludes the diffuse and non-specific nature of the informal communications within intimate relations. Instead it mirrors the specificity and targeted communication of transaction.

Relative to other jurisdictions' approaches, Fisher J has pointed out that '[t]here is, of course, nothing inconsistent between the primacy of expressed intentions on the one hand and modern formulations based upon reasonable expectations, constructive trusts, unjust enrichment, or estoppel on the other.'[59] As observed in relation to the Canadian approach, reasonable expectations and detrimental reliance together are a proxy for the parties' meeting of the minds that might be ascertained using other means. As for courts' framing of intention as to property, this rests on the indicia of transaction.

The spectrum of approaches to ascertaining the parties' intention as to beneficial ownership ranges from inferences and imputation to expectation, and from an overtly transactional intention to an ostensibly more contextual approach most recently in Canada. For these purposes however it is noted that with the exception of the more relational approach in *Kerr v Baranow*,[60] the inquiry into the parties' state of mind refers to the generation of a beneficial interest through a discrete transaction. In general, it fails to comprehend intention as to beneficial ownership that might arise through the more diffuse relational context, limiting the concept of intention — and therefore of beneficial interests — for intimate partners.

II. The Limits of Transaction

The courts' treatment of intention is problematic. Although it attempts to locate an expression of the parties' will as to the beneficial interest, the transactional framing limits its capacity to achieve this goal — with consequences for equality. In three sections, this part exposes the limits of transaction as a frame for the inquiry into property distribution, identifying how the current transactional framing fails to appreciate the implications of gender.

First the transactional focus seeks a discrete expression of intention. Such expression precludes intention to distribute economic resources expressed through the fabric of long-term relations that serve the couple's shared purpose. In response to this limitation, I identify the role that relations might play in ascertaining intention as to property.

Secondly, and more specifically, conclusions courts draw about intention from examining spousal financial management conflict with empirical evidence about spousal financial dealings. I therefore distinguish the empirical evidence about spousal financial management from courts' assumptions to highlight the way in which such assumptions uphold gendered presumptions about the distribution of economic resources within the family.

Thirdly, related to spousal financial management is the question of the effect of the exercise of power on the parties' conduct and on their intention. In other contexts, the application of power through undue influence,[61] unconscionability,[62] and duress[63] for

[59] *Cossey v Bach* [1992] 3 NZLR 612, 628.
[60] *Kerr v Baranow* [2011] 1 SCR 269.
[61] *Johnson v Buttress* (1936) 56 CLR 113.

example, is relevant in determining the true state of the parties' will. But there is no equivalent examination in the trust cases of an ostensible 'intention' in the face of an exercise of power. Again this calls into question whether the existing framing of intention is sufficient to locate accurately the will of the parties — or whether it simply upholds gendered power structures of the family.

A. Relational Intention

When courts search for intention as to the distribution of property, their ideal scenario involves an express statement along the lines described by Hampshire at the outset of this chapter; or at least express 'discussions':

> The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been.[64]

A clear expression of intention has the advantage of demonstrating the parties to be conscious of engaging in the distribution of property. *Draper v Official Trustee in Bankruptcy* and *Turton v Turton* for example, both involved unequivocal expressions of intent as to beneficial title.[65] In *Draper*, Mr Draper's affairs were in a precarious state. Knowing this, when he and his wife sought to buy a property, they planned to acquire it in Ms Draper's sole name. The bank however insisted that the parties own it jointly in law. The parties therefore expressly agreed that Mr Draper would hold his interest on trust for Ms Draper, who was putting forward the purchase money. When Mr Draper subsequently became bankrupt, his trustee claimed Mr Draper's interest. Ms Draper, in response, successfully claimed a half beneficial interest.

Turton involved an express trust over the couple's home. There was no doubt as to Ms Turton's beneficial interest, because of the clear expression of its creation. The question for the court in this case was as to the extent of the beneficial interest— requiring analysis of contribution, rather than intention.

Each of these cases exhibited indicia of transactional exchange — they were communicated formally; they were specific, relating to the property itself in clear terms; they did not rely on tacit assumptions as to the intended outcome or subject matter, rendering complete the obligations and contents of the arrangement.[66] Together these factors show the parties' minds to be *ad idem* as to the distribution of property, demonstrating what Macneil calls 'high levels of recognition of exchange'.[67]

These are exceptional examples however, in the context of intimate partner trusts. For the most part, claims are brought for the very reason that there is no high exchange recognition: the parties do not make statements of intention, so courts must interpret

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[62] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.
[63] *Public Service Employees Credit Union Co-Operative Ltd v Campion* (1984) 75 FLR 131.
[64] *Lloyds Bank Plc v Rosset* [1991] 1 AC 107, 132.
[65] *Draper v Official Trustee in Bankruptcy* [2006] FCAFC 157 ('*Draper*'); *Turton v Turton* [1988] Ch 542 ('*Turton*').
[66] See the indicia of exchange outlined in Macneil, 'Many Futures', above n 1; Ian R Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (Yale University Press, 1980) ('New Social Contract').
[67] Macneil, 'Many Futures', above n 1, 794–7.

their circumstances to locate it. The way courts approach this task however, highlights the boundaries of transactional intention: boundaries that necessarily generally preclude recognition of expressions of intention through other means.

First, the nature of courts' inquiry is contingent, as illustrated through often inconsistent interpretation of equivalent facts.[68] The same factual matrix can in one case be interpreted as sufficiently transactional to support intention, yet in another is too relational to meet the threshold. Occasionally indicia of relational exchange and the accompanying low exchange recognition will nonetheless suffice to evidence intention to distribute the beneficial estate.[69] The inconsistency illustrates the limits of transactional intention as a true expression of the parties' minds, particularly where the inconsistency reflects gender inequality.

Secondly, and likewise generally an expression of women's inequality, some circumstances are rejected altogether as evidencing intention as to property despite the possibility of locating intention within the parties' relational exchange. At the other end of the scale from the express intention in *Draper* and *Turton*, *Burns v Burns*[70] is an example of low exchange recognition and consequently, no requisite intention. Mr Burns purchased the family home in his sole name when Ms Burns was pregnant with the couple's second child. Mr Burns believed the house purchase to be a better application of his wage than renting. Not only was there no express statement of the parties' intention as to the beneficial title, nor were there words or circumstances demonstrating that the parties had intended Ms Burns to hold a beneficial interest. Without an expression of intention focussed on the property as the object of that intention, the Court found that Ms Burns had no beneficial interest.

On Macneil's reckoning, in primary relations such as the intimate relationship in *Burns*, the parties' interactions and the norms of the relationship 'mute participant sensing of exchange motivations and of exchange itself.'[71] Exchange inevitably occurs daily within the relationship, but the parties either do not see it or if they do, do not explicitly recognise it as such. This is because intimate partners

> …may have so internalized contrary motivations and thinking as to be made to feel guilty or otherwise uneasy in recognizing the existence of extensive exchange motivations either in themselves or in other[s]....[72]

Unlike the familialisation of property law that recognises the relationship as the context for property distribution, on a relational approach to trusts the relations themselves comprise exchanges that allocate resources. The nature of primary relations is such that there may be no separately identifiable intention as to the solidarity of relations, and property distribution. The material interconnectedness that

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[68] Compare eg *Muschinski v Dodds* (1985) 160 CLR 583 and *Oxley v Hiscock* [2005] Fam 211 as to the effect of legal advice; *Wirth v Wirth* (1956) 98 CLR 228 and *Baumgartner v Baumgartner* (1987) 164 CLR 137 as to the effect of a dominant partner on the likely intention of the spouse, and see further below.

[69] *Cossey v Bach* [1992] 3 NZLR 612.

[70] *Burns v Burns* [1984] Ch 317 ('*Burns*').

[71] Macneil, 'Many Futures', above n 1, 796.

[72] Ibid (citations omitted). This accords with judicial comment that intimate partners are unlikely to express intention as to property. See eg *Pettitt v Pettitt* [1970] AC 777, 799; *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 417.

is a necessary function of intimate relations means that property distribution might, without conscious expression, necessarily be a function of the solidarity of relations.

> Exchange is simply the transfer mechanism essential to distribution of the fruits of specialization if it is to continue and achieve its efficiencies of production. In dealing with exchange among humans, however, it is easy to overread the word, adding to it conscious recognition of its occurrence and particularly of the gains to be achieved through it.[73]

Thus Mr Burns' decision to acquire a home may demonstrate his intention to advance the family's shared purpose: an intention without conscious expression that it was part of a long-term exchange with Ms Burns resulting in a shared beneficial interest. Instead the search for the indicia of transaction anchors his intention — the exercise of a party's mind that justifies property — to a discrete property acquisition as a personal investment decision of an independent Mr Burns. It ignores, to Ms Burns' detriment, that the property was purchased as an incident of the Burns' relationship.[74]

Considering intention relationally encompasses the possibility of property not as a firm boundary by which the legal titleholder seeks to separate the parties, but as a 'permeable boundary' that instead represents points of connection between the two.[75] A transactional approach invests power in Mr Burns as an individual isolated from Ms Burns, evincing intention as to a sole interest. In contrast, a relational approach comprehends the parties' interdependence. Decisions made ostensibly by Mr Burns (interpreted as revealing a transactional intention) were made with Ms Burns, for the couple and their children, and implicitly recognising Ms Burns' own vulnerability: young, unmarried, vocationally unqualified, and pregnant. Ms Burns was dependent on Mr Burns' income for her material support, and that of their children — and so too was Mr Burns dependent on Ms Burns for bearing and rearing the couple's children and (presumably) caring for his needs. In their day-to-day interactions over time, including through the acquisition of property for their shared purpose the couple revealed their interdependence where their property — the family home — served to connect them.

Such an analysis identifies the sharing central to the trust and shared purpose described in the relational accounts of Macneil[76] and Nedelsky.[77] And as Gardner and Davidson point out, 'familial trust in one another also warrants the law's intervention.'[78]

Between the ends of the exchange spectrum — between the transactional *Turton* and *Draper* at one end and the relational *Burns* at the other — there lies a mixture of circumstances that exhibit indicia of exchange as neither purely transactional nor purely relational. Words — sometimes with promissory intent and sometimes without — may evince a high exchange recognition but sometimes they may not. Generally,

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[73] Macneil, 'Many Futures', above n 1, 794 (citations omitted).
[74] *Burns v Burns* [1984] Ch 317.
[75] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2012), 107.
[76] Macneil, 'New Social Contract', above n 66.
[77] Nedelsky, above n 75. See also Marshall Sahlins, *Stone Age Economics* (Tavistock, 1974).
[78] Simon Gardner and Katharine Davidson, 'The Future of *Stack v Dowden*' (2011) 127 *Law Quarterly Review* 13, 15.

even in the absence of words, formalities will point to high exchange recognition resulting in a beneficial interest. Confusingly however, 'outlier' cases evincing no exchange recognition will also support a beneficial interest. Attracting diverse responses from the courts the cases illustrate the limitations of the transactional approach, which ignores the means and mode of exchange within primary relations.

1. High v Low Exchange Recognition

In some instances, courts are willing to interpret in a promissory sense, words or conduct related to the property itself. These cases signify the higher exchange recognition necessary to evidence a transaction, and consequently the requisite intention. Thus in *Eves v Eves*[79] there was no direct discussion about property. However, Mr Eves had told Ms Eves that the house was to be in his sole name as she was too young at the time of purchase. The Court found that his excuse raised a 'clear inference that there was an understanding between them that she was intended to have some sort of proprietary interest in the house: otherwise no excuse would have been needed.'[80] Thus, and in satisfaction of the requirement of intention, the Court found Mr Eves' had indicated — albeit indirectly — that the house was to be for both of them.

Other decisions have inferred intention from suggestive words, even without promissory implication. In *Grant v Edwards*, Mr Edwards told Ms Grant not to put her name on the title because it would complicate her divorce proceedings.[81] The Court read this as intention to share the beneficial title because it could see no reason why Mr Edwards would need to explain away Ms Grant's interest unless she were intended to have one. The implication is that the parties were consciously making a strategic decision as to the legal title to protect Ms Grant's interest. Although the logic of the argument makes sense, the parties' communication was informal and imprecise, normally indicating more relational exchange. It could equally be argued that the intention arose not from a discrete transaction upon the acquisition of the legal title, but rather from the circumstances of the parties' exchange as a function of their relationship.

It is not only express words that demonstrate high exchange recognition: so too do formalities and specificity of communication. Notably, both *Stack*[82] and *Lankow*[83] involved scrupulous record keeping by the women claimants. This habit evidenced the 'unusual' nature of the exchange. Normally in an intimate context, the parties would be unlikely to adopt more formal and specific — or business-like — modes of tracking and communicating their financial dealings.

By contrast, lacking formality in communication, other claimants were unable to demonstrate intention. *Pettitt,*[84] *Burns*[85] and *Rosset*[86] for example could only offer evidence of minor purchases and the carrying out of spousal 'duties' such as childcare, housework and renovation — all relational indicia of exchange supporting

[79] [1975] 1 WLR 1338.
[80] Ibid 1344.
[81] [1986] Ch 638.
[82] *Stack v Dowden* [2007] 2 AC 432.
[83] *Lankow v Rose* [1995] 1 NZLR 277.
[84] *Pettitt v Pettitt* [1970] AC 777.
[85] *Burns v Burns* [1984] Ch 317.
[86] *Lloyds Bank Plc v Rosset* [1991] 1 AC 107.

social solidarity in the domestic context. In these circumstances there is likely to be low exchange recognition — no acknowledgement that the parties have intended a distribution of the beneficial interest. The search for transactional intention precludes the possibility of property in such cases, denying the potential of the parties' relationship to found an intention as to the beneficial title.

2. Outliers

Confusingly, and highlighting the contingent nature of transactional intention, words that appear to be promissory, indicating intention in a more transactional sense, can also be construed against intention as to the vesting of a property interest because of the relational context. In *Gissing*[87] for example, the couple's communications during their relationship were informal, involving tacit assumptions about property. Mr Gissing's statement when he left, that 'the house was hers' was therefore interpreted by each party according to their differential understanding of their very unspecific arrangements. The statement ostensibly indicated a genuinely expressed intention however the Court found no inference that the parties had intended Ms Gissing to have any interest. Unaware of the future inconsistent application of the law, Lord Reid mused that

> a more sophisticated wife who knew what the law was would probably be able to produce some vague evidence which would enable a sympathetic judge to do justice by finding in her favour. That would not be a very creditable state in which to leave the law.[88]

In *Gissing*, despite words to the contrary, the Court implicitly found the informality of marital communications and their generally non-specific terms represented low exchange recognition: a barrier to a finding of intention for a differential beneficial property distribution.

By contrast, others have successfully claimed a beneficial interest despite ostensibly low exchange recognition. In *Cossey v Bach* a divorced couple reunited when Mr Bach won Lotto.[89] On Ms Cossey's insistence, he used part of his winnings to purchase a home in their joint names. The relationship broke down again after only 14 months and Mr Bach brought an action claiming a full beneficial interest in the property.

The evidence relied upon by the Court regarding intention as to the beneficial interest was clearly relational. The parties' communications as to property were informal, and the arrangements involved no planning. The terms of the acquisition were unstated and non-specific, and the source of the parties' perceived obligations was internal to their relations. Evidencing the tacit assumptions underpinning the exchange, Mr Bach said:

> by putting Pauline's name on the title I felt that it would give her, you know, if things worked out it would have given her an interest in the place at the time … I never

[87] *Gissing v Gissing* [1971] AC 886.
[88] Ibid 897.
[89] [1992] 3 NZLR 612.

> thought of having to maybe give her half or something like that. [I] felt if our relationship didn't work out she would be honest about it and would see it as mine.[90]

The ostensibly low exchange recognition would normally uphold the joint legal title — prompting the question as to why the Court found a beneficial interest in Mr Bach. There were two reasons for this. First, Ms Cossey in evidence said, 'I don't care really about half of everything. All I want is to have a little home back to how I was and how he met me.'[91] The Court took this to mean that Ms Cossey had no intention as to beneficial ownership, justifying Mr Bach's claim for a greater beneficial interest. Her statement can however, be understood relationally. Her intention as to title correlated with her familial relationships, and was a feature of the family's social solidarity manifested through the parties' relational exchange.

Apart from the finding as to Ms Cossey's state of mind as to property, the Court found that Mr Bach 'presented as an impressionable and easily led person who was naive in legal and business matters. The defendant was the more dominant and worldly figure of the two.'[92] Based on Ms Cossey's 'dominance,' the Court read into the couple's dealings that Mr Bach did not intend to afford Ms Cossey a beneficial interest, but that she had overridden his will.

Burns might be a 'classic hard case,'[93] and the law may have moved on since *Rosset*. But the point remains that courts are more likely to uphold the beneficial interest claimed where they have understood the parties to recognise their conduct as exchange, evincing an intention whose terms relate specifically to property in the way of a transaction. In doing so, courts treat the parties as bounded individuals, failing to inquire into the material interdependence at the heart of a relational intention as to the distribution of economic resources. Perhaps as illustrated by the outlier cases in particular, the source of such intention as to property lies not in an expressed or discernable, conscious, discrete, and specific transaction, but rather is to be found within the diffuse and informal communications, understandings, and exchanges of relations themselves. To analyse these exchanges effectively requires attention to spousal financial dealings and in particular, the effects of gender on a couple's financial arrangements.

B. Spousal Financial Dealings

The model legal subject is pervasive in the law, particularly apparent when behaviour requires interpretation and courts turn to market norms '[falling] back on the classical liberal vision of private law when faced with the hard questions.'[94] The same can be said of the intimate partner trust cases in the face of empirical evidence challenging judicial assumptions about couples' financial interactions. Despite the observed familialisation of property,[95] the law fails to give full effect to the particular social

[90] Ibid 633.
[91] Ibid 634.
[92] Ibid 617.
[93] Rebecca Probert, 'Trusts and the Modern Woman — Establishing an Interest in the Family Home' (2001) 13(3) *Child and Family Law Quarterly* 275; John Mee, '*Burns v Burns*: The Villain of the Piece?' in R Probert, J Herring and S Gilmore (eds), *Landmark Cases in Family Law* (Hart Publishing, 2011) 175.
[94] Craig Rotherham, *Proprietary Remedies in Context* (Hart Publishing, 2002), 36.
[95] Hayward, above n 54.

context of intimate relations, in particular ignoring the gender of marriage[96] that profoundly affects spouses' conduct and the choices parties make. Spousal financial dealings — and the consequences for intention as to beneficial interests — can only be properly understood if the particular and gendered context of intimate relations is accounted for.

Gender norms lie at the heart of marriage, the institution that at common law deprived women of full legal personhood and of property.[97] These gendered constraints formed the unalterable foundation of the marriage 'contract', where free will existed — if it existed at all — through the decision of whom to marry.[98] 'Choice' to enter marriage has historically been institutionally circumscribed including by social expectations and women's employment opportunities. As Pateman points out, 'personal circumstances are structured by public factors.'[99] Thus the marriage 'contract' itself, in negotiating terms,[100] constituted a 'not fully articulated act of will'.[101] Despite the MWPA and second-wave feminism, the gendered foundation of marriage remains, as traditional asymmetries in marriage have survived women's 'full legal enfranchisement.'[102] Contemporary data confirm that this remains the case.[103]

The gender of marriage is supported by embedded understandings of gender in structures external to marriage[104] such as the labour market. Thus intimate partners are likely (consciously or unconsciously) to replicate the structures of gender 'generat[ing] a sense of themselves and their partners as mutually caring often [reproducing] gender inequality.'[105] In the face of gender norms beyond the family, even attempts at equality within a relationship often nonetheless result in domestic division of labour that is a gender hierarchy.[106]

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[96] See eg: Carole Burgoyne and Stefanie Sonnenberg, 'Financial Practices in Cohabiting Heterosexual Couples: A Perspective from Economic Psychology' in Joanna Miles and Rebecca Probert (eds), *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (Hart, 2009) 89; Susan Moller Okin, 'Justice and Gender' (1987) 16(1) *Philosophy and Public Affairs* 42; Marilyn French, *Beyond Power: Women Men and Morals* (Jonathan Cape, 1985).

[97] Mary Lyndon Shanley, 'Just Marriage: On the Public Importance of Private Unions' in Alison Diduck (ed), *Marriage and Cohabitation: Regulating Intimacy, Affection and Care* (Ashgate, 2008) 285, 295.

[98] Kate Galloway, 'Marriage and Equality: What's Love Got to Do with It?' (2015) 40(4) *Alternative Law Journal* 225.

[99] Carole Pateman, *The Disorder of Women* (Polity Press, 1989) ('Disorder'), 131.

[100] Jean Bethke Elshtain, 'Introduction: Toward a Theory of the Family' in Jean Bethke Elshtain (ed), *The Family in Political Thought* (University of Massachusetts Press, 1982) 7; Carole Pateman, *The Sexual Contract* (Polity Press, 1988).

[101] Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books, 1989), 123.

[102] Richard W Krouse, 'Patriarchal Liberalism and Beyond: From John Stuart Mill to Harriet Taylor' in Jean Bethke Elshtain (ed), *The Family in Political Thought* (University of Massachusetts Press, 1982) 145, 150.

[103] See eg Carrie Yodanis and Sean Lauer, 'Is Marriage Individualized? What Couples Actually Do' (2014) 6(2) *Journal of Family Theory & Review* 184.

[104] Ibid; Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson, 1985), 12; Pateman, 'Disorder', above n 99.

[105] Lynn Jamieson, 'Intimacy Transformed? A Critical Look at the 'Pure Relationship'' in Alison Diduck (ed), *Marriage and Cohabitation: Regulating Intimacy, Affection and Care* (Ashgate, 2008) 21, 28.

[106] Janeen Baxter et al, 'Gender, Justice and Domestic Work: Life Course Transitions and Perceptions of Fairness' (2013) 4(1) *Longitudinal and Life Course Studies* 78; Shanley, above n 97, 293; Carolyn Vogler, 'Managing Money in Intimate Relationships: Similarities and Differences between Cohabiting

In their financial dealings, couples may behave according to gendered norms rather than exercising 'free will' as it is comprehended in a civic or market sense.[107] This is relevant in the intimate partner trust cases because of courts' close attention to couples' financial management. Courts treat the mode of sharing income and resources, and who pays for what in the household, as strong indicators of intention as to property — but in a transactional, and not in a relational sense. It is therefore only certain modes of resource distribution that will support a finding of intention as to property, and not others.

In contrast to the assumed 'rational' profit motive of the market, money management in intimate relations reflects multiple meanings which are subject to change,[108] and which may or may not correspond to legal interpretations of ownership. This has implications for courts' interpretation of intention as to property.

Courts view a couple's money management practices as evidence of their intention as to property. Thus Mr Burns took responsibility for household payments and the distribution of resources, putting him in a strong position in terms of evidenced intention as to property.[109] Mr Baumgartner's evidence was preferred but as he had taken charge of the mortgage repayments, he was in a relatively strong position to prosecute his central argument: that the property was his.[110] The judge at first instance in *Fowler v Barron*, in finding for Mr Barron, held that Mr Barron had paid all the expenses from his pension, leaving Ms Fowler to keep her income 'to spend as she wished and when she chose.' In fact she paid for her own and their children's expenses.[111]

While a couple's application of funds — their distribution of economic resources — might indicate free will and therefore intention in the market mould, this cannot be assumed. Regardless of ownership of funds, the parties' behaviours may reflect differential control over finances that is a function of their views on relationships in general, and their relationship in particular.[112] This might also be accompanied by maldistribution of economic resources, a feature of marriage relations.[113]

For example: a spouse may only manage money, carrying out decisions already made by the other without playing any role in financial decision-making.[114] In contrast, the spouse with financial control has power to make the decisions about money. If courts look simply to who expends funds, say on the mortgage, this may more be a function of the parties' tacit assumptions about economic roles and less about 'intention' as to ownership.

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and Married Couples' in Joanna Miles and Rebecca Probert (eds), *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (Hart, 2009) 61.

[107] Carole Pateman and Charles Mills, *Contract and Domination* (Polity Press, 2007).

[108] Yodanis and Lauer, above n 103; Sean R Lauer and Carrie Yodanis, 'Individualized Marriage and the Integration of Resources' (2011) 73(3) *Journal of Marriage and Family* 669; Supriya Singh and Clive Morley, 'Gender and Financial Accounts in Marriage' (2011) 47(1) *Journal of Sociology* 3.

[109] *Burns v Burns* [1984] Ch 317.

[110] Baumgartner v Baumgartner (1987) 164 CLR 137.

[111] *Fowler v Barron* [2008] EWCA Civ 377, [9].

[112] Burgoyne and Sonnenberg, above n 96, 100–1.

[113] See eg Jan Pahl, *Money and Marriage* (MacMillan, 1989).

[114] Ibid 53.

There are further questions about intention as evidence of an exercise of will, where decision-making constitutes the exercise of power by one partner over the other in respect of economic resources. The parties in *Baumgartner*[115] for example, pooled their earnings in a joint bank account. Joint ownership of the account might indicate 'objectively' that the parties shared control based on the rights attendant on ownership; yet Mr Baumgartner clearly had sole control.[116] On Ms Baumgartner's evidence, she needed Mr Baumgartner's permission to use the funds to purchase even personal items.[117] It is problematic therefore to examine intention based on the state of the parties' pooled funds in the face of Mr Baumgartner's controlling behaviour.

In other cases, the male partner may not have exercised coercive control, but the parties' circumstances may still leave the woman with little control over financial resources. Thus unlike Ms Baumgartner, Ms Burns[118] earned negligible income and Mr Burns both managed and controlled the household finances. Accordingly he decided to purchase the family home in his name, providing Ms Burns with sufficient housekeeping. She appears not to have been precluded from access to finances like Ms Baumgartner but her lack of financial control and management left her with little basis on which to argue an intention to share the beneficial estate. The Court found Ms Burns' economic contribution to be insignificant, no doubt at least in part due to Mr Burns' financial control. Yet it is feasible that Mr Burns took the role as a consequence of the parties' understanding of gender roles in the home, and Ms Burns' financial disadvantage beyond it. This affords an alternative context for understanding the parties' financial management.

Finally, assumptions of togetherness imposed on intimate partners may themselves not be reflected in the parties' financial management. In *Stack*[119] for example, the parties asserted financial independence through maintaining separate accounts. Their independence lay at the heart of the 'in some ways very unusual facts'[120] validating Ms Dowden's claim: despite the joint legal estate, Ms Dowden used her income to acquire the property pursuant to what was declared an intention that she hold the beneficial title.

This selection of cases reflects the heterogeneity of couples' financial arrangements identified in empirical studies. Spousal financial arrangements reflect 'complex conjugal contracts'. Importantly, they mirror the 'social and economic circumstances of people's lives and their ideas about the nature of marriage.'[121] Without more, it is difficult to ascribe causal connection between intention as to land ownership and a type of financial arrangement. There are too many (relational) factors at play.

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[115] *Baumgartner v Baumgartner* (1987) 164 CLR 137.
[116] For a background on financial abuse, see eg Prue Cameron, 'Relationship Problems and Money: Women Talk About Financial Abuse' (WIRE Women's Information, 2014) <http://www.wire.org.au/wp-content/uploads/2014/08/WIRE-Research-Report_Relationship-Problems-and-Money-Women-talk-about-financial-abuse-August2014.pdf>; Fiona Macdonald, 'An Overview of Economic Abuse' (Good Shepherd Youth and Family Service and Kildonan Uniting Care, 2012) <https://www.goodshepvic.org.au/Assets/Files/Catalyst_Paper_1.pdf>.
[117] *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 437.
[118] *Burns v Burns* [1984] Ch 317.
[119] *Stack v Dowden* [2007] 2 AC 432.
[120] Ibid 442.
[121] Pahl, above n 114, 168.

In the first place, couples tend to define harmonious relationships discursively in terms of sharing and collectivity, potentially over-reporting matters such as resource pooling.[122] Jamieson suggests that couples 'construct a sense of each other as good, mutually caring partners, despite unequal sacrifice for their common good.'[123] This casts new light on those claimants who did not foresee problems with title to property, assuming that the parties would continue to care for each other including through resource sharing.[124] Their intention as to property may well lie within their discursive understanding as to the material interdependence inherent in their relationship.

Even where evidence as to couples' understanding of resource sharing might appear to justify assumptions of collective property, courts deal with the concept variably. In *Cummins*[125] for example, the Court's assumptions of conjugal collectivity resulted in a finding of equal beneficial ownership. In *Burns* however the Court denied that conjugal collectivity held implications for property.[126] Looking at the cases as a whole there is a disjunct between couples' discursive understanding of their money management and property distribution, the 'fact' of the parties' money management arrangements, and courts' reading of the evidence. Consequently, a court's interpretation of collectivity may not in any particular case be a valid proxy for ownership intention. Conversely, where conjugal collectivity speaks to the parties' understanding of and intention as to shared beneficial ownership, the 'objective' indicia demanded by the courts may be lacking.

Further complicating the interpretation of the parties' intention as to beneficial title, by the time of relationship breakdown any discursive definition of relationship as one of sharing is likely to have altered. Certainly it is a feature of many of the cases, notably *Baumgartner*, *Lankow,* and *Pettkus,* that the male partner effectively denied altogether the couple's shared material lives.[127] These cases illustrate that 'while family income may be "theirs" during marriage, if the marriage breaks down it becomes clear it was really "his" all along.'[128] Tacit gendered assumptions about resource distribution are given form as the parties' differential understanding of the nature of their relationship, in hindsight, is played out before the courts. This is an important, yet ignored, aspect of intention as to the beneficial interest.

A second key aspect of relational factors relevant to financial management is that each party's perception of the financial aspects of their relationship is likely to differ from the other — 'communication expressed is not communication received'[129] — and this may be inextricably linked with their emotional entanglement. Like Ms Muschinski[130] and Ms Baumgartner,[131] Ms Anderson's [132]evidence also referred to

[122] Burgoyne and Sonnenberg, above n 96, 104.
[123] Jamieson, above n 105, 28.
[124] See eg *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Oxley v Hiscock* [2005] Fam 211.
[125] *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278.
[126] *Burns v Burns* [1984] Ch 317.
[127] *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Lankow v Rose* [1995] 1 NZLR 277; *Pettkus v Becker* [1980] 2 SCR 834.
[128] Pahl, above n 114, 8, citing J Millar 'The Costs of Marital Breakdown' in R Walker and G Parker (eds) *Money Matters* (Sage, 1988) 99. See also Anne Bottomley, 'Women, Family, and Property: British Songs of Innocence and Experience' in Mavis Maclean and Jacek Kurczewski (eds), *Families, Politics and the Law: Perspectives for East and West Europe* (Clarendon Press, 1994) 261.
[129] Macneil, 'Many Futures', above n 1, 727–8.
[130] *Muschinski v Dodds* (1985) 160 CLR 583, 604.
[131] *Baumgartner v Baumgartner* (1987) 164 CLR 137, 141.

her belief in the couple's future relationship as the basis for her understanding about their financial affairs and the beneficial ownership of their home. In *Stokes v Anderson*, Ms Anderson had discussed marriage with Mr Stokes, including canvassing possible wedding arrangements. In evidence addressing Ms Anderson's payments in relation to the property, she said that: 'I gave him the money because he was to be my husband — I would do anything he asked — it wasn't a loan.'[133] Mr Stokes was successful, however, in his appeal against Ms Anderson's award of a half interest in the house held in his sole name in law. Ms Anderson instead was awarded a one half interest in the half interest Mr Stokes' acquired from his ex-wife using funds contributed by Ms Anderson. Ms Anderson's understanding of the implications of her relationship and how the couple managed their money was quite different from the way in which Mr Stokes perceived it. Ultimately, the Court accepted Mr Stokes' account, although conceding a smaller interest to Ms Anderson.

In each of these cases the women claimants understood an intention as to a shared beneficial interest in the context of their expectation of marriage: claims their partners contested. In each case the court resolved the differential understandings in the men's favour, preferring their evidence. By contrast, remembering Pahl's observation that there is 'his marriage and her marriage',[134] it is possible that the different accounts arise honestly as different perspectives on the same issue. The difference is perhaps inevitable in primary relations where communication is informal and reliant on tacit agreement of unspecified obligations and expectations.[135]

Further, and despite courts dismissing its relevance, marriage and contemplation of marriage may be important in understanding couples' intention as to property distribution.[136] Intimate partners are likely to behave based on their feelings of responsibility to the relationship — their source of obligation is derived internally, not driven through external norms.[137] Eekelaar and Maclean in their survey about attitudes to marriage found that some were motivated in their financial dealings by duty, some by what they described as a 'source obligation' embedded within the relationship and that built over time, and others based on ethical principles of love and care.[138] Similarly Yodanis and Lauer found that pooling money indicates togetherness and trust in a relationship,[139] while Singh and Morley point out that 'it is togetherness rather than equality that is at the centre of marriage.'[140] Money is pooled not as a representation of intention as to beneficial title, but is a sign of good faith in the relationship and representative of intimacy as the source of the parties' obligations. This may also be reflected in intention as to property sharing. There is a link between relationship and the allocation of economic resources, but not necessarily in the way construed by courts.

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[132] *Stokes v Anderson* [1991] 1 FLR 391; 1991 WL 837739, 4.
[133] Ibid, 5.
[134] Pahl, above n 114, 5.
[135] Macneil, 'Many Futures', above n 1.
[136] See eg Pahl, above n 114, 168.
[137] Macneil, 'Many Futures', above n 1, 785.
[138] John Eekelaar and Mavis Maclean, 'Marriage and the Moral Bases of Personal Relationships' in Alison Diduck (ed), *Marriage and Cohabitation: Regulating Intimacy, Affection and Care* (Ashgate, 2008) 91.
[139] Yodanis and Lauer, above n 103.
[140] Singh and Morley, above n 108, 9.

In addition to internalised norms of sharing in financial arrangements, Eekelaar and Maclean found that generally survey respondents felt uncomfortable about enforcing rights.[141] This is perhaps symptomatic of the wider taboo on discussing financial matters within intimate relationships,[142] a feature of relational exchange[143] and one acknowledged by the courts.

> During happy days of a relationship, discussion of property and of interests in it will rarely be ventured, either because it is regarded as embarrassing or unnecessary or divisive or simply unromantic.[144]

Despite acknowledging this, courts continue to reason about intention contrary to what is known about domestic financial dealings — in particular the great variability in drivers of money management systems, and the fundamental difference between domestic economic decision-making and that of the market. Instead courts imply intention as to property by scrutinising a couple's financial affairs drawing assumptions that deny the expression of relational norms. They rely on presumptions of communication of intention imported from market-based contract and property where the assumed external motivation of legal enforceability promotes adherence to discrete promises. Thus the requisite intention attaches to the transactional distribution of beneficial interest according to the norms of the rational market actor.

Importantly transactional intention fails to comprehend the source of the parties' distributive decisions. Transaction, after all, is motivated externally to the parties' relations. Discrete exchanges comprise distribution based on the assumption of rational market actors. By contrast, claimants in the intimate partner cases appear frequently to distribute economic resources, including property, because of their feelings towards their partner, and based upon tacit assumptions about their relationship. It might be argued that rather than implied rational and objective market imperatives driving intention as to property, an ignored source of intention as to the beneficial interest lies within exchanges in furtherance of the parties' relations themselves.

C. Power

In addition to the discursive power of gender roles informing couples' money management, power might exist as domination within the intimate relationship.[145] Violence[146] and coercion[147] interrupt not only assumptions as to transactional intention, but may also inform relational dynamics. Either way, examining the will of the parties requires attention to the exercise of power.

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[141] Eekelaar and Maclean, above n 138, 111.
[142] Vogler, above n 103, 64.
[143] Which tend to rest on tacit assumptions: Macneil, 'Many Futures', above n 1, 772.
[144] *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 417. See also Waite LJ in *Midland Bank Plc v Cooke* (1995) 27 HLR 733, 746 — also cited in eg *Jones v Kernott* [2010] 1 WLR 2401 and *Oxley v Hiscock* [2005] Fam 211.
[145] Sarmas has canvassed the 'hidden' issue of violence in equity and trusts in Lisa Sarmas, 'Uncovering Issues of Sexual Violence in Equity and Trusts Law' (1995) 6 *Legal Education Review* 207. See also Regina Graycar, 'Telling Tales: Legal Stories About Violence against Women' (1996) 7(1) *Australian Feminist Law Journal* 79.
[146] *Peter v Beblow* [1993] 1 SCR 980; *Eves v Eves* [1975] 1 WLR 1338; *Murdoch v Murdoch* [1975] 1 SCR 423.
[147] *Midland Bank Plc v Cooke* (1995) 27 HLR 733.

Violence and oppression is a recurrent theme in the cases surveyed.[148] Mr Eves for example left the matrimonial home locking the two large rooms leaving Ms Eves and their two children access to only one room, the bathroom and the kitchen.[149] Mr Peter was an alcoholic who physically abused his partner from the birth of their first child.[150] Ms Pettkus left Mr Becker alleging she had been 'beaten and otherwise abused,'[151] and Mr York 'had a controlling nature and … a proclivity for violence.'[152] In *Murdoch v Murdoch*, 'there was a physical clash that resulted in the hospitalization of the wife'[153] — a fact only mentioned, in this 'curiously detached and dispassionate manner,'[154] in the dissenting appellate judgment. Mentioned only in the lower court, Ms Dowden had a restraining order against Mr Stack, and an undertaking from him that he would not molest her or their children.[155] Ms Huen left the relationship because of violence,[156] and in *Walker v Hall* there was evidence of violence but no finding of fact by the trial judge.[157] Likewise, Ms Cossey had a domestic violence order against Mr Bach.[158]

In some cases, such as *Pettkus*, the relationship was violent for a long time. In others, such as *Stack*, the facts do not reveal whether there was a history of abuse. It is difficult to use statistics on the prevalence of domestic violence to generalise about a causative link between violence during relationship breakdown and a history of oppressive or violent behaviour.[159] Nonetheless the prevalence of domestic violence generally in society[160] and the pervasiveness of violence and ostensibly coercive or dominating behaviours in these cases must at least cast doubt on the integrity of a finding as to the state of the parties' minds that omits to inquire about it.

In the same way that consent in contract might be vitiated through oppression, so too must violence inevitably at least inform an assessment of the parties' minds in terms of property. As Graycar points out, the fact that the law's categories do not expect to fit violence within their parameters requires us to 'dismantle and rearrange the

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[148] Of the 40 cases analysed in this thesis, 16 indicate violence or domineering behaviour. For some, this is only evident through comments in the court below. Others contain an indication rather than a direct finding of violence. A further 10 cases involve comments that the relationship had 'deteriorated' from which I infer that there may be circumstances of power relevant to the court's inquiry. Situations of adultery and where there was otherwise a significant power imbalance (such as a substantial age difference) likewise may indicate circumstances warranting judicial investigation.
[149] *Eves v Eves* [1975] 1 WLR 1338.
[150] *Peter v Beblow* [1993] 1 SCR 980.
[151] *Pettkus v Becker* [1980] 2 SCR 834.
[152] *York v York* [2015] EWCA Civ 72, [10].
[153] [1975] 1 SCR 423, 443.
[154] Graycar, above n 145, 86.
[155] *Stack v Dowden* [2005] EWCA Civ 857.
[156] *Sui Mei Huen v Official Receiver for and on Behalf of the Official Trustee in Bankruptcy* [2008] FCAFC 117.
[157] [1984] Fam Law 21.
[158] *Cossey v Bach* [1992] 3 NZLR 612.
[159] See eg Kelsey Hegarty and Gwenneth Roberts, 'How Common Is Domestic Violence against Women? The Definition of Partner Abuse in Prevalence Studies' (1998) 22(1) *Australian and New Zealand Journal of Public Health* 49.
[160] For a contemporary Australian overview see Janet Phillips and Penny Vandenbroek, 'Domestic, Family and Sexual Violence in Australia: An Overview of the Issues' (Australian Parliamentary Library, 14 October 2014 2014). <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/ViolenceAust>.

framework within which those stories are told.'[161] Such an approach involves considering violence and oppression as factors that might vitiate an ostensible intention. This would uphold the underlying purpose of the inquiry to establish the exercise of the parties' free will.

While not all decisions disclose physical violence, in many cases the man's insistence on how title was to be held — and his ability to carry out his intention to acquire their home in his own name — might indicate dominating behaviour. Thus despite Ms Baumgartner's pleas, Mr Baumgartner said that the property could not be in joint names because they were de factos only, and that this was unacceptable to the lender.[162] The power dynamic left Ms Baumgartner in no position to counter Mr Baumgartner's decision as to title.

In some cases however, the court may recognise the necessary expression of intention despite an ostensible exercise of power. In similar circumstances to *Baumgartner*, Mr Eves[163] told his partner that she was not entitled to legal title because she was at the time under the age of 21. However, in contrast to *Baumgartner*, the Court found that Mr Eves' words 'amounted to a recognition by him that, in all fairness, she was entitled to a share in the house, equivalent in some way to a declaration of trust.'[164] Although the outcome in this case may be just, ignoring the exercise of power against Ms Eves precludes a full explanation of the requisite intention.

It is possible however for the court to read intention differently in the face of an exercise of power or dominance. In *Hepworth v Hepworth,* despite Mr Hepworth's request to hold jointly, Ms Hepworth 'refused. She absolutely refused. There was no other conversation.'[165] The property was acquired in Ms Hepworth's sole name using pooled funds, and Mr Hepworth provided a third party guarantee. The Court found the wife to have a 'dominant personality' whereas he 'did not have the quick intelligence of the wife.'[166] There was no explicit finding of oppression, but her 'dominance' opened an alternative construction of intention. The Court found it impossible to believe that Mr Hepworth would have intended to give away the beneficial title. In contrast to the absent analysis of dominance in *Baumgartner*, the Court ordered in Mr Hepworth's favour.

In each of these three cases, one spouse refused to share title with their partner. The legal titleholder was sufficiently dominant to ensure that the title was held in their name alone, despite their partner's express wishes to the contrary. In one case the man's promise indicated he knew the woman was entitled to a beneficial interest; in another, the man's comments implied no intention; and in the third, the Court made a value judgment about the man's likely intention based on its impressions of his wife. Power only became relevant to the court when it appeared to be exercised by a woman against a man, in *Hepworth*. That quite different conclusions arise from similar facts may well indicate the role of gender in how the law interprets the exercise of power on the parties' minds.

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[161] Graycar, above n 145, 80.
[162] *Baumgartner v Baumgartner* (1987) 164 CLR 137, 140.
[163] *Eves v Eves* [1975] 1 WLR 1338.
[164] Ibid.
[165] *Hepworth v Hepworth* (1963) 110 CLR 309, 315. Ms Cossey was similarly described as 'dominant', and failed in her application: *Cossey v Bach* [1992] 3 NZLR 612, 617.
[166] Ibid 312.

Courts' failure to understand the role of power is illustrated also in their expectation that formality of communication will resolve questions of intention. Legal advice is such an example, and has been a factor relevant in ascertaining the parties' 'true' intention. In *Muschinski*,[167] Mr Dodds had suggested Ms Muschinski see a solicitor about her concerns about co-ownership. The solicitor 'at first strongly opposed the suggestion, but changed his mind, apparently because he became satisfied with the arrangements proposed by [Mr Dodds].'[168] It appears that the solicitor advised Ms Muschinski after meeting privately with Mr Dodds and having satisfied himself with the terms of Mr Dodds' proposal.[169] The solicitor apparently acted for both parties, a factor unremarked upon in court but which raises obvious questions as to the independence of the advice, and the influence of Mr Dodds.

Mr Dodds was of course, entitled to seek protection for his future investment. However, making Mr Dodds a joint owner in advance of his contribution left Ms Muschinski exposed. She had no protection for her significant up-front financial investment. That the advice proffered expressly aimed to achieve Mr Dodds' goals without pointing out the risks to Ms Muschinski's investment, is troubling. Further, the mere fact of legal advice does not necessarily support an argument that Ms Muschinski intended Mr Dodds to have a beneficial interest in half the property. The relationship was 'somewhat volatile', 'not always placid', and the parties were 'separated on a number of occasions'.[170] This is the context within which Ms Muschinski found herself desiring to improve the relationship, in the face of an insistent partner and a solicitor who seems already to have accepted her partner's submission. She was ostensibly at a disadvantage in terms of power.

To illustrate again the contingency of determining intention through transactional means, in a similar display of formality Ms Oxley took advice form the couple's solicitor. Unlike Ms Muschinski, she was advised to protect her interest but chose not to, responding, 'I feel I know Mr Hiscock well enough not to need written legal protection in this matter.'[171] In both cases the taboo of intimate partners discussing financial matters and the tacit assumptions of primary relations might explain the women's choices — on the one hand to ignore the solicitor's advice, and on the other to go along with it. Ms Oxley's claim was ultimately successful, and the issue of legal advice was not determinative. If however, following *Muschinski*, taking legal advice evidences intention then Ms Oxley's rejection of legal advice should also presumably have defeated her claim.

In light of the likely inadequacy of legal advice to support a 'true' intention, other formalities may be similarly suspect in a relational context. Baroness Hale observed that land title forms providing for a trust nomination would resolve issues of intention concerning beneficial interests.[172] Both legal advice and documentary formalities, while potentially valuable, on their own misapprehend the context of exchange within an intimate relationship and the likelihood that intention is not expressed at all.

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[167] (1985) 160 CLR 583.
[168] Ibid 592.
[169] See evidence cited in *Muschinski v Dodds* (1982) 8 Fam LR 622, 626.
[170] *Muschinski v Dodds* (1985) 160 CLR 583, 588, 600, 601.
[171] *Oxley v Hiscock* [2005] Fam 211.
[172] *Stack v Dowden* [2007] 2 AC 432, 453. Mentioned also in *Springette v Defoe* [1992] 2 FLR 388; 1992 WL 895079, 6.

Viewing the parties as bounded individuals fails to comprehend the role of power in relationships and the effect of power on the exercise of the parties' free will. The problem is not the disclosure of the interest necessarily but in discerning the parties' will where that is likely to be informed by a range of social and emotional factors themselves determined according to the exercise of gendered power relations.

Conclusion

In claims concerning the distribution of property, intention serves the important purpose of evidencing the meeting of minds of the parties. Intention represents the expression of individual will that justifies courts' intervention to declare the distribution of property. Thus in locating the indicia of exchange that support property, including when searching for the parties' intention, courts focus on discrete transactions representing exchange between separate individuals.

Courts themselves acknowledge that intimate partners are unlikely to express their intention as to property clearly and unequivocally, in the manner of commercial actors. This reflects the fact of a couple's primary relations: the relational context of intimate partners' exchange over time frequently involves 'low exchange recognition'[173] and consequently little if any expressed intention. However, it would be a mistake to assume that low exchange recognition signals a *lack* of intention. It simply means that intention is unlikely to be found within transactional indicia such as direct, precise, and specific communication. Instead, intention may occur through informal, imprecise, and non-specific communications relying on the parties' tacit assumptions.

In the absence of formal and specific statements, but with variable outcomes, courts use a number of proxies to interpret parties' behaviours as indicative of intention. These proxies however are imprecise, reflecting the law's general preference for transaction and its concomitant inability to encompass the indicia of relational exchange. This transactionism has consequences for equality, particularly in the face of gendered assumptions embedded within the law itself.

The cases discussed in this chapter illustrate the role gender plays in courts' understanding of intimate relations and the implications of that understanding for intention and therefore property. Violence is hidden, and couples' behaviours are interpreted through the lens of market behaviours. Although the familialisation approach of relying on discretion to deal with evidential matters — and viewing the domestic context of the parties' claims — goes some way to promoting equality in distribution, it does not address the structural issues of gender and power.

Re-reading intention relationally overcomes the constraints of the liberal context of property dependent on the atomised liberal subject of the law. The element of intention can be retained, upholding the structure of property law and its norms, but intimate relationships are likewise accommodated through a shift in the framing of intention from that of a transaction to relations. Reframing requires at the very least understanding the possibility of gendered norms in couples' financial arrangements, and the implications of power for the exercise of intention. To do so might raise the

[173] Macneil, 'Many Futures', above n 1, 794–7.

possibility that instead of the discrete intention of an individual, the parties might develop, hold, and express an intention tacitly and within the norms of their relations.

Intention is, of course, only one of the elements essential to demonstrate distribution of a beneficial estate. The other, contribution, is however also limited by the constraints of transaction in the intimate partner context. The next chapter analyses the role of contribution in intimate partner trust cases. Like intention, contribution is construed transactionally, raising questions about the capacity for the law to achieve substantive equality. Also like intention, contribution can be understood relationally and the next chapter explains how this might be achieved. Together these two chapters identify how the courts frame the two principal elements of the law of intimate partner trusts, and also how they might be reinterpreted in the interests of equality.

CHAPTER 4 — CONTRIBUTION

> Rarely, if ever, has contract been able to free itself entirely from non-economic exchange impedimenta [sic], such as social exchange (barely semi-specific in nature), the motivations of kinship, of friendship, of altruism, of hatred, of distrust, of the host of psychological and social phenomena not lending themselves to the measurability or monetization of economic exchange. Moreover, the more ongoing the relation, the more diffuse and non-transactional become the economic exchanges involved.[1]

This chapter challenges the role of contribution within the normative framework of property in intimate partner trusts. As with intention, contribution serves the liberal commitment of upholding the individual's autonomy, justifying a claim to property. The courts' approach to identifying contribution sufficient to support a beneficial interest reflects their approach to intention — it is a transactional approach.

While it is possible — even likely — that many intimate partners each contribute directly to the acquisition of property achieved through mutual communication and 'measured reciprocity',[2] frequently this is not the case. We know this through the claims arguing for a beneficial interest, each of which challenges the legal title. In contrast to a transactional exchange familiar to the law of conveyancing, the trust claimants tend to contribute in a way either that fails to resonate sufficiently in transaction, or is perceived in transactional terms despite its quite different relational context. The effect of both these characterisations is a tendency by courts to exclude or to limit in particular women's contribution to the household economy, entrenching a gender bias within the distribution of property.

This chapter identifies how courts' treatment of contribution is transactional, why this is an inadequate explanation of spousal contributions within the household, and why such contributions might validly support a beneficial interest. In the interests of gender equality in beneficial property distribution, this chapter suggests that the law should prioritise relations.[3] To that end it points to a way in which the law might conceive of contributions in terms of the parties' relations in answer to the inequality of transactionism.

The first part of this chapter analyses the four jurisdictions' treatment of contribution, analogising from Macneil's relational contract theory. This 'determine[s] what is structuring the relations that have generated the problem'[4] of inequality. As with Chapter Three, Macneil's framework affords a means by which to perceive the courts' approach — this time to contribution — as transactional. Further, appreciating exchange along a spectrum from transactional to relational provides the language to

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[1] Ian R Macneil, 'The Many Futures of Contracts' (1974) 47 *Southern California Law Review* 691 ('Many Futures'), 732–3.
[2] As used by Macneil for example, in Ian R Macneil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law' (1978) 72 *Northwestern University Law Review* 854, 858.
[3] See eg Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2012) ('Law's Relations').
[4] Ibid 236.

describe the parties' contributions — their behaviours that provide key evidence in the cases — as relational exchange. This part elucidates how property law's adherence to liberal principles grounded in individualism and market exchange, as well as the invocation of the public/private divide, supports the law's transactional approach.

The second part of the chapter articulates the inequality that arises from transactionism. First it establishes the gendered nature of household contributions. It demonstrates that to ignore gender in considering contribution will inevitably skew property distribution in favour of the party better equipped to demonstrate a transactional engagement with property. Secondly, it establishes intimate relations as a site of economic activity, dispelling any assumptions that there is no exchange within a relationship. Finally, it distinguishes contribution in furtherance of *relations* from alternative (re)distributive mechanisms involving contribution as a feature of *relationships*, or status.

I. Framing Contribution

Trusts law frames contribution principally in terms of a nexus between the acquirer and the property in dispute.

> Where the plaintiff can demonstrate a *link or causal connection* between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour.[5]

Contribution thus serves as an expression of intention evidencing the parties' state of mind as to distribution of property between them. The closer it is to the acquisition of the legal estate, the more likely is contribution to reflect the intention required to support a claim for a beneficial interest. The more measurable, finite and specific contribution is in relation to the acquisition,[6] the more readily the courts can construe it in transactional terms that align with the general premise of property law — and thus uphold the claim for beneficial interest.

This part analyses the courts' approach to contribution in two respects. First it examines capital contributions as the benchmark of transactionism in property law, demonstrating why courts traditionally preferred capital expenditure as founding a property interest. Secondly, it explores non-capital financial contribution and labour along Macneil's exchange spectrum from more transactional to more relational. It demonstrates that successful claims largely involve contributions that can be construed in transactional terms, excluding those that are characterised as more relational. In focussing on transactions, the law necessarily fails to recognise the diversity of contribution in property terms, and in doing so generally reinforces the unequal treatment of women both within their intimate relationship, and more widely.

A. Capital

[5] *Kerr v Baranow* [2011] 1 SCR 269, 300 (emphasis added).
[6] See Macneil, 'Many Futures' above n 1.

Capital is the preferred starting point for analysing the beneficial interest because it represents what Macneil refers to as a 'given exchange'.[7] It mimics the market transaction and as such is easily identifiable as economic contribution. It is not surprising that in general — with the notable exception of *Cummins*[8] — despite holding in law as joint tenants, where the parties provide purchase money in unequal shares equity will find a beneficial tenancy in common proportionate to their contribution.[9] It would go against conscience to uphold the joint legal title if the parties had not in fact contributed equally.

The capital contribution without corresponding legal title offers the greatest chance of representing the discrete reciprocity that lies at the transactional heart of the beneficial interest. Suspicious of gifts[10] and reflecting the assumption that a payment must attract a directly reciprocal benefit, equity is concerned to explain what Canadian courts call a 'gratuitous transfer'.[11]

The legal mechanism that historically has accounted for capital contribution is the resulting trust. In the absence of a gift and reflecting the need for a quid pro quo, the beneficial title is presumed to remain with the party contributing capital, in proportion to their contribution. Capital is effectively exchanged for the beneficial interest. The resulting trust is the most direct route from the starting point of a rebuttable presumption of a beneficial interest.

Alternatively, for the intimate relationship — more particularly, in the case of de jure marriage — the gratuitous transfer might traditionally have been upheld through the counter-presumption of advancement, leaving the equitable estate at home with the legal title.[12] The presumption of advancement rationalised the transfer of the legal and beneficial interest based not on exchange, but as a corrective to married women's financial dependence,[13] or based on husbandly duty.[14]

The outcome of the leading early modern English cases starting in the 1970s was founded instead on the constructive trust. There was in these cases extensive judicial discussion reflecting the historically greater potential for the resulting trust in circumstances involving intimate partners. Thus Lord Upjohn confirmed that the parties' contest was far more likely to be resolved through a resulting trust than through contract.[15] Notably both of these mechanisms suppose a discrete transaction: contribution of capital in exchange for a proportionate interest in property.

In these early cases the constructive trust was a relatively untried basis for a property distribution, but the boundaries and role of contribution were clear: the law required a

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[7] Ian R Macneil, 'Exchange Revisited: Individual Utility and Social Solidarity' (1986) 96(3) *Ethics* 567, 585.
[8] *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278, discussed below.
[9] See eg *Bull v Bull* [1955] 1 QB 234; *Calverley v Green* (1984) 155 CLR 242; *Pettitt v Pettitt* [1970] AC 777.
[10] Tsun Hang Tey, 'Reforming the Presumption of Advancement' (2008) 82 *Australian Law Journal* 40, 40.
[11] See eg *Kerr v Baranow* [2011] 1 SCR 269.
[12] *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278, 298.
[13] *Pettitt v Pettitt* [1970] AC 777.
[14] See eg *Murless v Franklin* (1818) 36 ER 278.
[15] *Pettitt v Pettitt* [1970] AC 777, 814, reiterated in *Gissing v Gissing* [1971] AC 886, 896.

'substantial contribution to the purchase'.[16] Such contribution sits on the transactional end of Macneil's spectrum[17] where a transaction is that which is 'sensibly seen separately from events preceding and following it.'[18] Capital contribution generally bears close temporal connection to the acquisition of the legal estate, marking out a clear commencement and duration. Capital is also a discretely planned contribution, whose value is specifically measurable with reference to the transaction itself. Further, capital contribution need not indicate the parties' interdependence and the expectation of future cooperation — both of which are key features of the more relational exchange. These characteristics contrast, for example, with the contribution of labour over the life of a relationship. While measurable of itself, the extent and continuation of labour is dependent upon the vagaries of the relationship over time and is distant from the acquisition of the legal estate.

The requirement for capital to be measurable directly in terms of the acquisition was affirmed in England in *Grant v Edwards*, where the Court found that there was no 'direct provision of part of the purchase price' and therefore no resulting trust.[19] The resulting trust was argued also in *Walker v Hall*,[20] and *Oxley v Hiscock*.[21] Eventually however *Stack v Dowden* laid to rest its role in England in the context of intimate partners.[22] By this stage also the presumption of advancement had long been considered unsuitable for resolving property disputes,[23] and the constructive trust had become the preferred means of ascertaining beneficial interests.

The evolution from resulting to constructive trusts reframed the contribution sufficient to support a beneficial interest. As *Stack* demonstrated, the contemporary English approach allows a more nuanced and complete investigation of the ways in which spouses might support the acquisition of property through contribution, rather than the more limited accounting of capital. In contrast though to the direct and overtly transactional nexus between capital and property, as Arden J pointed out, the critical point is not the amount of the parties' contributions. Instead, 'the court has to have regard to all the circumstances which may throw light on the parties' intentions as regards the ownership of the property.'[24]

Like the English courts, the Canadian courts have rejected the resulting trust as a means of dealing with differential capital contributions in intimate relationships. The Canadian iteration of the resulting trust in intimate relationships had taken the form of the 'peculiarly Canadian invention'[25] of a common intention resulting trust. While *Pettkus v Becker*[26] favoured unjust enrichment for dealing with intimate partner

[16] *Gissing v Gissing* [1971] AC 886, 902.
[17] Articulated in Macneil, 'Many Futures', above n 1. Further developed in Ian R Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (Yale University Press, 1980) ('The New Social Contract') and summarised in Ian R Macneil, 'Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a 'Rich Classificatory Apparatus'' (1981) 75 *Northwestern University Law Review* 1018 ('Economic Analysis').
[18] Macneil, 'Many Futures', above n 1, 693.
[19] [1986] Ch 638, 646.
[20] [1984] Fam Law 21.
[21] [2005] Fam 211.
[22] [2007] 2 AC 432.
[23] Ibid 442, citing *Pettitt v Pettitt* [1970] AC 777.
[24] *Fowler v Barron* [2008] EWCA Civ 377, [41].
[25] *Kerr v Baranow* [2011] 1 SCR 269, 285.
[26] [1980] 2 SCR 834.

claims for a beneficial interest, more recently in *Kerr v Baranow*[27] Ms Kerr claimed a beneficial interest on the grounds of both a resulting trust and unjust enrichment. The Court therefore sought to resolve the role of the common intention resulting trust.

Although the Court decisively rejected any further role for the common intention resulting trust,[28] the judgment confirmed the link between intention and contribution. Before *Kerr*, capital contribution to acquiring property that was not reflected in the legal title would generally invoke the resulting trust analysis. But, using the common intention resulting trust framework, a beneficial interest would be found only where the fact of the contribution represented an intention that the property be held beneficially in proportion with the parties' contributions.[29] In contrast to the general resulting trust approach applied other than to intimate relationships, this did not establish a rebuttable presumption of differential beneficial ownership. Instead it allowed the possibility to prove an intention to hold differentially. *Kerr* however, confirmed the doctrine of unjust enrichment as the preferred approach to capital expenditure. Capital is thus treated similarly to other types of contribution.

As in England, Australian courts have traditionally aligned differential capital contributions with a proportionate beneficial interest.[30] The presumption of resulting trust is rebuttable, but nonetheless reflects the direct connection between an otherwise unaccounted for payment and property: a presumption of direct reciprocity indicative of transaction.

The presumption was however, successfully rebutted in *Muschinski v Dodds*[31] where Ms Muschinski had used her capital to acquire property in joint names upon Mr Dodds' assurances to contribute later. The question was whether she held a beneficial interest greater than her one-half legal interest. The Court sought to account for her otherwise 'gratuitous transfer' by determining what was expected as reciprocation for the capital payment.

Gibbs CJ explored the parties' liability under the contract for purchase of the land. It was this initial arrangement — and its consequential potential shared liability — that indicated the intention that the beneficial interest was at home with the legal title. He searched for an intention that Ms Muschinski forgive Mr Dodds' his future contribution, but found none. Accordingly he held that Ms Muschinski was entitled to compensation to the extent that she had paid more than half the purchase money, but not to a greater beneficial interest. On this analysis there is no relationship between her differential capital contribution and property.

In contrast, Brennan J found the nature of the parties' initial transaction to be a gift upon assurances — providing a reason for an otherwise 'gratuitous transfer'. While not a contract, it was an expression of the donor's intention that rebutted the presumption of resulting trust. In considering Mr Dodds' assurances and reflecting the indicia of relational exchange,[32] Brennan J looked at the 'lack of specificity as to the

[27] [2011] 1 SCR 269.
[28] Ibid 286, 289.
[29] Ibid 288, citing *Murdoch v Murdoch* [1975] 1 SCR 423.
[30] *Calverley v Green* (1984) 155 CLR 242.
[31] (1985) 160 CLR 583.
[32] Notably relating to the lack of 'measurement and specificity': see eg Macneil, 'Economic Analysis', above n 17, 1028–9.

[renovation] work to be done [by Mr Dodds as part of their arrangement], the standard to which it was to be done, and particularly the time within which it was to be done' and found that Mr Dodds would not forfeit his beneficial interest if he failed to fulfil the assurances. The gift of property from her to him was conditional only upon his *giving* of the assurance: not upon its fulfilment. Instead of a differential beneficial interest, Brennan J found that Ms Muschinski had merely a compensable interest. Her capital contribution did not support a property interest but was instead exchanged for an assurance alone.

While *Muschinski* upheld a rebuttal of the presumption of resulting trust, *Cummins*[33] appeared to exclude the trust in any guise. Mr and Ms Cummins originally purchased land jointly, with Ms Cummins contributing 75 per cent of the purchase price. The couple then used the proceeds of a joint bank account to pay for construction of a residence. In 1987 Mr Cummins transferred his one half interest in the property to Ms Cummins without evidence of payment of the stated consideration. His trustee in bankruptcy subsequently sought to recover his original half interest on the basis that the 1987 transfer was made to avoid creditors. The Court was to decide on the extent to which the home belonged to Mr Cummins (and therefore his trustee in bankruptcy) and Ms Cummins, who had been since 1987 the sole legal owner.

Ms Cummins unsuccessfully sought the application of the presumption of resulting trust so that her beneficial interest would reflect her initial capital contribution. The presumption was, however, dispensed with in favour of a declaration of an inference of joint ownership. The Court rejected the suggestion that spousal capital contribution could generate a property interest at all, because 'it is often a purely accidental circumstance whether money of the husband or of the wife is actually used to pay the purchase price to the vendor.' [34]

The Court thus reframed the connection between capital contribution and property. Where the foundation for contribution is direct reciprocity satisfying the liberal foundations of property, the *Cummins* approach is not concerned with a discrete quid pro quo. Instead it assumes a unitary relationship entity whose opaque internal mechanisms are of no concern to the court. Ms Cummins' initial capital payment thus appears to have no particular standing as against any other type of contribution — whether money or labour. In short, *Cummins* appears to prevent even the possibility of claiming a beneficial interest based on differential capital contribution, founding the beneficial interest solely on assumptions about marriage.[35]

Despite not having resorted to the resulting trust analysis,[36] the Court in *Cummins* nonetheless justified its position apparently rebutting a presumption of resulting trust. On either approach, Ms Cummins' specific (capital) contribution was irrelevant. It was instead material that 'title was taken in the joint name of the spouses.'[37] The right of survivorship was a valid incidence of marriage, where the parties would 'wish the

[33] *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278.
[34] Ibid 302, quoting Scott, *The Law of Trusts* (4th ed, 1989), 239.
[35] This is addressed further below.
[36] *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278, 303. See also analysis in Lisa Sarmas, 'Trusts, Third Parties and the Family Home: Six Years since *Cummins* and Confusion Still Reigns' (2012) 36 *Melbourne University Law Review* 216.
[37] *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278, 303.

assets to be enjoyed by the survivor.'[38] There was no imperative for equity to intervene to sever the joint tenancy by recognising a differential beneficial interest. Although this might answer 'one of the two concerns of equity…which founds a presumed intention in favour of tenancy in common'[39] it does not rebut the presumption of resulting trust. As to the issue of the 'disproportion between the quantum of beneficial ownership and the contribution to the acquisition,' the Court cited the 'range of financial considerations and accidental circumstances in the matrimonial relationship.'[40]

Although avoiding a resulting trust analysis, and for that matter a constructive trust analysis, more positively the Court opened the way for considering contribution beyond capital. Although Ms Cummins' claim was based on capital contribution the judgment refers to 'contribution by money or labour to the various expenses of the household'[41] as a broader category of contribution presumed to support a beneficial interest. Any type of contribution then, appears to generate an inference of equal interests, whether reflected in the legal title or not. The fact of contribution however, is assumed.

The *Cummins* approach deviates from a traditional understanding of resulting trusts in two key, but somewhat contradictory, ways. First, spousal capital contribution was not accounted for as a gratuitous transfer that might entitle the grantor to a proportionate beneficial interest. Such an approach contradicts the assumption that capital contribution represents a quid pro quo for property, or that it must otherwise be accounted for in terms of some transaction recognised by the law. However, the judgment does mention the relevance of the parties' joint contribution of labour.[42] This implies that the presumption of joint beneficial interests regardless of the legal title and of capital contribution presupposes *some* contribution that probably includes labour. Altogether, contribution according to *Cummins* appears to have a broader foundation than exists in the case law in general, albeit lacking the direct reciprocity of a transaction. [43]

Secondly, the gratuitous transfer was not accounted for as a gift through the presumption of advancement — there was no accounting at all. *Cummins* thus establishes the inference of marital joint ownership as a distributive mechanism, regardless of specific, planned,[44] relative capital contribution.[45] The case infers joint (and equal) property irrespective of actual contribution, but implicitly assumes joint contribution as a consequence of marriage — effectively returning to a concept of family assets that was rejected resoundingly in the early cases.[46] Ignoring what each party actually contributes in favour of assumptions about married life renders this a

[38] Ibid 302, discussing *Calverley v Green* (1984) 155 CLR 242. This is reminiscent of Macneil's description of relational exchange that seeks 'undivided sharing of the benefits and burdens'. See Macneil, 'Many Futures', above n 1.
[39] *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278, 303.
[40] Ibid.
[41] Ibid 302.
[42] *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278, 302, citing Professor Scott.
[43] However, as Sarmas points out, this approach seems to benefit some women while making others worse off. See Sarmas, above n 36, and further below.
[44] Reflecting two of Macneil's indicia of exchange: see eg Macneil, 'Economic Analysis', above n 17, 1028–9.
[45] Sarmas, above n 36, 230.
[46] See eg *Gissing v Gissing* [1971] AC 886, 900.

status-based distribution that interferes with the expected role of contribution in ascertaining property under the general law.

These two ideas may be reconciled if the assumption of labour exists as a function of marriage, rather than as a measured reciprocation for an interest in property — ie a quid pro quo. The former role of labour goes to status, while the latter goes to contribution as an element of property.

The increasingly small role of the resulting trust has however, given way to the development of the constructive trust, which provides scope for the courts to entertain contributions other than capital.

B. Beyond Capital

The rise of the constructive trust since *Pettitt* and *Gissing* has responded to the changing nature of credit arrangements for property acquisition, to the increasing diversity in intimate relationships beyond de jure marriage for life, but also to the realisation of the poor fit of the law of trusts to intimate partners' property. Described as the familialisation of property law,[47] the law has evolved informed by the jurisprudence of family law and with it, the norms of domestic life. With this evolution, courts now accept a far broader range of contributions than were contemplated in the early cases.

Since the resulting trust established capital contribution as the benchmark for beneficial interests, the specificity of contribution has become increasingly diffuse and with it, its capacity to indicate direct reciprocity between contribution and property. This section outlines different types of contribution, contrasting the courts' approach to non-capital financial contributions, and contribution to domestic life. It highlights that despite encompassing a more relevantly contextual approach to considering contribution, the success of a claim is highly dependent on the court's willingness to characterise contribution as transactional. Upholding transactionism in the domestic context however, results in the exclusion of contributions likely to reflect the reality of the parties' relationships.

1. Non-Capital Financial Contributions

Despite the equitable principle that property should reflect the parties' respective contributions,[48] financial contribution does not necessarily signal a beneficial interest. In contrast to capital contribution, non-capital financial contributions are ad hoc or dispersed over time, as with payment of household expenses. They lose the obvious transactional quality of the capital payment for a number of reasons. Often occurring over time, there will frequently be more 'guesswork and intuitive judgement'[49] informing each party's contribution in a relational context, than the rational calculation that occurs in a directly reciprocal, transactional exchange. The guesswork of household financial management shows in the facts of many cases — where a spouse loses their job,[50] has a child,[51] misses out on an expected divorce settlement[52]

[47] See eg Andrew Hayward, 'Family Property and the Process of "Familialisation" of Property Law' (2012) 24 *Child and Family Law Quarterly* 284.
[48] *Baumgartner v Baumgartner* (1987) 164 CLR 137, 156.
[49] Macneil, 'Economic Analysis', above n 17, 1043.
[50] *Grant v Edwards* [1986] Ch 638.

or has an extra-marital affair.[53] Contribution over time is frequently not measurable specifically in relation to the property transaction at the time of purchase. This translates to a 'lack of specificity' in relational exchange.[54] Because payments are easily interpreted as being for some purpose other than property, courts can disregard them.[55]

Non-capital financial contributions were central to deliberations in *Baumgartner* where the Court weighed them to determine the parties' respective interests in a case where one party held the sole legal title. [56] Mr Baumgartner had used the proceeds of sale of his solely owned unit to pay the deposit for his purchase of real property as the couple's home. Having contributed to the mortgage repayments for the shared home, Ms Baumgartner claimed a beneficial interest. The Court declared that Mr Baumgartner held the property on trust for the couple jointly, reflecting their proportionate contribution to the acquisition, subject to a charge in Mr Baumgartner's favour covering his initial capital contribution. Despite Ms Baumgartner's lack of capital contribution, and the lack of specific application of the pooling arrangement over time, the Court found that the parties' pooled funds had facilitated the land purchase. It would therefore be unconscionable for only one contributor to the fund (Mr Baumgartner) to assert ownership of the asset purchased. The Court thus attributed to the pooled funds a purpose of land acquisition even though they were expended on diverse purchases. Despite their diffuse nature relative to capital contribution, they could still feasibly be measured in terms of an interest, with reference to the mortgage repayment.

In *Jones v Kernott* the parties had separated some 12 years before the claim. During that time, Ms Jones alone had borne the mortgage repayments of a jointly owned house. Despite their likely calculability, the English Court recognised 'the practical difficulty…of taking any such account [of financial contributions], perhaps after 20 years or more of the ups and downs of living together as an unmarried couple.'[57] This statement reflects the lack of 'measurability and specificity' relative to the property acquisition, as well as the dispersed temporal element that characterises the exchange as more relational than transactional.

This case illustrates how intimate partners might enter into property acquisition based not on a specific and planned transaction between themselves, but rather might hold an 'expectation of continued interdependence'[58] to complete the acquisition. The way in which the parties undertook mortgage payments over time generated internally directed norms as to the way in which the exchange took place into the future. These are all relational behaviours that operate at the 'real life level of exchange relations.'[59]

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[51] *Fowler v Barron* [2008] EWCA Civ 377.
[52] *Muschinski v Dodds* (1985) 160 CLR 583.
[53] *Gissing v Gissing* [1971] AC 886.
[54] See eg discussion in Macneil, 'Economic Analysis', above n 17, 1043–4.
[55] See eg Mr Lankow's failed attempt to argue that his partner had received ample benefit from her contributions, including a home, cars, holidays and a comfortable lifestyle: *Lankow v Rose* [1995] 1 NZLR 277, 285.
[56] *Baumgartner v Baumgartner* (1987) 164 CLR 137.
[57] *Jones v Kernott* [2012] 1 AC 776, 785.
[58] Macneil, 'Exchange Revisited', above n 89 585.
[59] Ian R Macneil, 'Values in Contract: Internal and External' (1983) 78 *Northwestern University Law Review* 340, 351

It was only Mr Kernott's ultimate decision to attempt to claw back his interest that interrupted the then existing arrangement and called into question — retrospectively — the parties' course of dealing.

While the Court queried how best to value the parties' respective contributions,[60] for this analysis, measurability is more aligned with the question of specificity of exchange at the outset as a marker of a discrete transaction. Ultimately the Court did manage to weigh the financial contributions to ascertain both the parties' intention as to differential beneficial interests, and the proportions they held. Despite the relational context, in this case the Court inferred reciprocity between an owner of the legal estate (Mr Kernott), and the person undertaking payment of the security (Ms Jones). Thus although ostensibly more relational, the Court was able to perceive it as sufficiently transactional to warrant a beneficial interest.

In Canada, non-capital financial contributions are also relevant to ascertaining beneficial interests. In *Kerr v Baranow*,[61] the Court invoked the juristic reason analysis to explore motivation for the contribution and justification for upholding the parties' corresponding deprivation and enrichment. This analysis allowed for a reckoning of the parties' various financial contributions including the extent to which they represented a specific payment for a reciprocal benefit. If the financial contribution represented a deprivation without corresponding enrichment for that party, then it would be unjust. Compared with the trusts framework in other jurisdictions, unjust enrichment provides the clearest articulation of the importance of reciprocity between contribution and property. The court asks whether this financial contribution can be accounted for in terms of this property; and whether there is any other way to account for this financial contribution other than by interpreting it as a quid pro quo for a beneficial interest.

The most difficult type of financial contribution for courts to reconcile with a property interest is that of payments to support the household. Household payments are the most removed temporally, and in terms of planning, from an exchange aligned with property acquisition. Its measurability is therefore limited relative to the property interest itself — despite its calculable dollar value over time. Although a couple may arrange in advance how they split their expenses, if the court is searching for a reciprocal exchange by which to *measure property* now, household contribution is instead better characterised as a projection of the couple's likely future exchange. How their contributions unfold will depend on the vagaries of the couple's relationship, and their variable capacity to contribute over time. An expectation of future mutual contribution is more a commitment to the couple's long-term shared purpose than immediate maximisation of individual return, and thus marks a more relational form of exchange.[62]

In *Fowler v Barron* for example the trial judge had found that the parties, who held in law as joint tenants, did not hold equal beneficial interests.[63] The judge relied on the fact that Mr Barron had provided the deposit, paid the mortgage, paid the balance

[60] Note the parallels with the statement that it is often a 'purely accidental circumstance whether money of the husband or of the wife is actually used to pay the purchase price to the vendor': *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278, 302.
[61] [2011] 1 SCR 269.
[62] See comparison in Macneil, 'Exchange Revisited', above n 7.
[63] [2008] EWCA Civ 377 ('*Fowler*').

purchase price from the proceeds of sale of his solely owned flat, and paid the taxes and outgoings. In contrast, Ms Fowler spent her income 'on herself and her children.'[64] Such reasoning separates the parties into distinct and unrelated entities in economic terms — atomised individuals ostensibly concerned with maximising their own utility in disparate spheres.

The decision was overturned on appeal. Following *Stack v Dowden* (decided after the trial judgment was handed down) Arden J observed that 'it was not so much the unequal contributions to the purchase of the house that mattered, rather the inferences as to the shared intention to be gleaned from the evidence overall.'[65] The intention to hold beneficially equally would by default follow the joint interests in law, unless Mr Barron could present sufficient evidence to displace this presumption. It was an error of law, the Court said, to focus only on the extent to which the parties contributed to the cost of the acquisition — as might have been the case in a resulting trust scenario. In the absence of some common intention about a differential beneficial interest, expressed or inferred, 'it should make no difference to their interests in the property which party paid for what expense.'[66]

The judgment in *Fowler* reflects the status-based presumption in *Cummins* albeit in a case involving joint, rather than sole, ownership. However, instead of ignoring the actual contribution, using the starting point of assumed equality it implicitly affords weight to each party's contribution as justification for their existing (joint) interests. In doing so, and in the absence of more, it finds sufficient connection between the party who bears household expenses and the acquisition of property. It may not be a transaction per se, but in contrast with the trial judgment it attributes value to contributions made pursuant to the parties' relations.

This advances the position in *Stack*. Ms Dowden took responsibility for a majority of household spending — including the jointly held mortgage — but notably she made these contributions from her own accounts.[67] It was the unusual separation of the parties' income and expenditure that evidenced an intention that they hold differential beneficial interests. Arguably it was her behaviour, rather than the types of contribution, that supported her claim for a beneficial interest.

The Court's reading of the parties' behaviour could be interpreted in two ways. On one hand, the style of money management is akin to a transaction, namely a deal that she pay expenses and own the property despite the joint interests in law. Alternatively, Ms Dowden's payments, like those of Ms Baumgartner, may have been sufficiently discrete contributions measurable in terms of property itself. In either case, while the Court acknowledged the diverse expenses sufficient to support a beneficial interest, Ms Dowden was successful because her mode of contribution could be interpreted as transaction. In keeping their accounts 'rigidly separate'[68] the parties themselves were behaving as market individuals.

Unlike mortgage payments whose specific object is the property itself, the question facing the court in a claim based upon other types of financial contribution is whether

[64] Ibid [7].
[65] Ibid [47].
[66] Ibid [42].
[67] *Stack v Dowden* [2007] 2 AC 432, 464.
[68] Ibid 465.

meeting these expenses demonstrates sufficiently direct reciprocity between the parties in terms of property. The nature of these financial contributions might be meeting household expenses,[69] or the cost of raising the children.[70] On a transactional analysis, there is no ostensible expectation of a quid pro quo of property in these circumstances, and courts' approach to such contributions has been variable.

Part of the reason for this, notably relating to expenses associated with children, is that they tend to be covered by family law statutes. Expenses may be recoverable or one parent might have a right to share costs under redistributive statutory provisions. However it is of no assistance to a claimant that they may be compensated under a different regulatory framework, where the opportunity cost of child support remains uncompensated. Regardless of whether distribution of household income is dealt with via family law, such reckoning does not address the nature of the parties' overall relative financial contributions within the household and the distributive effect of this in terms of property.

2. Contribution to Domestic Life

Apart from household financial contribution, the cases deal with labour expended on what was described in *Kerr v Baranow* as the 'joint family venture'.[71] Similar metaphors were applied in *Muschinski* ('a "joint venture", a "partnership"'[72]) and in *Cummins* the Court fastened on the nature of the 'matrimonial relationship' as one of mutual sharing.[73] The joint venture analogies and the 'matrimonial relationship' all recognise the inevitably materially intertwined lives of the parties not just financially, but also through labour.

Generally however, for intimate partner trusts there is a requirement that to 'count' as contribution, labour must be beyond the 'sort of things which a wife does for the benefit of the family' such as 'clean[ing] the walls or work[ing] in the garden or help[ing] her husband with the painting and decorating'.[74] Day-to-day domestic labour is therefore not associated with a beneficial interest, falling as it does outside the requisite transactional framework. In particular, it fails to be sufficiently 'measurable and specific' in terms of a transaction concerning property. Silbaugh for example observes that the way in which housework is characterised as private and 'emotional' 'den[ies] material security to the performers of domestic labour'.[75]

It is true that its diffuse nature over time distances labour from the sharp commencement[76] of a discrete property transaction. Additionally such domestic contribution is not inherently transferable. Occurring within primary relations, domestic labour is 'unlimited and unique' to the couple rather than the classic market

[69] Ibid 459.
[70] *Fowler v Barron* [2008] EWCA Civ 377.
[71] [2011] 1 SCR 269, 304.
[72] *Muschinski v Dodds* (1985) 160 CLR 583, 611.
[73] *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278, 302–3.
[74] *Pettitt v Pettitt* [1970] AC 777, 796, citing *Button v Button* [1968] 1 WLR 457, 462.
[75] Katharine B Silbaugh, 'Commodification and Women's Household Labor' in Martha Albertson Fineman and Terence Dougherty (eds), *Feminism Confronts Homo Economicus* (Cornell University Press, 2005) 338, 357.
[76] 'Sharp-in, sharp-out' is one of the indicia of transaction: Macneil, 'Many Futures' above n 1, 750-3.

transaction that is not unique, and is transferable.[77]

For example, the housewife's investment in her domestic skills is specific to the needs and wants of her spouse. As Pateman points out, 'what being a woman (wife) means is to provide certain services for and at the command of a man (husband)'[78] and what those services are, depend on the husband's needs.[79] Although an economic or a legal analysis might find alternative services in the market, this fails to appreciate the plural meanings of a single activity.[80] Domestic labour can thus be simultaneously economic and emotional. Yet although domestic labour is measurable (economic), in the intimate partner trust cases the courts tend to choose not to do so, perceiving it as altruistic and beyond the law.

This tendency is illustrated in the somewhat older Canadian decision of *Murdoch v Murdoch,* where Ms Murdoch worked on Mr Murdoch's three ranches, including:

> Haying, raking, swathing, moving [sic], driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding, anything that was to be done. I worked outside with him, just as a man would, anything that was to be done.[81]

Mr Murdoch was absent from the ranches for five months of every year, during which time Ms Murdoch performed these tasks on her own. Mr Murdoch described her work as that of 'an ordinary rancher's wife'.[82] The majority did not consider her labour relevant to her claim for joint ownership of the ranches. In searching for evidence of an intention that she hold a beneficial interest, the majority held that her contribution was that of a ranch wife, rather than contribution sounding in a beneficial interest.[83]

The decision to categorise Ms Murdoch's contribution as that of 'a ranch wife' illustrates the way in which the courts have traditionally used the public/private divide to include or exclude labour from calculations of a beneficial interest. Relegating this labour to the domestic realm, the Court in *Murdoch* reinforced the transactional norms required to justify a beneficial interest.

By contrast, applicants who undertake work above and beyond 'general' spousal duties are more likely to be considered to have contributed sufficiently to support a beneficial interest in property. Therefore Ms Becker's extraordinary contribution to the couple's honey business was central to the declaration of her beneficial interest in Mr Pettkus' sole legal title.[84] Lugging heavy beehives, almost her own weight, for the couple's beekeeping business, working with Mr Pettkus 'continuously, unremittingly and sedulously in the joint effort'[85] could only be understood as supporting an expectation of a quid pro quo — that is, supporting an intention to hold a beneficial interest in the property. Similarly, Ms Lankow made an extraordinary contribution to Mr Rose's property investments that resulted in a significant increase in the value of

[77] Ibid.
[78] Carole Pateman, *The Sexual Contract* (Polity Press, 1988), 128.
[79] Ibid 129.
[80] See eg Silbaugh, above n 75, 349.
[81] *Murdoch v Murdoch* [1975] 1 SCR 423, 443.
[82] Ibid 444.
[83] Ibid 437–8.
[84] *Pettkus v Becker* [1980] 2 SCR 834.
[85] Ibid 853.

his holdings.[86] She worked after hours, using her skill as a legal secretary 'out of office hours, at lunchtime, in the evening and at weekends'[87] to facilitate the improvement of Mr Rose's affairs. The extent of her contribution played an important role in the Court upholding her beneficial interest in his solely owned property.

II. The Limits of Contribution

Since *Stack* the English position has been receptive to a holistic view of the parties' finances and labour in considering contribution as an element necessary to demonstrate a beneficial interest. The English jurisprudence[88] now distinguishes the intimate context from that of strangers,[89] indicating that 'emotional and economic commitment' is central to support a beneficial interest.[90] Contribution is a proxy for these ideas. However as Wong observes, the English decisions embody an unstated ideological understanding about money in the household.[91] In particular, courts adopt the 'marriage model' of cohabitation, reproducing 'patterns of the logic of semblance' and reinforcing 'conjugality as the basis of acceptance of these relationships'.[92] Such presumptions, Wong argues, 'may not be apposite'.[93]

The courts' various approaches to contribution raise an analytical problem reflecting embedded assumptions of gender. Notably, these assumptions are not borne out by empirical evidence about economic management between intimate partners. Judicial assumptions about intimate relations and household economic relations where those assumptions fail to account for gender, thus represent the limitations of contribution and raise the spectre of inequality. Further, by upholding beneficial interests based on transactions and excluding intimate relationship behaviours as a possible locus of exchange, the courts uphold — and therefore themselves constitute — structures of gender that relegate the 'private' beyond the reach of the law.[94] The effect of the law's application — and exclusion — extends also to women's broader social relations, through reinforcing women's lesser economic standing relative to men.

This part of the chapter first establishes the gendered context within which intimate partners contribute to the household. This identifies the relevance of gender in determining contribution in the intimate partner trust cases. Further, and as a corrective to the shortcomings of transactionism in understanding contributions, the following section then explains the rationale for understanding domestic contributions as exchange. It suggests that to do so permits a more equitable approach to determining contribution relevant to uphold a beneficial property interest. Lastly, and anticipating the counter-argument of the promise of a principle of spousal equality, this part of the chapter differentiates a relational approach to contribution from reliance on a status-based analysis of property rights.

A. The Gender of Contribution

[86] *Lankow v Rose* [1995] 1 NZLR 277.
[87] Ibid 284.
[88] *Stack v Dowden* [2007] 2 AC 432; *Jones v Kernott* [2012] 1 AC 776.
[89] *Gissing v Gissing* [1971] AC 886, 904.
[90] *Jones v Kernott* [2012] 1 AC 776, 784.
[91] Wong, 'Shared Commitment', above n 37.
[92] Ibid 64.
[93] Ibid 63.
[94] Frances E Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96(7) *The Harvard Law Review* 1497.

Interpreting the household economy is a complex task.[95] Since Pahl's early work, studies have proliferated involving interviewing heterosexual couples, both married and unmarried, about their money management, their views on financial distribution, and their approach to the allocation of household labour. This literature reveals that a couple's motivations lie in a complex matrix of factors including socio-economic status, gender norms, relative and absolute spousal earning capacity, marital status, and stage of life.

Different models describing spouses' approaches to financial and labour decisions reflect broader debates about individualism and relationships.[96] Macneil's observation of the inherent tension between self-interest and social solidarity[97] for example, is reflected in couples' assumptions about sharing and ownership within a relationship.[98] Thus in *Baumgartner*, Mr Baumgartner gave evidence as to making financial decisions to secure the couple into the future[99] (solidarity) whilst at the same time asserting his sole legal interest in the couple's home (self-interest).

A sharing approach assumes that within marriage, regardless of who earns the income it should be shared equally. In contrast, in an ownership approach to financial allocation the party earning income is considered to have a 'right' to that income. This is supported by widespread assumptions that tend to attach to the role of breadwinner.[100] In a discursive sense, and as Pateman argues in a structural sense attendant upon male privilege,[101] the breadwinner wields more power within the relationship and is thus entitled to a greater allocation. Many of the cases involved a male breadwinner, although a clear example of the way in which a breadwinner role might function in terms of money management occurs in *Stack v Dowden.* The parties' accounting of their separate contributions in light of Ms Dowden's significantly greater income illustrates how an assumption of a right to money earned might manifest.[102]

[95] See eg Fran Bennett, 'Researching within-Household Distribution: Overview, Developments, Debates, and Methodological Challenges' (2013) 75(3) *Journal of Marriage and Family* 582; Anu Raijas, 'Money Management in Blended and Nuclear Families' (2011) 32(4) *Journal of Economic Psychology* 556; Man Yee Kan and Jonathan Gershun, 'Gender Segregation and Bargaining in Domestic Labour: Evidence from Longitudinal Time-Use Data' in Jacqueline Scott, Rosemary Crompton and Lyonette Clare (eds), *Gender Inequalities in the Twenty-First Century* (Edward Elgar, 2010) 153; Joanna Miles and Rebecca Probert (eds), *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Hart, 2009); Katherine J Ashby and Carole Burgoyne, 'Separate Financial Entities? Beyond Categories of Money Management' (2008) 37 *Journal of Socio-Economics* 458.
[96] Anthony Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Polity, 1992); Elisabeth Beck-Gernsheim, 'On the Way to a Post-Familial Family: From a Community of Need to Elective Affinities' in Alison Diduck (ed), *Marriage and Cohabitation: Regulating Intimacy, Affection and Care* (Ashgate, 2008) 3; Illouz, above n 32.
[97] Macneil, 'Exchange Revisited', above n 7. See also Silbaugh, above n 75.
[98] Carolyn Vogler, 'Money in the Household: Some Underlying Issues of Power' (1998) 46(4) *The Sociological Review* 687.
[99] *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 438.
[100] Carolyn Vogler, Michaela Brockman and Richard D Wiggins, 'Managing Money in New Heterosexual Forms of Intimate Relationships' (2008) 37 *Journal of Socio-Economics* 552.
[101] Pateman, above n 78, 141.
[102] *Stack v Dowden* [2007] 2 AC 432, 461.

Regardless of how they manage their money, a couple's financial and household labour decisions are informed by structural and cultural factors[103] indicative of Nedelsky's 'nested relations'[104] and highlighting the fallacy of atomistic individualism as a means of comprehending autonomy.[105] On a relational reading, individuals exist in a broader social context that informs the way in which they live their lives — including in the context of distribution of domestic proprietary interests.

In *Parianos v Meluish*[106] for example, Mr Parianos had held the legal title to the couple's home in his own name. He originally acquired the property thanks to funds provided by his mother-in-law. Upon his death, his estate became vested in a trustee in bankruptcy and his widow made a claim for a half beneficial interest. During the couple's marriage, Mr Parianos had not permitted his wife to work. He said that: 'Women should not work outside the home; their place is in the home. Wives of Greeks don't work; it's an (sic) slur on the family.'[107] He told his wife that: 'It doesn't matter that the house is in my name, because it's yours too. What's mine is yours.'[108] On this example, diverse norms and the parties' overarching context will inform the way in which property is distributed.

Relevant to the process of litigation and judging, Sonnenberg goes further, questioning the way in which the empirical data around money management has been interpreted.[109] She points out that rather than explain any neutral 'truth' about spousal finances or division of labour, interview responses on which the money management studies are based are themselves a discursive act that construct through language 'what it means to be husband and wife'.[110] In response she suggests that relying solely on 'individual cognitions' in which the 'solitary perceiver [is the] principal unit of analysis'[111] is insufficient to reveal how the relationship economy really works. Instead, she suggests a broader analysis that includes power, the way in which money management is a way of 'doing gender',[112] and the implications of this for 'financial entitlement, ownership and fairness.'[113] While Sonnenberg addresses the implications for the 'social (or economic) psychology of domestic life'[114] her work is relevant also for the law.

The courts' examination of spousal money management illustrates Sonnenberg's point. For example, courts take account of 'individual cognitions' in taking evidence and weighing it up. Despite these cognitions, at the same time the court frequently

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[103] See eg Simone Wong, 'Shared Commitment, Interdependency and Property Relations: A Socio-Legal Project for Cohabitation' (2012) 24 *Child and Family Law Quarterly* 60.
[104] Jennifer Nedelsky, 'Law, Boundaries and the Bounded Self' (1990) 30(Spring) *Representations* 162.
[105] Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1(1) *Yale Journal of Law and Feminism* 7; Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004).
[106] [2003] FCA 190.
[107] Ibid [16].
[108] Ibid [17].
[109] Stefanie Sonnenberg, 'Household Financial Organisation and Discursive Practice: Managing Money and Identity' (2008) 37 *Journal of Socio-Economics* 533, 545–6.
[110] Ibid 546. See also Pateman, above n 78, 128.
[111] Sonnenberg, above n 109, 539.
[112] Ibid 547.
[113] Ibid 548.
[114] Ibid 539.

judges the parties' contributions based on its own presuppositions about relationships and money management, according to unspoken assumptions[115] rather than by a nuanced understanding of the parties' actions and relations.[116]

In *Baumgartner*[117] for example, the focus was on the precise detail of the parties' money management behaviours from which the court drew conclusions as to the beneficial interest. The Court focussed on the pooling of resources, and Mr Baumgartner's claim that despite pooling wages, Ms Baumgartner's wages were not themselves applied towards the property acquisition — nor were they intended to be.[118] Mr Baumgartner had taken charge of the couple's money as he claimed that Ms Baumgartner 'was unable to budget with the money that was available.'[119] Ms Baumgartner's evidence related to the couple's shared purpose of their future together, evidenced by her understanding of his promises of marriage and their desire to have a baby together. The trial Judge preferred Mr Baumgartner's 'individual cognitions' including as to the couple's money management, and this formed the basis of the High Court's judgment. The High Court rejected Ms Baumgartner's own cognitions in support of her claim for a beneficial interest in the property, although it did declare a constructive trust as to 45 per cent of the property, in recognition of her contribution.

It is interesting also to contrast the Court of Appeal decision in *Fowler v Barron* with the finding of the lower court. Mr Barron had been successful in his claim for a resulting trust over Ms Fowler's half legal interest in the couple's former home owned by the couple jointly in law. At first instance the Judge found that:

> Because the respondent paid all the essential outgoings of his pension, the applicant kept all her net income, child benefits and other receipts to spend as she wished and when she chose. …
>
> The applicant made no contribution to the purchase price or any mortgage payment. Nor furthermore did she make any indirect contribution to either of them. In the particular circumstances of their relationship it was completely understood and accepted by the respondent that her money was hers to spend as she chose when she wanted.[120]

Accepting Mr Barron's 'individual cognitions', this finding at once both diminishes Ms Fowler's contribution to the family, while giving priority to Mr Barron's contributions to payment of the mortgage and house-related expenditure. Ms Fowler successfully challenged the ruling on appeal, where Arden LJ found that

> The reality was that she [Ms Fowler] spent much of her income and the child benefits principally on herself and her children and meeting what the judge termed 'optional expenditure' such as gifts, school clubs and trips, personal clothing, holidays and special occasions. In my judgment, the proper inference is that, with the exception of

[115] See discussion in J L Austin, *How to Do Things with Words* (Clarendon Press, 1962).
[116] See eg *Burns v Burns* [1984] Ch 317; *Lloyds Bank Plc v Rosset* [1991] 1 AC 107.
[117] *Baumgartner v Baumgartner* (1987) 164 CLR 137.
[118] *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 432.
[119] Ibid 438.
[120] *Fowler v Barron* [2008] EWCA Civ 377, [9], [13].

> clothing for herself, these payments were her contributions to household expenses for which both parties were responsible.[121]

Expanding perhaps on Sonnenberg's observation of individual cognitions, Arden LJ cited Baroness Hale's warning, that

> In family disputes, strong feelings are aroused when couples split up. This often leads the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms.[122]

Both *Baumgartner* and *Fowler v Barron* illustrate how judges may adopt a party's 'own cognition' of the couple's money management with the potential for perverse results. Preferring Mr Baumgartner's account to that of Ms Baumgartner, the High Court accepted individual perceptions as to the implications of the way in which money was managed.[123] In *Fowler v Barron*, based on Mr Barron's assertions of the couple's money management, Ms Fowler's contributions were minimised with the consequence of a loss of her property at first instance. The sociological evidence suggests a nuanced inquiry is called for. Without one, courts' conclusions based on either 'individual cognitions' alone or on presuppositions about intimate relationships, are unlikely to be adequate.

For contribution to serve its stated purpose courts must look beyond their reading of the 'facts' of money management to impute property consequences. Failing to account for power[124] and the way in which the parties enact gender norms — including discursively in their evidence before the court[125] — imputes into contribution a demonstration of free will and reciprocity where it does not exist.

Although his earlier work omitted considerations of power,[126] Macneil's later and more refined analysis recognises the importance of power in influencing the terms of exchange.[127] While not acknowledged by courts, power is highly relevant in considering how a couple contributes. For example, where a couple's finances are jointly controlled or controlled by women, they tend to be subject to joint decision-making. Where controlled by men, men make the decisions.[128] Broadly speaking, men will therefore inevitably influence financial decisions including allocation of income and expenditure, while women will not. The effects of male authority can be seen in many of the cases, especially where the men as breadwinners,[129] or as the partner

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[121] Ibid [41].
[122] Ibid [38], citing *Stack v Dowden* [2007] 2 AC 432, 458.
[123] See eg *Baumgartner v Baumgartner* (1987) 164 CLR 137, 144; *Lankow v Rose* [1995] 1 NZLR 277, 284.
[124] See discussion above, Chapter Three.
[125] See eg *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137, where the claimant women gave evidence of their concern to establish a home for their families, and for Ms Baumgartner, the possibility of marriage.
[126] Macneil, 'Many Futures' above n 1.
[127] Macneil, 'The New Social Contract', above n 17*,* 31–5.
[128] Carolyn Vogler and Jan Pahl, 'Money, Power and Inequality within Marriage' (1994) 42(2) *The Sociological Review* 263, 277.
[129] For examples of the male partner deciding or insisting on title arrangements to suit his interests, see eg *Muschinski v Dodds* (1985) 160 CLR 583; *Eves v Eves* [1975] 1 WLR 1338; *Burns v Burns* [1984] Ch 317; *Lloyds Bank Plc v Rosset* [1991] 1 AC 107.

controlling a joint account,[130] made the decision to hold the property in their sole name in law. Therefore if the court assumes, as it did in *Cummins,* that it is purely accidental who pays for what, it fails to account for the possibility of gendered power relations that have informed the relevant financial behaviour.

Even without coercion, a couple's financial management is likely to express gender norms embedded within the norms of intimate relationships. For example, 'joint accounts have become a symbolic expression of the jointness of marriage'[131] with bank accounts 'often a matter of form'.[132] Yet the reality of which partner manages and which party controls money will tend to overshadow any legal entitlement to jointly held funds, even as the effect at law of a joint account reflects a norm of togetherness. To illustrate, the men in *Hohol v Hohol*,[133] *Hofman v Hofman*,[134] *Baumgartner,*[135] and *Parianos v Meluish*[136] all took control of the couple's finances — whether held in joint or separate accounts — so that during the relationship the women's legal rights to the money became irrelevant. There is tension therefore between the norms informing parties' choices about money management, the power dynamic between the parties manifesting as control over finances, assumptions about togetherness and intimacy, legal rights to money, and ultimately, contributions made to acquire property.

Equity will, of course, look beyond form to ascertain beneficial interests.[137] But this task differs from courts' inquiry into bank accounts in the intimate partner trust cases. Bank accounts in the cases frequently are not the object of an inquiry into ownership of the bank account *per se*, but are instead a proxy to point to issues of intention and contribution as to the beneficial interest in real property.[138] In such cases the assumption by the court is that the legal form of the bank account, without more, will suffice to indicate an intention as to the parties' distribution of their overall property interests — because it represents an intention to share. In the case of *Baumgartner*,[139] this assumption was helpful to protect Ms Baumgartner's 45 per cent contribution. On the other hand, such an approach will work against claimants who did not hold a joint account and where the home was acquired in the sole name of one party, but where the parties may nonetheless have allocated financial roles of management and control between them. This was the case in *Gissing*, *Burns*, and *Rosset*.[140]

Further however, looking beyond the form of a bank account is still unlikely to reveal the true connection between the parties' respective contributions to home and property acquisition. This is because of the implicit assumptions courts make that

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[130] *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Parianos v Melluish* [2003] FCA 190; *Hofman v Hofman* [1965] NZLR 795.
[131] Supriya Singh and Clive Morley, 'Gender and Financial Accounts in Marriage' (2011) 47(1) *Journal of Sociology* 3, 4.
[132] Ibid 13.
[133] [1981] VR 221.
[134] [1965] NZLR 795.
[135] (1987) 164 CLR 137.
[136] [2003] FCA 190.
[137] See eg *Bull v Bull* [1955] 1 QB 234.
[138] See eg discussion in *Baumgartner v Baumgartner* (1987) 164 CLR 137, 156 per Gaudron J.
[139] Ibid.
[140] *Gissing v Gissing* [1971] AC 886; *Burns v Burns* [1984] Ch 317; *Lloyds Bank Plc v Rosset* [1991] 1 AC 107.

intimate partners make rational choices about their financial contributions that reflect intentions specifically as to property.

Contrary to a straight legal interpretation of rights or an investigation into substance not form, a couple may manage a joint bank account as if it were separate accounts,[141] or may manage a separate account jointly.[142] The relevant intention and contribution do not lie solely in questions of legal or beneficial ownership of the joint account but also involve questions of the parties' money management practices and the exercise of power.[143] How the court responds to evidence either of the fact or practice of the parties' bank account is therefore important.

Appreciating power and the possible — or likely — gendered expression of money management is essential to a legal response to claims for beneficial interests that sounds in equality. In some cases, the courts have acknowledged the power wielded by men over their partners. In *Hofman v Hofman*, the Court recognized that Mr Hofman had taken 'patriarchal credit' for the couple's wealth, in finding a half beneficial interest in favour of Ms Hofman.[144] Similarly, in *Hohol v Hohol*, a man who had 'an autocratic and authoritarian personality…[who had] ruled his family, and particularly his wife, like a despot when they lived together'[145] was found to hold a half interest on trust for his former partner.[146] Such examples are in the minority however.

So long as a gendered distribution of finances affects women's economic equality,[147] and courts discount women's domestic contributions as a measure of a property exchange, the law upholds women's broader economic inequality. This occurs through the inconsistent recognition of the role played by relationship and gender in the parties' domestic economic behaviours. Resolving the gendered distribution attendant on transaction requires recognising intimate relations as sites of economic exchange, providing the means to reconceptualise contribution that advances equality.

B. Domestic Contribution as Economic Exchange

Courts' transactional reading of parties' contributions misses a conceptual link that connects the parties' individual interests and the shared purpose of the intimate relationship. While courts focus on the parties' inputs (contribution) to elicit the distribution of the output (property), they misconstrue both the factors informing contribution, and the broader distributive effects of the household economy. As Pahl has observed, '[b]y treating [the household] as though it were an individual, the household has become a sort of black box, within which the transfer of resources between earners and spenders has been rendered invisible.'[148] The courts likewise appear to misapprehend the parties' relations as an ongoing economic exchange. By implication, household labour and expenditure are seen to arise from virtues such as

[141] Such as was Mr Baumgartner's argument in *Baumgartner v Baumgartner* (1987) 164 CLR 137.
[142] As did Mr Hofman in *Hofman v Hofman* [1965] NZLR 795.
[143] Thus it was relevant in *Hofman v Hofman* that Mr Hofman, who controlled the couple's money, had maintained both his and Ms Hofman's accounts 'fairly much in equilibrium': [1965] NZLR 795, 796.
[144] Ibid 802.
[145] *Hohol v Hohol* [1981] VR 221, 222.
[146] Contrast the earlier Canadian decision of *Murdoch v Murdoch* [1975] 1 SCR 423.
[147] See eg Jan Pahl, *Money and Marriage* (MacMillan, 1989) ('Money and Marriage').
[148] Ibid 3–4.

love, service, or duty — albeit not a legal duty.[149] Each of these characterisations is implicitly unilateral, ostensibly involving no exchange.[150] Characterising the virtues of household labour and expenditure as altruistic, their economic value is minimised, if not negated. If they are invisible as an input (contribution) then they will not appear as an output (property) in the hands of the grantor.

In his groundbreaking economic analysis of the family, for all its noted limitations,[151] Becker explains in economic terms the specialised roles of men and women within the family.[152] He explains that men's higher wages render it rational for women to stay at home bearing and rearing children, while men are employed outside the home and build their careers. Ignoring the stereotypes he relies on, he advances understanding through recognising that the family is more than a unitary economic entity albeit one headed by an altruistic male.[153] His observations are limited by their presupposition of rational choice as driving specialisation without acknowledging ascribed gender or power relations, but he does demonstrate a connection between labour specialisation and the household's complex system of economic exchanges.

Becker's work remains relevant despite significant changes in women's workforce participation in recent decades, as the gendered specialisation of labour and money management remains within intimate relationships. Indeed specialisation of domestic labour and expenditure continues to form part of the distributive mechanisms of the household economy.[154]

Despite recognition of the economic function of the household, household labour is still frequently considered to reflect a non-economic — indeed a 'virtuous' — contribution.[155] Housework is nonetheless integral to the household economy and therefore also the wider economy. Although not specifically analysing the household context, Arrow thus observes that 'virtues play a significant role in the operation of the economic system'[156] despite not being traded 'at market rates'.[157] Instead, virtues are complementary to what is supplied and, for Arrow, are to be regarded as an

[149] Marcia Neave, 'Living Together — the Legal Effects of the Sexual Division of Labour' (1991) 17(1) *Monash University Law Review* 14; Silbaugh, above n 75. See also discussion in *Peter v Beblow* [1993] 1 SCR 980.
[150] Carol M Rose, 'Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa' (1992) 44(3) *Florida Law Review* 295 ('Giving, Trading').
[151] See eg June Carbone, 'What Do Women Really Want? Economics, Justice and the Market for Intimate Relationships' in Martha Albertson Fineman and Terence Dougherty (eds), *Feminism Confronts Homo Economicus* (Cornell University Press, 2005) 405.
[152] Gary S Becker, *A Treatise on the Family* (Harvard University Press, 1981).
[153] Ibid 192. For a critique, see eg Pateman, above n 78, 129.
[154] See eg Susan Gabrielle Meagher, 'Persistent Inequalities: The Distribution of Money, Time and Care' in S K Schroeder and L Chester (eds), *Challenging the Orthodoxy* (Springer, 2014) 79; Himmelweit et al, 'Sharing of Resources within the Family and the Economics of Household Decision Making' (2013) 75(3) *Journal of Marriage and Family* 625; Kan and Gershun, above n 95.
[155] See eg Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books, 1989); Michael Walzer, *Spheres of Justice* (Martin Robertson & Company, 1983).
[156] Kenneth J Arrow, 'Gifts and Exchanges' (1972) 1(4) *Philosophy and Public Affairs* 343, 345.
[157] Ibid 346.

'unrequited transfer'.[158] Arrow also recognises that 'a more subtle form of giving affects the allocation of economic resources.'[159]

On Arrow's analysis, it is not only that value-laden domestic contribution *may* play an economic role: rather, he expects that such values are integral to all exchange. This understanding however, diverges from that of the courts in the trusts cases. For unlike its recognition of the directly reciprocal 'rational' transfer by strangers in a market transaction, the common law does not recognise a relational economic compact as supporting a property interest. Instead, courts tend to characterise intimate partners' exchange as an expression of virtue, which in turn tends to preclude it from the economic and therefore the legal consequences of property. In circumstances where the parties engage in a gendered division of labour and financial management, these assumptions are likely to ignore women's contributions as 'virtuous' rather than economic. This implicit reasoning cuts women off 'from distributive processes and social goods outside the sphere of kinship and love.'[160] Thus the contributions of Ms Burns and Ms Rosset constituted an implicitly virtuous home making role, worth 'nothing'[161] and thus not constituting an exchange in the eyes of the court. To bring women's household contributions into the court's understanding of distributive processes requires recognising them as exchange in the first place.

According to Macneil, '[s]pecialisation of labour presupposes exchange, since only exchange can achieve the distribution of rewards necessary to sustain specialisation. Direct bilateral exchange is, however, by no means essential.'[162] Specialisation of labour results in an 'exchange surplus'[163] because to live together, parties need to exchange with each other the fruits of their specialised skills or do without. Where an intimate couple engages in at least some specialisation of labour or household finance, they therefore engage in exchange. Further, household contribution is pluralistic:[164] it is possible for such contribution to be simultaneously altruistic and economic. They are not mutually exclusive. This realisation paves the way for considering domestic contribution in determining a beneficial interest.

In advancing his argument, Macneil uses this foundation to point out that the 'long-run individual economic (material) interests of each party conflict with any short run desires to maximise individual utility respecting the goods in any particular exchange.'[165] For any particular contribution a spouse will have the longer-term goal of distribution through exchange that is part of the ongoing relationship.[166]

Thus Macneil contends that relational exchanges tend to look into the future, expecting ongoing mutual support over time. Instead, the transactional exchange anticipates that through direct, measured reciprocity the parties take what they are due

[158] For a similar analysis, see Rose, 'Giving, Trading', above n 150, 299. Rose describes gifts that 'leak' into transfers, on the basis that the 'unilateral gift [is not] a very robust category'.
[159] Arrow, above n 156, 345.
[160] Walzer, above n 155, 240.
[161] In the case of Ms Burns: *Burns v Burns* [1984] Ch 317, 327.
[162] Macneil, 'Many Futures' above n 1, 696–7.
[163] See explanation in Macneil, 'Exchange Revisited', above n 7.
[164] Silbaugh, above n 75.
[165] Macneil, 'Exchange Revisited', above n 7, 578.
[166] For example, Mr Baumgartner gave evidence that the parties were working towards their future: *Baumgartner v Baumgartner* (1987) 164 CLR 137, 140.

and go their separate ways without thought to the future.[167] Relationships depend entirely on further cooperation — an aspect absent from both a pure transaction and a pure gift.[168] If we perceive domestic contributions to be part of a mutual social, emotional, and material exchange, the boundaries drawn by a transactional approach to property become permeable, in Nedelsky's terms.[169]

As Macneil points out for example, the shared purpose of parenting enhances a couple's solidarity, representing at least in part their commitment to each other and their joint future. For a couple parenting, it is 'likely to be virtually impossible to say what was given in return for what. This essential fuzziness is enhanced by distributions through generalised reciprocity to children, the infirm, etc.'[170] Recognising the couple's shared purpose of economic gain, however, involves a division of labour according to comparative advantage and the resulting exchange of each party's individual surplus.[171]

The couple's shared purpose and their solidarity in achieving it is important notably for the primary caregiver who is likely to forego personal benefits in wages and career development while devoting (her) time to child bearing and child rearing. Becker sees this reflected in women's 'demand' for a 'long term "contract" from their husband to protect them against abandonment and other adversities.'[172] His analysis thus suggests a connection between diffuse or 'fuzzy' contribution over time and an expectation of an economic quid pro quo.

On this reckoning, within intimate relations, contribution — monetary or otherwise — serves an economic purpose. And its purpose simultaneously serves the household represented through the parties' mutual goals, and each individual who comprises that household. The household is not unitary, but nor is the couple simply two atomistic agents. The lack of direct reciprocity between contribution and acquiring property is compensated for by the clearly material function of contribution in the context of generalised reciprocal household contributions.

Thus domestic contribution is capable of supporting a claim for a beneficial interest within the liberal framework of property, and should do so in the interests of equality given that parties' diverse exchange contributions are frequently gendered. The question that follows relates to the second purpose of contribution, namely ascertaining the extent of the beneficial interest. To serve this purpose, contribution requires valuation. The value of domestic contribution is already achieved in family law through a broad understanding of contribution and equivalency in the division of wealth between the parties,[173] but it also occurs in the law of trusts.

The non-monetary contributions of Ms Seguin were accounted for in *Seguin v Vanasse*,[174] although the outcome of that case was remedial and therefore

[167] Macneil, 'Many Futures' above n 1, 802–4.
[168] See also Rose, 'Giving, Trading', above n 150.
[169] Nedelsky, 'Law's Relations', above n 3, 70–6.
[170] Macneil, 'Exchange Revisited', above n 7, 585. See also Theorem 2.1 in Becker, above n 152, 17, 19, 26.
[171] Becker, above n 152, 16, 19.
[172] Ibid 14.
[173] As explained, for example, in *Moore v Moore* [2008] FamCA 32.
[174] [2011] 1 SCR 269.

redistributive rather than proprietary. In *Jones v Kernott*, Lord Walker and Baroness Hale found that 'financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended…or fair.'[175] In *Cummins* too, the Court implicitly conferred value on all or any contributions to support its justifying a presumption of joint ownership, based on a 'range of financial considerations and accidental circumstances in the matrimonial relationship.'[176]

In contrast, in many other cases courts have refused to acknowledge the value of domestic contribution. In *Burns*, the Court found that despite holding paid work for some periods during their relationship, Ms Burns had not contributed sufficiently to justify a beneficial interest. This conclusion is founded upon assumptions as to Ms Burns' assumed wifely homemaker role. Fox LJ, for example, rejected the proposition that relevant contribution might include keeping the house and caring for children.[177] Similarly, Ms Rosset's contribution was seen as no more than a wifely occupation — one that was not measurable in the transactional terms of an improved valuation of the property but was a 'natural' aspect of being a wife.

> … it would seem the most natural thing in the world for any wife, in the absence of her husband abroad, to spend all the time she could spare and to employ any skills she might have, such as the ability to decorate a room, in doing all she could to accelerate progress of the work quite irrespective of any expectation she might have of enjoying a beneficial interest in the property.[178]

The difficulty for the law in doing so is the entrenched conception of non-market activities as purely emotional rather than economically productive. Such a tendency is at least in part explained by Pateman's analysis of the sexual contract where she identifies the place of women within marriage, and the terms of the exchange women enter into. On her reading, the exchange is concluded, transactionally, at the point of marriage after which the woman's labour — sexual, emotional, physical, and reproductive — is a term of the contract.[179] Both Pateman's analysis and the accompanying binary of emotions and economic exchange deny 'material security to performances of domestic labour.'[180] Together they contribute to the structural inequality of women who continue to bear the lion's share of unpaid caring work.[181] Just as marriage no longer necessarily imports conjugal presumptions enforceable by law,[182] so too does the law need to update its perception of labour beyond the dichotomy of emotion and economy as one strategy to improve women's economic standing.

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[175] [2012] 1 AC 776, 794.
[176] *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278.
[177] *Burns v Burns* [1984] Ch 317, 331.
[178] *Lloyds Bank Plc v Rosset* [1991] 1 AC 107, 131.
[179] Pateman, above n 78.
[180] Silbaugh, above n 75, 338.
[181] Natalie Skinner and Barbara Pocock, 'The Persistent Challenge: Living, Working and Caring in Australia in 2014. The Australian Work and Life Index' (Centre for Work + Life, 2014) <http://www.unisa.edu.au/documents/eass/cwl/publications/awali_2014_national_report_final.pdf>; SA Hoenig and ARE Page, 'Counting on Care Work in Australia' (AECgroup Limited for econoimc Security4Women, 2012) <http://www.security4women.org.au/wp-content/uploads/eS4W-Counting-on-Care-Work-in-Australia-Final-Report.pdf>.
[182] *PGA v the Queen* [2012] HCA 21.

Despite an obvious need to address gendered economic inequality, there is a noted objection to affording economic consequences to women's household labour. Because women continue to bear the disproportionate burden of household labour, some are concerned about the potential commodification of women and their caring work, and the consequences of commodification on relationships. Radin describes this as a 'double bind'. On the one hand, without an economic return for their labour women will remain excluded from an equitable distribution of wealth. On the other hand, affording economic value to women's emotional and altruistic labour might alter its true or virtuous value and the meaning it holds for many women.[183] While there is a broader discussion to be had about the value of caring work throughout society,[184] for these purposes the scope of the question is limited to the possible dilemma for women exiting a relationship or seeking to enforce their beneficial interest against a third party. There are however, a number of reasons to support an economic evaluation of labour.

In the first place, the virtue argument ignores Arrow's observation of the economic reality of virtues, and their role in economic transactions.[185] On this argument, there is no 'pure' virtue in such arrangements. The parties' long-term exchange is, by definition, materially and emotionally intertwined. Parties wishing to claim that their contribution is virtuous in a way incapable of economic valuation will be parties who choose not to prosecute a claim for a beneficial interest. In fact, the tenor of the claims is such that women claimants appear to feel somehow cheated that their partner's representations of togetherness into the future — including materially — have not manifested in property.[186]

The second argument in favour of economic valuation draws on the Canadian unjust enrichment approach. The fact that the man has benefited economically, expressed through property, through the labours of the woman whether given virtuously or not, justifies recompense. Unjust enrichment analysis highlights that the flow of economic benefit expressed through property need not be unidirectional in intimate relations. In unravelling a relationship, it is not equality for a court to insist that a woman be content with the virtues of her contributions while the man is materially benefited. Part of the problem with the virtue argument is that it is women's work that carries this mantle, while men's contributions tend to find economic expression. So long as virtuous work does not apply equally to the activities of both parties, there is a case for translation of caring work into property through the mechanism of contribution.

Finally, for women such as Ms Eves, Ms Baumgartner, and Ms Muschinski,[187] their partners' promises to deliver joint title (or compensation for it) never eventuated during the relationship: there was never in these cases any suggestion that the women's contributions were not part of an overall mutual economic plan. Women who go to court invoke a choice to attribute economic value to their caring work: to deny them this because of a theoretical undermining of the expressive qualities of

[183] Margaret Jane Radin, 'Market-Inalienability' (1987) 100 *Harvard Law Review* 1849, 1916.
[184] Jennifer Nedelsky, *New Norms of Work and Care: Re-Thinking What It Means to Be a Responsible Adult,* Working Paper, (2014).
[185] Arrow, above n 156, 345.
[186] See eg *Pettkus v Becker* [1980] 2 SCR 834; *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Fowler v Barron* [2008] EWCA Civ 377.
[187] *Eves v Eves* [1975] 1 WLR 1338; *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Muschinski v Dodds* (1985) 160 CLR 583.

relations is to deny these women the opportunity to redeem their contributions which were made on the assumption of long term material, albeit collective, gain.

There are risks however. The broader implications of recognising economic value in caring work may well be a heightened conservatism. Once women's caring work is economically compensated there is less incentive to promote women's economic autonomy outside the home. However, recognising their contribution as economic is important for women who have borne the opportunity cost of caring at the expense of their personal financial advancement, and importantly, without the anticipated future economic interdependence of the relationship being realised. It is a pragmatic approach to resolving the double bind.

In support of this, Silbaugh suggests that 'as long as so many of women's activities remain nonmarket and as long as women's economic welfare is a concern of feminists, economic analysis of nonmarket activities is affirmatively desirable.'[188] Further, in the same way that a worker might engage in paid work for virtuous reasons, so too does 'virtuous work' such as domestic labour hold economic value[189] and it is possible for any single activity to hold co-existent plural meanings.[190] The spheres of both commerce and the home are more nuanced than the commodification arguments allow.[191] As Rose points out, the purpose of commerce is bringing people together. Relations and trust are important in market exchange[192] as well as comprising a noted feature of intimate relations.

Acknowledging that 'marketable and non-marketable aspects of domestic labour…co-exist'[193] aligns with Macneil's characterisation of exchanges along a spectrum. It recognises contribution within a relational context, allowing the possibility of identifying a broader range of economic exchange that more accurately reflects the parties' emotional and material interdependence. Attributing value to domestic contribution as economic exchange renders permeable the existing boundaries delineating 'mine' and 'yours' that are imposed by the law through its insistence on transaction. Such a change recognises equitable economic outcomes arising from existing relations between the spouses, and between spouses and the property in question. Further, attributing value sounding in property affects women's economic standing beyond the home.[194]

Despite the evolution of the cases' treatment of contribution, the results for women have been haphazard — from Ms Burns' unsuccessful claim[195] to the Court's

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[188] Silbaugh, above n 75, 339.
[189] Ibid 356; Joan C Williams and Viviana Zelizer, 'To Commodify or Not to Commodify: That Is Not the Question' in Martha M Ertman and Joan C Williams (eds), *Rethinking Commodification: Cases and Readings in Law and Culture* (New York University Press, 2005) 362, 366.
[190] Silbaugh, above n 75, 349.
[191] Carol M Rose, 'Whither Commodification' in Martha M Ertman and Joan C Williams (eds), *Rethinking Commodification: Cases and Readings in Law & Culture* (New York University Press, 2005) 402, 418.
[192] Rose, 'Giving, Trading', above n 150.
[193] Silbaugh, above n 75, 354.
[194] See eg analysis in Caroline Lambert, 'Reproducing Discrimination: Promoting the Equal Sharing of Caring Work in CEDAW, at the ILO and in the SDA' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU e-Press, 2010) 153.
[195] *Burns v Burns* [1984] Ch 317.

accounting to offset Ms Baumgartner's lost wages during her maternity leave.[196] Failing to rationalise the courts' approach is likely to maintain the boundaries of property that exclude particular types of contribution and therefore, particular types of people. Additionally, the law's suppositions about relationships and property will fail to comprehend growing diversity in intimate relations.[197]

Without disturbing the liberal property foundation of contribution, the existing framework can incorporate diverse contributions made in furtherance of the relationship. Because of the complexities of the household economy, examination of contribution requires nuance, accounting for power relationships and gender norms. The groundwork for this has been laid in *Stack v Dowden*, refined somewhat in *Jones v Kernott*. The most nuanced examination has perhaps occurred in *Seguin,* which also offers a clearly articulated rationale for inclusion and valuation of diverse contributions. *Cummins* however fails to allow for the relational aspects of spousal exchange, relying instead on stereotypes of spousal conduct ostensibly grounded in status — albeit implicitly accepting any contribution as validly supporting a property interest. In light of this decision — and alternative, status-based approaches to spousal property redistribution — it is worth contrasting the relational approach to contribution with that of status.

C. Contribution v Status

This chapter assumes property distribution to accord with the liberal foundation of the common law, stemming in particular from pronouncements in the early decisions that the common law knows no principle of family property. It is for this reason that the law of intimate partner trusts has evolved even as family law has for the most part provided a redistributive mechanism for married, and in most jurisdictions, unmarried, intimate heterosexual partners.

One solution to inequality may be a family property regime — a presumed equal distribution of property between intimate partners as a matter of course. Such a regime would fall within the responsibility of Parliament. Interestingly however, the decision in *Cummins*[198] in ignoring the nature and extent of the parties' contribution, in one sense went as far as possible towards family property within the confines of the common law. In *Cummins*, the High Court of Australia held that a married couple who held jointly in law would be deemed to hold jointly also beneficially. The Court used the fact of the couple's conjugality to infer a joint legal and beneficial estate ('*Cummins* approach'). While ostensibly avoiding the presumptions of the English courts about what 'committed couples…ought to do',[199] it appears to have generated property rights out of status — countering with its own problematic assumptions about marriage:

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[196] *Baumgartner v Baumgartner* (1987) 164 CLR 137.
[197] See eg Carl Stychin, 'Family Friendly? Rights, Responsibilities and Relationship Recognition' in Alison Diduck and Katherine O'Donovan (eds), *Feminist Perspectives on Family Law* (Routledge-Cavendish, 2006) 21; Cees J Straver, Wim CJ Robert and Ab M van der Heiden, 'Lifestyles of Cohabiting Couples and Their Impact on Juridical Questions' in John Eekelaar and Sanford N Katz (eds), *Marriage and Cohabitation in Contemporary Societies* (Butterworths, 1980) 39.
[198] *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278.
[199] See eg Wong, above n 103, 63.

> It is often a *purely accidental circumstance* whether money of the husband or of the wife is actually used to pay the purchase price to the vendor, where both are contributing by money or labor to the various expenses of the household. It is often a *matter of chance* whether the family expenses are incurred and discharged or services are rendered in the maintenance of the home before or after the purchase.[200]

Certainly, the way in which the parties contribute may indeed appear to be accidental. Pahl for example notes the secrecy surrounding marital finances, which plays a key role in 'maintain[ing] great inequalities between spouses.'[201] It may not therefore be a conscious decision by the parties as to what roles they adopt within the relationship economy. Additionally, over time the parties' circumstances may change and so too might the nature and proportion of contribution. Sickness, caring responsibility, and the fluctuations of work will all affect who does what and who pays for what. All of this may appear 'accidental'.

On the other hand it is also clear that even where the parties do not make express arrangements for money management and domestic labour, their contributions tend to be informed by gender norms. Despite appearances, contribution is not a 'matter of chance.' Instead it is a function of gendered society.

Although recognising equal beneficial interests, the *Cummins* approach does not necessarily treat the parties equally[202] because it fails to account for the parties' individual context, and it fails to appreciate the type and extent of the parties' contributions. Positively, the *Cummins* approach dispenses with assumptions about domestic labour and its worth that have otherwise excluded such contributions from a reckoning of property.[203] It makes no judgement about the nature of caring work in the household. Women whose contribution has consisted of child bearing and rearing, and payment for childcare and the weekly food bill, will have that contribution implicitly recognised as equal to, say, the ostensibly property-related financial contribution of their partner.

By contrast, the *Cummins* approach fails to acknowledge women's capital contributions or significant financial contributions towards the property. Sarmas has compared the outcomes for women of the application of the resulting trust approach and the *Cummins* approach,[204] revealing that women who have contributed more capital than their partner will be worse off. Sarmas points out also women's structural disadvantage relative to men, concluding that 'a new rule that makes some women worse off in a context where there is a pre-existing structural disadvantage will clearly work to further entrench that disadvantage.'[205] In other words, equality is not equity.

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[200] *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278, 302, quoting Austin Scott, *The Law of Trusts* (4th ed, 1989) vol 5, 239, [454] (emphasis added).
[201] Pahl, 'Money and Marriage' above n 147, 141. Vogler, Lyonette and Wiggins discuss the 'taboo' on discussing financial matters: Carolyn Vogler, Clare Lyonette and Richard D Wiggins, 'Money, Power and Spending Decisions in Intimate Relationships' (2008) 56(1) *The Sociological Review* 117, 118.
[202] Approaches to equality is discussed generally in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU e-Press, 2010).
[203] Notably in eg *Burns v Burns* [1984] Ch 317; *Lloyds Bank Plc v Rosset* [1991] 1 AC 107.
[204] Sarmas, above n 36.
[205] Ibid 247.

Apart from the uncertain extent of the application of the *Cummins* approach,[206] the more immediate challenge is to navigate a path through ostensibly competing outcomes, to 'avoid any injustice which would result if account were not taken of the disparity between the worth of their individual contributions either financially or in kind.'[207] Women's financial contributions need to be accounted for, but so too do their contributions through domestic labour. The presumption of resulting trust and counter-presumption of advancement previously achieved such a balance, though not (generally speaking) beyond the circumstances of a husband's capital contribution.

The law has a history, therefore, of recognising the way in which a married couple might conduct its financial affairs as a two-way flow of resources and labour. In the case of advancement, this was characterised as gift. On Macneil's reckoning, the gift might alternately be seen as generalised reciprocity, or contribution in anticipation of future exchange. The presumption itself however has not lasted intact[208] and in Australia where it presumably still exists, does not apply to de facto relationships.[209] Historically however, the presumption was a tool recognising the potentially inequitable distribution of beneficial interests arising from the presumption of resulting trust in light of the reality of intimate relations.

The diminishing role of the presumption of advancement misapprehends the ongoing structural economic disadvantage facing women, as does its inapplicability to de facto couples. Its likely limitation to de jure marriages[210] highlights its link to status, ignoring that inequality experienced by women is not a function of their relationship status, but a function of their gender. On the other hand, invoking status reinforces existing gender norms, limiting courts' thinking to the historical forms and functions of marriage[211] and entrenching the structural *status quo*. The presumption exists to soften the inequity of the resulting trust, highlighting the likely gendered nature of the resulting trust itself; but the presumption itself reinforces gendered norms. In yet another double bind, women's economic standing is insufficiently evolved to warrant the removal of protections invoked by status, yet status itself fails to resolve the inequalities of gender.

The variation of the *Cummins* approach goes some way to disposing of some of the problems with the presumption of advancement particularly, and contribution generally. It does not require consideration of the value, or extent of contribution, or understanding the long-term and diffuse exchange of the parties pursuant to their relationship. It accommodates the parties' shared purpose and their emotionally and

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[206] Sarmas observes that it is unclear whether the *Cummins* approach operates other than in the case of a de jure marriage, and beyond the matrimonial home. Further, its application differs as between the lower courts and the appellate courts, and as between married and unmarried couples. Ibid.
[207] *Baumgartner v Baumgartner* (1987) 164 CLR 137, 150.
[208] '[T]he strength of the presumption [must be] much diminished.' *Pettitt v Pettitt* [1970] AC 777, 793. Further, the 'old presumptions' are 'inappropriate' to intimate partner trusts: Lord Diplock, 824. The *Equality Act 2010* (UK), s199, abolishes the presumption of advancement but at the time of writing, this provision is yet to commence. New Zealand has repealed the presumption, *Property (Relationships) Act 1976* (NZ), s 4. See also Jamie Glister, 'Is There a Presumption of Advancement?' (2011) 33 *Sydney Law Review* 39.
[209] *Calverley v Green* (1984) 155 CLR 242, 260. Though note Gibbs CJ, 251, who found that it did. This is also a 'controversial' question in Canada: *Kerr v Baranow* [2011] 1 SCR 269, 287–8.
[210] See eg discussion in *Calverley v Green* (1984) 155 CLR 242, 259; *Kerr v Baranow* [2011] 1 SCR 269, 287–8.
[211] See eg Wong's critique of the 'marriage model' adopted by the courts, in Wong, above n 103.

materially intertwined lives. All of these points align with the direction so far in this argument. However, in failing to accommodate contribution at all, it does not have capacity to entertain questions of the parties' actual contributions. Notably in *Cummins*, Ms Cummins' significant capital contribution was not relevant. Further, the *Cummins* approach as a status-based approach cannot accommodate the parties' relations. In depending on relation*ship* as ascribed by the law it runs the risk of replaying the gendered norms of marriage and society more broadly, without appreciating the parties' own life plans.

Finally, implementation of presumptions or even the *Cummins* inference as to joint property are unlikely to forestall claims of a trust altogether. Such claims still exist post-*Cummins* even in the Australian context where family law provides a redistributive mechanism.[212] For this reason, the law of intimate partner trusts must find a way to resolve the implications of gender, and to recognise relations in a way that promotes equality.

Distribution based on status may in some circumstances be sufficient to promote equality in the outcome, but it fails to do so in many others. Whether using a statutory framework or common law, substantive equality requires recognition of the diverse contexts in which women contribute to the relationship economy and the right to a beneficial property interest arising from that contribution. The importance of the law's role in recognising economic outcomes from relational exchange goes beyond equality for the parties before the court, to shape social expectations more broadly as to the nature of domestic contributions vis-à-vis property.

Conclusion

Contributions between partners even where there is a lack of direct reciprocity concerning property rights can, like intention, be accounted for as a beneficial interest through a relational approach. Acquisition of the legal title might occur transactionally upon the conveyance of legal title, but also relationally between partners through specialisation of household labour and expenses, as well as through capital and other financial contribution to the parties' shared lives. A relational exchange might lack the direct reciprocity of transaction, but in generating 'exchange surplus,' it occurs in anticipation of future exchange. Lacking the individualistic motivation of the direct transaction, it serves the purpose of social solidarity that is at the heart of relations generally, and intimate relations in particular.

So long as the law excludes some types of contribution from the reckoning of beneficial interests, it entrenches women's inequality relative to men. To promote equality requires the law to recognise the scope of contributions that comprise exchange within intimate relations. To achieve this, however, requires more than simple formal equality along the lines of *Cummins* or any alternative status-based approach, which fail to account for diverse contributions. It is the diversity of experience of women, their contributions, and their relationships that demands of the law a more nuanced approach to understanding the contribution necessary to determine property interests. Even if a status-based or equal-shares approach is a starting point for determining the distribution of equitable interests, the couple's

[212] See eg *Sui Mei Huen v Official Receiver for and on Behalf of the Official Trustee in Bankruptcy* [2008] FCAFC 117; *Stanford v Stanford* (2012) 87 ALR 70.

particular circumstances will still need to be accounted for to reflect an equitable distribution. In other words such an approach fails to resolve the questions of equity that already exist, while the way in which equity resolves those questions currently, fails to address questions of equality.

Finally, Sarmas raises the further question of whether the *Cummins* approach deals only with the matrimonial home or property more broadly. This object of the claims for a beneficial interest — the home — forms the third element of analysis in this thesis. The home represents a further locus of relations that is in some cases implicitly involved in the court's decision, though it is absent in others. Generally however, the application for a beneficial interest applies to the family home. Despite playing no express legal role in the cases, 'home' provides the fulcrum around which the relationship turns. It represents the third arm of the relationships at stake in intimate partner claims and will be explored in detail in the following chapter.

CHAPTER 5 — HOME

> [C]ouples … will strive to make a home… a place that provides safety, security and love and which is as well frequently the place where children may be cared for and nurtured. In a relationship that involves living and sleeping together, couples will share their worst fears and frustrations and their fondest dreams and aspirations. They will plan and work together to achieve their goals… [P]artners …will base their actions on mutual love and trust.[1]

Beyond intention and contribution, 'home' provides a further contour to claims by intimate partners for a beneficial interest in property. Not generally a concept recognised by the law of property[2] but not entirely absent from the law,[3] 'home' features in the 'family home' trust cases[4] as both the object of rights and, as argued here, as an element of the relations at stake. Representing both relations between people, and between people and place, 'home' embodies the essence of the concept of property[5] yet its role in the cases is ambiguous at best.

The problem for those whose claiming a 'home interest' is not that the law fails to recognise it altogether. Rather, in such cases, claimants' problems stem from the lack of coherence in the understanding and application of the concept.[6] The same might be said of the intimate partner trust cases. This thesis is not concerned with the 'home interest' per se: such claims effectively seek to equate legal rights with home itself. However, this chapter draws on Lorna Fox's work and the literature surrounding 'home' to suggest that the concept of home, as diverse and problematic as it might be for the law, enhances the argument for a relational approach to intention and contribution in claims for a beneficial interest.

The first part of this chapter analyses the duality of 'home' in the case law across the four jurisdictions. On the one hand, the trust is invoked generally because 'home' is the object of the claim. In contrast, courts frequently find arguments focussed on 'home' to be irrelevant.[7]

Continuing the relational framework of Chapter Four, the second part of this chapter views 'home' as indicative of relations both between people and between people and place. For a couple, 'home' represents values so that even roles of 'husband' and 'wife' can be concomitant with sharing a home. Yet courts' understanding of 'home'

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[1] *Peter v Beblow* [1993] 1 SCR 980, 1013.
[2] See eg Kevin Gray and Susan Francis Gray, 'The Rhetoric of Reality' in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis Butterworths, 2003) 204, 245
[3] See discussion in Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, 2006) ('Conceptualising Home'), 7–11.
[4] See eg Lorna Fox, 'Trusts of the Family Home: The Impact of *Oxley v Hiscock*' (2005) 56 *Northern Ireland Legal Quarterly* 83; Simone Wong, 'Constructive Trusts over the Family Home: Lessons to Be Learned from Other Commonwealth Jurisdictions?' 18(3) *Legal Studies* 369.
[5] Manifested, for example, in Locke's labour theory of law: John Locke, 'The Second Treatise of Government (an Essay Concerning the True Original, Extent and End of Civil Government)' in J W Gough (ed), *The Second Treatise of Government (an Essay Concerning the True Original, Extent and End of Civil Government); and, a Letter Concerning Toleration* (Blackwell, 3rd ed, 1966). See also Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2012).
[6] Fox, 'Conceptualising Home', above n 3, 11.
[7] See eg *Oxley v Hiscock* [2005] Fam 211, 222.

fails to comprehend such signification with the consequence that they are unlikely to completely understand arguments as to intention and contribution.

While bearing in mind the importance of intention and contribution, 'home' also warrants consideration in ascertaining the beneficial interest. The parties frequently intend that they make the site of the property their home, and they tend to contribute to their home through specialised exchange. Where 'home' stands for conceptions of self, of place, and the locus of investment, parties invoking 'home' are likely to be speaking to the elements recognised within the law of property. In other words, home lies at the centre of an inquiry into property, providing a foundation for the traditional legal elements.

I. 'HOME' IN THE CASE LAW

It is no coincidence that the couple's home is usually the object of actions in the intimate partner trust cases. Across the four jurisdictions, the fact of the property being 'home' is clearly relevant.[8] Some cases feature assets other than the home,[9] but even in these claims 'home' is central. Sarmas has suggested that at least some of the law in the Australian context might not extend beyond the (matrimonial) home.[10] Although this is yet to be tested, the shared home is certainly central to the cases.[11]

Yet despite 'home' as a common feature in the cases, the purpose it apparently serves in legal analysis differs greatly from one case to the next. Following a close reading of cases across the four jurisdictions, this part analyses the way in which the trust cases apply 'home'.

A. The Terminology of 'Home'

The cases refer variously to 'matrimonial home',[12] 'quasi-matrimonial home',[13] 'joint home',[14] 'erstwhile joint home',[15] 'family home',[16] or simply 'home'.[17] While some do not mention 'home' at all,[18] the frequent use of matrimony as a qualifier points to particular conceptions of home itself. 'Home' is clearly relevant to determining the beneficial interest between intimate partners, but the import of these diverse descriptions — or the absence of any reference — is less clear.

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[8] See eg *Baumgartner v Baumgartner* (1987) 164 CLR 137, 146, 154.
[9] See eg *Muschinski v Dodds* (1985) 160 CLR 583; *Pettkus v Becker* [1980] 2 SCR 834.
[10] Lisa Sarmas, 'Trusts, Third Parties and the Family Home: Six Years since *Cummins* and Confusion Still Reigns' (2012) 36 *Melbourne University Law Review* 216, 234.
[11] *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278.
[12] *Kerr v Baranow* [2011] 1 SCR 269; *Sui Mei Huen v Official Receiver for and on Behalf of the Official Trustee in Bankruptcy* [2008] FCAFC 117; *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278; *Parianos v Melluish* [2003] FCA 190; *Cossey v Bach* [1992] 3 NZLR 612; *Lloyds Bank Plc v Rosset* [1991] 1 AC 107; *Pettkus v Becker* [1980] 2 SCR 834; *Murdoch v Murdoch* [1975] 1 SCR 423; *Gissing v Gissing* [1971] AC 886; *Pettitt v Pettitt* [1970] AC 777.
[13] As used by counsel in *Burns v Burns* [1984] Ch 317; *Stack v Dowden* [2007] 2 AC 432, 447.
[14] *Turton v Turton* [1988] Ch 542; *Grant v Edwards* [1986] Ch 638; *Eves v Eves* [1975] 1 WLR 1338.
[15] See eg *Burns v Burns* [1984] Ch 317, 333.
[16] *Jones v Kernott* [2012] 1 AC 776; *Stack v Dowden* [2007] 2 AC 432; *Drake v Whipp* (1996) 28 HLR 531; *Gillies v Keogh* [1989] 2 NZLR 327; *Green v Green* (1989) 17 NSWLR 343; *Walker v Hall* [1984] Fam Law 21; *Murdoch v Murdoch* [1975] 1 SCR 423.
[17] See eg reference to the bach the parties made their 'little home' in *Hayward v Giordani* [1983] NZLR 140.
[18] *Springette v Defoe* [1992] 2 FLR 388; *Hussey v Palmer* [1972] 1 WLR 1286.

Earlier English cases' use of 'matrimonial home' carries two implications. First, it flags the courts' perception of a necessary connection between coupledom and home — itself perhaps unconsciously reflecting the values associated with 'home' including, implicitly, that of relations. Secondly, it distinguishes the home of the de jure marriage from the 'quasi-matrimonial' home of the de facto couple. The choice of term points to some understanding about the object of the claim (home) that is not explicit in the judgments. The use of this term certainly does say something about the fact of marriage, but it is the juxtaposition of 'home' with intimate relations, that might inform a claim to property.

For example, courts' choice of terminology as between a 'matrimonial' or 'quasi-matrimonial' home apparently reflects differential albeit unclear, meanings of 'home'. In *Stack* Lord Neuberger discussed the possible nexus between intimate partners sharing a home, and the requisite elements to establish property ownership. He emphasised that 'particularly where [the parties] have chosen not to marry, their close and loving relationship does not by any means necessarily imply an *intention to share* all their assets equally.'[19] He apparently sought to sever the inference of intention to share implicit in both matrimony and home, from an inquiry into property. Despite the sharing implicit in home, the fact that home was mentioned at all differentiates the claim from one lying necessarily in property.[20]

In some cases, to give meaning to 'home', courts revert to legislation. Thus in *Murdoch v Murdoch* where the object of the claim was a 'homestead' the Court turned to the homesteading legislation which defined 'homestead' as 'a parcel of land not more than a quarter section, where the owner's residence is situated'.[21] More frequently, and despite the concerns of the distribution of property according to the general law, courts turn to family law legislation. Unsurprisingly, this reveals a conception of home intrinsically related to marriage. *Hogben v Hogben* for example, referred to the somewhat unhelpful *Marriage Act 1958* (Vic), which defined the matrimonial home as

> so much of any real property in question as consists of a dwelling and its curtilage (if any) which the judge is satisfied was acquired by them [ie, husband and wife] or either of them at any time during or in contemplation of the marriage wholly or principally for occupation as their matrimonial home.[22]

In this claim by Ms Hogben for a joint beneficial interest in her husband's solely owned property, and beyond the definitional issues as a question of statute law, the matrimonial home was found to be

> a piece of property that stands on a very special footing. Acquired for the purpose of providing a home for both husband and wife to be enjoyed by them both over the years, both are interested in it whatever the position may be as to title… Meantime it is to be the home of both and *both have in this sense a real interest in it*.[23]

[19] *Stack v Dowden* [2007] 2 AC 432, 474 (emphasis added).
[20] See also discussion in *Lankow v Rose* [1995] 1 NZLR 277, 286.
[21] *Murdoch v Murdoch* [1975] 1 SCR 423, 433.
[22] *Hogben v Hogben* [1964] VR 468, 472, citing *Marriage Act 1958* (Vic), s 163(4)(b).
[23] Ibid 472 (emphasis added).

In England, *Miller* also examined the relevant marriage legislation, but to distinguish business from family assets. The Court found that 'matrimonial property', which included the 'matrimonial home', was the financial product of the parties' common endeavour. It acknowledged that

> [t]he parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose.[24]

Reference to 'matrimonial home' in the cases is somewhat puzzling given the absence of 'family assets' or 'family property'[25] as a recognised type of property. While *Gissing* affirmed the common law principle of separate property the Court nonetheless discussed the meaning of 'family asset', describing it as 'property acquired in contemplation of marriage or during the subsistence of marriage…for common enjoyment of both spouses and children for example, the matrimonial home, furniture and other durable chattels.'[26] In doing so, the Court in *Gissing* accorded meaning to the matrimonial home, even though no consideration was to be given to its beneficial ownership simply by virtue of its status as such. While not equating to property, 'home' in the matrimonial context held some other meaning still ostensibly relevant to the court's inquiry.

Despite the redundancy of 'family assets', the term arises in subsequent cases. *Allen v Snyder* described 'family assets' cases as involving 'a claim by one partner to a beneficial interest in property legally owned by the other.'[27] In New Zealand, the Court found that '[a] stable and enduring de facto relationship would create a favourable climate for a reasonable expectation that family assets would be shared…'[28] *Gillies v Keogh* found it relevant to consider the attitudes the de facto parties had towards their 'family property'.[29] The implication of sharing thus appears to be relevant, perhaps evincing a perceived connection between the 'matrimonial' or 'family' home and the possibility of intention.

More recent decisions use 'family home' and 'joint home', removing the differentiation between matrimonial and quasi-matrimonial property. The cases continue to describe the parties' intention as to the use of the home as shared, and with reference to their relations: an 'intention that it should be their home';[30] that the male partner 'would have put the house in joint names as it was to be their joint home;'[31] the property 'was bought to provide a home for them and their son;'[32] the 'couple intended it to be their family home;'[33] 'that house had become their home;'[34] 'most relevantly, a home into which he had put his savings and to which she was to give over the years the benefit of the maintenance and improvement contribution;'[35]

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[24] *Miller v Miller: Mcfarlane v Mcfarlane* [2006] UKHL 24, [22].
[25] A term used previously in *Pettitt v Pettitt* [1970] AC 777, 824.
[26] *Gissing v Gissing* [1971] AC 886, 904.
[27] [1977] 2 NSWLR 685, 697.
[28] *Cossey v Bach* [1992] 3 NZLR 612, 626, 632.
[29] [1989] 2 NZLR 327, 346.
[30] Eg *Drake v Whipp* (1996) 28 HLR 531, 533.
[31] *Eves v Eves* [1975] 1 WLR 1338, 1344.
[32] *Fowler v Barron* [2008] EWCA Civ 377, [53].
[33] *Jones v Kernott* [2012] 1 AC 776, 781.
[34] *Lankow v Rose* [1995] 1 NZLR 277, 277.
[35] *Midland Bank Plc v Cooke* (1995) 27 HLR 733, 747.

'occupied the house together as their home;'[36] 'the most important fact of all is the property was bought as a family home'.[37]

Further, the intention to share a home as partners anticipates a long relationship: a home is 'to be enjoyed by them both [husband and wife] over the years.' [38] The parties in *Walker v Hall* 'expected they would live together for life.'[39] In *Springette v Defoe*, they 'hoped' that 'their relationship should last for life'[40] although in *Miller* the entitlement of the parties 'would not [depend on] how long or short the marriage may have been.'[41] Such comments point to qualities of 'home' that differentiate it from other types of property without indicating that the intention to share for life of itself equates to property, yet perhaps implying the possibility of such intention.

That there must only be one home is evident from *Hillman v Box*, which involved an unsuccessful claim by a woman against the estate of her deceased former de facto partner. She claimed that the couple had maintained two homes, and gave evidence that at one stage he had moved into 'her' home. The Court found this 'somewhat curious'[42] and although it acknowledged that she provided him with a home for which he paid no rent together with 'ordinary domestic services',[43] the separation of their residences was relevant.[44]

Finally, ceasing to use the residence as a 'family home' after separation has been found to represent a failure of the purpose of a trust.[45] That purpose is the provision of a joint home, suggesting a possible role for 'home' at law. On the other hand, in *Wakefield v Silkwatch*[46] the claimant sought to apply a '*Baumgartner* constructive trust' in the context of an arm's-length commercial dealing. The claim was unsuccessful, but relevant to this discussion the Queensland Supreme Court did not indicate that a 'home' interest was a pre-requisite for the application of the *Baumgartner* principles.

B. Application

Consistent judicial reference to 'home' necessarily indicates that it holds some meaning. This section illustrates the way in which 'home' is applied in the cases, often to different ends. In broad terms 'home' provides the case narrative, invoked by judges to set the context of the claim. The terms selected by the court, and the tone of the narrative, are frequently telling of the court's attitude towards the claimant. The narrative tone tends to be played out in the legal pronouncements.

In other cases, claimants themselves invoke 'home' in their argument. The courts' response to this is variable, indicating the ambiguous role of 'home' in the law. Minimally 'home' offers little more than 'practical benefits', a derivative occupation

[36] *Stack v Dowden* [2007] 2 AC 432, 439.
[37] *Walker v Hall* [1984] Fam Law 21 (1983 WL 215565), 3.
[38] *Hogben v Hogben* [1964] VR 468, 472.
[39] [1984] Fam Law 21 (1983 WL 215565), 3.
[40] [1992] 2 FLR 388, 392.
[41] *Miller v Miller: Mcfarlane v Mcfarlane* [2006] UKHL 24, [22].
[42] *Hillman v Box (No 4)* [2014] ACTSC 107, [329].
[43] Ibid [377].
[44] Ibid [375].
[45] *Turton v Turton* [1988] Ch 542, 553.
[46] [2012] QSC 412 (14 December 2012).

licence. More substantially it may represent a possessory interest, or at best it supports a proprietary claim. In this discussion I distinguish the occupier's 'home interest' discussed by Fox.[47] Such an interest has no firm description, as it is highly dependent upon the claimant's own circumstances. In broad terms, Fox contrasts the occupier's home interest from that of commercial interests. The occupier's home interest amounts to a claim of rights based on the fact of occupation of premises as home. But the claim may simply be one of occupation alone, in the face of a third party creditor or even a landlord. In this thesis however, my interest in 'home' lies in its explanatory force to determine property distribution between the parties. When used in the cases, it appears to offer a means of drawing together the elements of intention and contribution in a relational context.

1. The Narrative of Home

The way courts weave 'home' into the judgments delineates 'cases of this nature'.[48] 'Home' is *necessary* to invoke the law of intimate partner trusts in the intimate partner claims, however the narrative tone might indicate whether 'home' is *sufficient* to support a claim for a beneficial interest. In a few cases for example, the object of the claim is simply a 'house'[49] and in others the factual narrative uses the term only occasionally.[50] In unsuccessful claims the courts' terminology appears indicative of the claimants' poor prospects.

In *Stokes v Anderson*, Ms Anderson was awarded a lesser interest than what she had claimed: only a one half interest in the half interest her former partner had acquired from his ex-wife using funds contributed by Ms Anderson. Nowhere did the judgment concede that the cottage was Ms Anderson's 'home', although '[f]rom the end of 1986, if not before, she lived at Stone Cottage on a permanent basis [and she] was there for the whole of 1987.'[51] The narrative thus diminished the context of 'home'. Without drawing a causal connection between the Court's choice of terminology and Ms Anderson's reduced beneficial interest, the judgment certainly contrasts with other more generous approaches.

Similarly in *Green v Green*[52] the Court largely focused on Mr Green's provision of a 'house' for Ms Green, although the majority judgment in support of the claim invoked 'home' to a greater extent than the dissent that refused it. In a tragic set of circumstances, Mr Green had brought Ms Green from Thailand when she was a child, at which point they entered into a 'de facto relationship'. Mr Green promised her that he would provide her with a house and that they would have children together. Ms Green claimed that throughout their relationship, Mr Green maintained his promise to house her. She brought the action against Mr Green's estate, seeking a declaration of a beneficial interest in her home.

The majority framed the facts largely using the terminology of 'property' and 'house'. It also disclaimed any possible interest in the 'matrimonial home' arising from a husband's obligation to house his wife, before acknowledging the possibility of

[47] Fox, 'Conceptualising Home', above n 3.
[48] *Oxley v Hiscock* [2005] Fam 211, 246.
[49] *Stokes v Anderson* [1991] 1 FLR 391; *Green v Green* (1989) 17 NSWLR 343.
[50] *York v York* [2015] EWCA Civ 72.
[51] *Stokes v Anderson* [1991] 1 FLR 391, 394.
[52] (1989) 17 NSWLR 343.

equity's intervention to recognize an interest in the 'family home'.[53] The majority did however incorporate 'home' into the narrative when discussing Mr Green's representations.[54] 'The deceased, over the entire period of his relationship with the respondent, represented to her that it was his intention that she should have some form of proprietary interest in the homes he provided for her…'[55] Further, Mr Green's intention was found to be that upon his death, each of his three wives would have their own home.[56]

By contrast, Mahoney JA in dissent described the circumstances almost entirely in terms of a series of transactions involving 'property' or the 'house'. In issue were 'three pieces of realty',[57] a claim for equitable ownership 'of the lands in question'.[58] The lack of relevance of 'home' in the dissenting judgment is highlighted in its dismissal of any suggestion of intention to grant a beneficial interest.

> [T]he surrounding circumstances make it unlikely that, in 1969, the deceased intended to vest the ownership of *valuable realty* in the plaintiff. She was then very young: on one view about thirteen or fourteen years old, on another about eighteen or nineteen. The deceased had no pressing reason to vest *such land* in her.[59]

Mahoney JA upheld the trial judge's finding that Ms Green's evidence was unreliable and therefore did not need to consider the content of Mr Green's representations or what they may have indicated about her 'home'.

Although Ms Green was awarded a beneficial interest, the difference in the approach of the majority and dissenting judgments again roughly correlates with some use of 'home' in a successful claim, and the absence of 'home' in a rejection of a beneficial interest. For the dissenter, 'home' was neither necessary nor sufficient to entertain a claim for a beneficial interest.

In *Burns* although the parties had 'set up home together' in their first shared rental accommodation, from that point the narrative focuses on the reason for buying the house, namely that Mr Burns 'realised that it was much better use of money to buy an asset — a house — rather than rent a flat.'[60] 'It [was] true that [Ms Burns] contemplated living with the defendant in the house'[61] but this had no implications for any intention to share a beneficial interest. None of the judgments mentions 'home'. While Ms Burns claimed a homemaker's contribution, much was made of the fact that at no stage had Mr Burns asked her to contribute to household expenses.[62] The fabric of the Court's judgment separates the parties' lives and their dwelling, denying the jointness of their 'home' and limiting any evidentiary effect it might otherwise have had. Needless to say, Ms Burns was unsuccessful in her claim.

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[53] Ibid 353.
[54] Ibid 360.
[55] Ibid 356.
[56] Ibid 358.
[57] Ibid 359.
[58] Ibid 360.
[59] Ibid 362 (emphasis added).
[60] *Burns v Burns* [1984] Ch 317, 327.
[61] Ibid.
[62] See eg ibid 330.

Similarly, the claimant in *Gillies v Keogh* was unsuccessful in his claim for a beneficial interest in the defendant's 'house'.[63] In his expansive introduction to the law, Cooke P did not mention house or home. Instead, he discussed 'interests' or 'ownership' in the abstract. As for the facts, the trial judge had accepted that Ms Gillies regarded as 'sacrosanct' an amount she received from the sale of her former matrimonial home. This sum was to 'be held for obtaining a replacement house property.'[64] She 'provided all the furniture, enough to set up the house comfortably.'[65] Mr Keogh's contribution through labour on the house was accounted for by his 'living on the spot'.[66] The narrative did not entertain the house as the couple's home. Instead it separated Ms Gillies' sole interest from any possible interest in Mr Keogh.

The language in these cases contrasts with the majority of decisions, in which 'home' is central to the narrative. In *Stack,* Baroness Hale situated 'home' at the heart of the range of factors relevant to determining a beneficial interest.[67] Indeed many of the English cases frame the law itself along the lines of: 'where a family home has been bought in joint names…'[68]

These narratives recognise the central role of 'home' in the relationship — frequently in a more sympathetic way than more legalistic approaches that fail to mention 'home' — even if not all claims are successful. Despite Ms Rosset losing her claim, the narrative described the parties' search for a new home and Ms Rosset's renovation efforts.[69] The Cookes had a shared home 'into which he had put his savings and to which she over the years had given beneficial maintenance and improvement contribution.'[70] In *Oxley v Hiscock*,

> …both of those properties … were regarded as these two people's home, and indeed each was asked in the course of oral evidence if they had been questioned back at the time what would they have said, for instance, regarding the property, and each gave evidence, 'Well, I would have said it was our home.'[71]

In *Cummins*, the fact that the property was the matrimonial home was central to legal argument.[72] *Parianos* cited the 'principles in which equity will intervene to declare the existence of a constructive trust over the family home.'[73] Ms Parianos' extensive efforts in making the home were part of the Court's narrative.

In New Zealand, the property-based approach in *Gillies v Keogh* contrasts with the more relational home-based approach in *Hayward v Giordani*. In the latter, where the surviving de facto spouse claimed a beneficial interest against the deceased partner's sole legal title, the Court referred in some detail to the couple's home-making. The

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[63] *Gillies v Keogh* [1989] 2 NZLR 327, 330.
[64] Ibid 335.
[65] Ibid 336.
[66] Ibid 337.
[67] *Stack v Dowden* [2007] 2 AC 432, 459.
[68] See eg *Jones v Kernott* [2012] 1 AC 776; *Oxley v Hiscock* [2005] Fam 211; *Stack v Dowden* [2007] 2 AC 432.
[69] Other cases also recite in some detail the efforts of the couple to turn a house into a home. See eg *Drake v Whipp* (1996) 28 HLR 531; *Eves v Eves* [1975] 1 WLR 1338.
[70] *Midland Bank Plc v Cooke* (1995) 27 HLR 733, 747.
[71] *Oxley v Hiscock* [2005] Fam 211, 219.
[72] *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278, 302–3.
[73] *Parianos v Melluish* [2003] FCA 190, [30].

couple was devoted to 'making their home liveable'[74] so that eventually 'the bach became a little home.'[75] Similarly, in *Lankow*, the parties 'made a home' in one of the flats before acquiring the house that 'became their home.'[76] Ms Rose shared in the planning for the new home and as with many of the English cases, the narrative extended to describe the effort and activities involved in a house becoming the couple's home.

It cannot be said that courts' general narrative approach and their adoption of the language of 'home' will necessarily support a claim for a beneficial interest. But where the language of home is lacking, there is apparently little hope of success. The cases that do use the language of 'home' depend on further factors one of which is the way in which the courts treat the claimants' own evidence — where that evidence itself invokes 'home'.

2. Arguing 'Home'

Despite 'home' representing a threshold for considering intimate partner trusts as a means to establish a beneficial interest, beyond that claimants' evidence invoking 'home' is distanced from legal consequence. Indeed there is considerable variability in courts' reception of claimants' arguments where those arguments centre on 'home'.

Courts are not prepared to find property in a 'home interest' per se: '[n]o case has yet held that in the absence of some financial contribution, the wife is entitled to a proprietary interest from the mere fact of marriage and cohabitation, and the fact that the property is the matrimonial home.'[77] In contrast to assumptions of sharing implicit in intimate relations, contributions 'may amount to no more than fair payment for board and lodging and the advantages of a home for the time being. More than that is commonly needed to justify an award.'[78] Similarly,

> [t]he acceptance of an obligation on the part of the husband to house his wife would not normally be regarded as an undertaking to give her a proprietary interest in the home in which they live, and wives usually have reasons for living with their husbands other than an expectation that they will increase their assets.[79]

In *Lloyd's Bank v Rosset*, Lord Bridge said that 'a common intention that the house is to be shared by parents and children as the family home throws [no] light on their intentions with respect to the beneficial ownership of the property.'[80] And (contrasting with *Cummins*) Lord Neuberger was

> unimpressed…by the argument that, merely because they have already lived together for a long time sharing all regular outgoings…the parties must intend that the beneficial interest in the home they are acquiring, with differently sized contributions, should be held in equal shares.[81]

[74] *Hayward v Giordani* [1983] NZLR 140, 141.
[75] Ibid 143.
[76] *Lankow v Rose* [1995] 1 NZLR 277.
[77] *Murdoch v Murdoch* [1975] 1 SCR 423, 431, citing Judson J from the trial judgment.
[78] *Gillies v Keogh* [1989] 2 NZLR 327, 334.
[79] *Green v Green* (1989) 17 NSWLR 343, 353.
[80] [1991] 1 AC 107, 130.
[81] *Stack v Dowden* [2007] 2 AC 432, 473.

The tenor of such pronouncements indicates that where a claimant uses 'home' in their argument, it must serve some purpose other than allege an interest simply by virtue of the property's use as a shared home. Ms Rosset's contribution to their home for example, simply constituted activities one would expect of a wife in the home. Her labour and the fact of a shared home were indivisible: aligning her argument with 'home' could not support a beneficial interest as the law did not recognise 'home' as property.[82]

By contrast, Ms Rose[83] and Ms Becker[84] managed to present evidence about their labour in a way that differentiated it from 'home duties'. Their labour was thus sufficiently independent from 'home' in the courts' eyes, to support their respective claims. Mr Lankow had attempted to tie Ms Rose's contributions to a rental arrangement, which would recognise a transaction providing her with a home but not a property interest.[85] Mr Pettkus effectively disclaimed his relationship with Ms Becker altogether, implying an arm's-length living arrangement but no proprietary interest.[86] In both cases, the defendants sought to deny the women their labour as contribution, characterising it as an incident of occupancy or domesticity — both implicit in the fact of the shared home. Unlike the outcome for Ms Rosset, these arguments were no barrier to a beneficial interest because the courts themselves interpreted the contributions independently of the sphere of home.

'Home' arose in evidence in both *Muschinski* and *Baumgartner*, where the claimants attested to the importance of the couples' plans for their respective shared homes. Ms Muschinski for example, said

> Mr Dodds was going to provide a home for me, no matter what. He was going to build a home and pay for it for the rest of his life. We were entering a partnership and whether it was $9,000 or $10,000 did not really matter at that stage. He was willing to provide whatever he had and whatever he was going to earn after; he was going to contribute to our future home and happiness.[87]

Brennan J held that 'the argument for a constructive trust must be that Mr Dodds' retention of the beneficial interest he was given is … inconsistent with the purpose for which the interest was given to him.'[88] That purpose seems, according to Ms Muschinski's evidence, to have been to create a 'home' but the Court's interpretation of her evidence is more transactional in tone.

> The better view of the arrangement is that the parties agreed…on the foundation on which they hoped to build their future relationship, and that that foundation included making Mr Dodds an independent owner of property which he might devote to their common purposes as a manifestation of his commitment to their relationship.[89]

Ms Muschinski had paid nearly the entire purchase price in exchange for Mr Dodds' giving of an assurance to contribute later. According to the Court, that he did not

[82] *Lloyds Bank Plc v Rosset* [1991] 1 AC 107.
[83] *Lankow v Rose* [1995] 1 NZLR 277.
[84] *Pettkus v Becker* [1980] 2 SCR 834.
[85] *Lankow v Rose* [1995] 1 NZLR 277, 287.
[86] *Pettkus v Becker* [1980] 2 SCR 834, 845.
[87] *Muschinski v Dodds* (1985) 160 CLR 583, 611.
[88] Ibid 608.
[89] Ibid 609.

carry out that assurance was of no consequence as it was the giving of the assurance, not its execution that formed the quid pro quo. Similarly, the Court's framing the transaction's purpose as vesting property in Mr Dodds to found a relationship, precludes Ms Muschinski's emphasis on Mr Dodds' acknowledgement of the place as 'her house',[90] his promises as to their mutual contribution to the joint venture of building a home,[91] and the context of her decision — reluctantly — to afford him a joint legal interest despite her considerably larger financial contribution.[92] Ultimately, 'home' held little value for the Court despite representing the crux of Ms Muschinski's claim.

Ms Baumgartner gave evidence that she 'just want[ed] a home for us and our child so that we can live on our own and don't have to worry about anyone else.'[93] Kirby P in the Court of Appeal found that 'the inference is inescapable that they intended this to be their home for the indefinite future and for their new family.'[94] After the home was bought solely in Mr Baumgartner's name, Ms Baumgartner had sought 'some proof that this is [her] home also'[95] although her partner denied this. At trial however, Rath J, finding against Ms Baumgartner, had described the role of 'home' quite differently. He held that she 'came to the appellant's home, in which she had no financial stake, and that she left that home "of her own will with a substantial quantity of furniture".'[96] The implication is that *Mr* Baumgartner's home required protection from a temporary interloper: itself implying some kind of exclusive, but not shared, interest associated with 'home'.

The High Court did not discuss a 'home interest' per se, but investigated the parties' intention and contribution specifically in the context of the relationship purpose of building a home.

> The land at Leumeah was acquired and the house on it was built in the context and for the purposes of that relationship. Together they planned the building of the house. Together they inspected it in the course of its construction. Together they moved out into it and made it their home after it was built. The case is accordingly one in which the parties have pooled their earnings for the purposes of their joint relationship, one of the purposes of that relationship being to secure accommodation for themselves and their child. Their contributions, financial and otherwise, to the acquisition of the land, the building of the house, the purchase of furniture and the making of their home, were on the basis of, and for the purposes of, that joint relationship.[97]

Intention and contribution are central to both *Baumgartner* and *Muschinski* but the parties' arguments about 'home' were important in each, constituting the purpose of their mutual endeavours. In *Muschinski*, the claimant's evidence about 'home' sought to inform the Court's understanding of the purpose of a perceived transaction whereby Mr Dodds would contribute to a half interest in the property for the purpose of the couple's shared home. By contrast in *Baumgartner*, the evidence about 'home', and in particular the couple's shared purpose of creating a home, supported Ms

[90] Ibid 611.
[91] Ibid.
[92] Ibid 592.
[93] *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 409.
[94] Ibid 418.
[95] *Baumgartner v Baumgartner* (1987) 164 CLR 137 141.
[96] Cited in ibid 142.
[97] Ibid 149.

Baumgartner's claim for a joint beneficial interest. In each case, a home-related purpose aligned with intention although in neither case did it result in a distribution of a beneficial interest, despite the courts' willingness to protect the women's respective financial investments.

The purpose of 'home' was relevant also in both *Turton v Turton* and *Walker v Hall,* which found the 'purpose of the implied or constructive trust was to provide a joint home for them both',[98] and 'when she left, the purpose of the trust ceased as it was no longer used as a family home.'[99] In these cases, the question of the parties' purpose of establishing a home was central to ascertaining their respective interests rather than the quite different search for intention.

The purpose of 'home' was relevant also in *Cossey v Bach*, where Ms Cossey only wanted 'to have a little home back to how I was and how he met me.'[100] The parties' interests were of no concern to her, she said. Instead, she sought a home. It was Ms Cossey's proclaimed lack of interest in how the property was to be held that defeated the element of intention — despite her insistence on a joint legal title. In contrast to Ms Cossey invoking 'home' as a motivation for a beneficial interest, the Court interpreted Mr Bach's intention quite differently. 'He wanted to provide a proper roof over their heads. So long as the family stayed together, the new property would be a family home for all. But those motives would no longer be relevant if the relationship came to an end.'[101] Unlike Ms Muschinski's interest, the Court effectively interpreted Mr Bach's beneficial property interest to be resurrected at the termination of the relationship and the consequential termination of the original purpose of providing a home. That the property was 'home' therefore seems to have been the foundation of the parties' shared interests, and once it was no longer their home, property could no longer be upheld.

While in one sense this may seem an appealing interpretation in light of the short-lived relationship between Mr Bach and Ms Cossey, the idea that Ms Cossey's interest was effectively subject to a condition subsequent — that it would last only so long as the couple shared the purpose of home — is not one that has been applied consistently. Thus Mr Dodds' legal interest was not taken subject to what Brennan J described as a condition subsequent; rather it was taken absolutely in consideration for his promise. This is a further example of the contingent interpretation of the meaning and relevance, or application, of 'home'. In some cases 'home' may be capable of supporting an intention as to property, but in others the consequences of 'home' are tangential.

Following the more positive narrative of home in *Drake v Whipp*, the Court found the parties' intention as to the beneficial interests reflected the intention of a shared home. According to Ms Drake, the parties 'were buying [the property] together as [their] home'[102] and Gibson LJ noted that 'Mr Whipp and Mrs Drake together purchased the property with the intention that it should be their home.'[103] This, plus their respective financial contributions, her contributions in kind, and a joint account from which to

[98] *Turton v Turton* [1988] Ch 542, 554.
[99] *Walker v Hall* [1984] Fam Law 21 (1983, WL 215565), 5.
[100] [1992] 3 NZLR 612, 634.
[101] Ibid 634.
[102] *Drake v Whipp* (1996) 28 HLR 531, 535.
[103] Ibid 537.

pay costs, supported a one third beneficial interest in her favour. This decision searches for the element of intention within the context of 'home' — this time in favour of the claimant.

'Home' continues to inform the court's understanding of intention. In *Fowler v Barron*, determination of the extent of the parties' beneficial interests started with an assumption that 'where…a house is transferred into the joint names of two individuals as their home, without any declaration of trust, the transfer will indicate that the parties intended to own the house in equal shares.'[104]

Mr Barron had given evidence that he intended the jointly owned property to become Ms Fowler's own home if she survived him, and their relationship had remained intact.[105] The trial judge accepted that the purpose of the joint tenancy was solely to provide for Ms Fowler after his death and that therefore there was no intention that she hold a beneficial interest commensurate with her legal estate inter vivos. By contrast, Ms Fowler's evidence as to intended ownership was that her first pregnancy 'was the spur for [them] to become a proper family unit' and to acquire the house 'to provide a home for themselves and their son.'[106] The trial judge however, accepted the conditional intention derived from Mr Barron's evidence.

The decision at trial was overturned on appeal, and Ms Fowler's beneficial interest was found to be at home with her one half interest at law. However this case illustrates the divergence in judicial framing of evidence about home insofar as it sheds light on intention and contribution. 'Home' supported the claims of Ms Fowler, Ms Baumgartner and Ms Parianos.[107] On the other hand, Ms Muschinski, Ms Cossey, Ms Stokes and Ms Walker had either no beneficial interest or a reduced one despite invoking 'home' in their arguments.[108]

The role of 'home' in determining property thus remains somewhat unclear. In some circumstances it defines the terms of a transaction, providing a neat framework for the application of the principles of property law. In others however — depending on judicial framing of the facts — arguments referring to 'home' fall outside the requisite property framework. The choices courts make in framing the facts to include or exclude 'home' reflect the alignment between the gendered assumptions of property law and the gendered construction of home. The result is the common law's propensity to exclude 'home' from having any real legal consequence.

II. HOME RELATIONS

At least part of the challenge for the law in taking account of 'home' is the ambiguous and frequently relational meaning of that term. In response, courts have tended to interpret arguments about 'home' as a claim of equivalence between home and property — which of course they reject.[109] Interpreting 'home' this way however,

[104] *Fowler v Barron* [2008] EWCA Civ 377, [24].
[105] Ibid [6].
[106] Ibid [53].
[107] Ibid; *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Parianos v Melluish* [2003] FCA 190.
[108] *Muschinski v Dodds* (1985) 160 CLR 583; *Cossey v Bach* [1992] 3 NZLR 612; *Stokes v Anderson* [1991] 1 FLR 391; *Walker v Hall* [1984] Fam Law 21.
[109] *Oxley v Hiscock* [2005] Fam 211; *Murdoch v Murdoch* [1975] 1 SCR 423; *Pettitt v Pettitt* [1970] AC 777.

obscures meanings relevant to the inquiry into property. Better understanding the parties' conceptualisation of the object of their exchange is likely to shed light on their intention as to property, and the relationship between their contribution and that perceived interest. Further, 'home' is likely to hold different meanings for each of the parties. To exclude it from consideration where it is central to the (relational) exchange at the heart of the claim is likely to privilege the party best able to express their claim in otherwise transactional terms and to preclude relational claims that might otherwise be viable.

To illustrate the consequences for equality of excluding 'home' from consideration, the first section in this part examines how ignoring 'home' imports gendered norms into legal analysis. The second section explores diverse values attached to 'home', informed by Fox's work,[110] to illustrate how a claimant's conception of 'home' might shed light on the elements of intention and contribution — and might thus make an important contribution to courts' inquiry.

A. The Gendered Home

The historical role of equity in protecting wives' property highlights women's traditionally exceptional status relative to the norm of man as property owner. While the doctrine of coverture continued as the norm at law, the married women's equity operated as a salve to the harshness of the operation of common law. Similarly the presumption of advancement was added to the presumption of resulting trust, where the resulting trust is the starting point and norm, and where advancement even through its very name, seems to recognise the limited capacity of married women to attain their own property. In both these examples, the male experience represents a norm or standard, while women's interests are an overlay, an exception.

Likewise, in a liberal market society the intimate is an outlier to the norm of that which occurs in the market itself. Where property and property law have evolved from the needs of the market, the market represents the norm. More recently however, family law has carved a discrete jurisprudential niche into property law, largely through statute. 'Home' in the trust cases ambiguously situates the beneficial interest as exceptional both in property (or trusts) law where it relates to the intimate rather than the market, and in family law where establishing the existing beneficial interest continues to draw on general principles of the market transaction, rather than that of relations.[111]

In the same way that equitable principles exhibit exceptionalism to the common law norm, 'home' is redolent of the linguistic tradition of binary opposites that feminist theorists identify as privileging 'masculine' norms associated with the public sphere and the market.[112] The arm's-length transaction between strangers forms the benchmark for determining a property interest, while a claim framed around 'home'

[110] Fox, 'Conceptualising Home', above n 3.
[111] *Stanford v Stanford* (2012) 247 CLR 108, 120.
[112] See eg Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Cavendish Publishing Ltd, 1998), 15; Dale Spender, *Man Made Language* (Pandora, 2nd ed, 1998); Frances E Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96(7) *The Harvard Law Review* 1497.

represents domesticity and intimacy, ostensibly with no particular standing under the general law.[113]

Walker v Hall for example, involved an acquisition 'in the joint names of a man and his mistress'.[114] In this case 'there [was] no special class of family assets which fall to be treated under the law of trusts in some way *different from other assets*.'[115] It was not open to the Court to hold that property belonged to the parties in equal shares 'simply because it was bought to be their family home and they intended that their relationship should last for life.'[116]

In these statements, Dillon LJ made it clear first that the 'neutral' measure of relationship was 'man', with 'mistress' ascribing a secondary status to the woman. Secondly the 'asset' transaction was the norm against which the domestic interest of home must be contrasted. 'Home' may have a role in the trust cases, but it stands as an exception to the norm of property.

If 'home' and the domesticity it implies are exceptional,[117] 'home' is at once part of legal analysis yet extraneous to determining the parties' property distribution. Similarly, Pateman explains how the social contract theorises how all people are brought within civil society — yet the social contract adopts the structures of patriarchy to exclude women's full participation. She posits an unacknowledged bargain implicit within Lockean social contract theory: the *sexual* contract. Women too enter into the contractual relations that define society, but they only enter civil society via their relations with men. Women are ostensibly included within the society yet are simultaneously consigned to an inferior status, occupying the interior world of the private sphere, through the operation of the very structures that include them.[118]

This duality resonates in the weak role ascribed to 'home' in the implied trust cases. Intimate partner claims for a beneficial interest occur within the common law by virtue of the 'shared home', but remain secondary, private, and relational, in a way that tends to exclude them from the operation of the law. They find acceptance within the law only where they can be measured in terms of dominant transactional norms.

Whether or not 'home' supports or hinders a claim is contingent upon judicial choices about framing the facts and the law. Apart from the exceptionality of 'home', judgments display a further duality that can be understood in terms of Heidegger's notion of construction and preservation of dwellings.[119] Heidegger investigates the meaning of what it is to be human through the importance of 'dwelling', another term for 'home'. He sees building, an essentially human activity, as integral to 'dwelling', and conceptualises building as comprising both construction and preservation. Reflecting this analysis, the cases describe couples as building a home together —

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[113] Established in *Pettitt v Pettitt* [1970] AC 777, 811.
[114] [1984] Fam Law 21 (1983, WL 215565), 3.
[115] Ibid 6 (emphasis added).
[116] Ibid.
[117] Fox notes the deserted wife's equity is less than a proprietary interest because it is doctrinally unstable, being fact dependent. Fox, 'Conceptualising Home', above n 3, 318.
[118] Carole Pateman, *The Sexual Contract* (Polity Press, 1988). For the role of the public sphere in civil society see eg Hannah Arendt, *The Human Condition* (University of Chicago Press, 2nd ed, 1998).
[119] Martin Heidegger, *Poetry, Language, Thought* (Albert Hofstadter trans, Harper & Row, 1971). Discussed in: Iris Marion Young, *On Female Body Experience: 'Throwing Like a Girl' and Other Essays* (Oxford University Press, 2005).

often literally constructing it, but especially for women, preserving it also. Young points out that Heidegger devotes his attention principally to construction, which she interprets as a masculine orientation[120] within a philosophical understanding of 'home'.

There is a further dualism that sheds light on the binary conceptualisation of dwelling. Construction is 'work', the historically conceptually privileged human activity that occurs in the public sphere. In contrast, preservation has more the character of 'labour', an activity afforded little kudos or recognition in the philosophical tradition.[121] Unlike work, labour occurs in the home, constituting the private that is traditionally anathema to the law.

The judgments display the construction/preservation duality in various ways. For example, courts tend to afford the privilege of property to a capital asset, but not to 'home'.[122] The former represents ideals of the market, but also Heidegger's 'construction'. An 'asset' is economic, *built* through the application of capital derived from *work,* whereas 'home' represents virtue, arising from *preservation* that occurs through repetitive *labour*. For the law, the former is the norm while the latter is exceptional. To complete the metaphors, property is constructed in legal terms through transaction whereas home is preserved through relations.

In relegating 'home' to an exceptional yet ambiguous status, the law imposes on it a binary, gendered construction. Where traditionally men work in the market and women labour in the home, men's interests are more likely to be comprehended as property while women's interests are contingent on the court's framing. The consequences of privileging asset building through work, is that men enjoy the exchange value of 'home', while women can access only its use value.[123] To comprehend the implicitly feminine 'home' in support of a claim for a beneficial interest requires shifting the axis of masculine benchmarks towards an understanding of 'home' that upholds substantive equality for the parties. Applying a limited and exceptional conception of home where it is central to a party's understanding of her interests excludes her experiences thus limiting her economic prospects relative to men.

B. Home's Layered Values

The courts acknowledge that parties derive understanding of their respective beneficial interests from tacit assumptions, an inevitable feature of relationships[124] yet they struggle to ascertain the parties' 'true' intentions. Although courts strictly differentiate between 'home' and property, the implications of property in terms of wealth, security, and identity are frequently mirrored in values attributed to 'home'. The difference lies in the derivation of those values — where property is conceived as occurring through more formal or transactional channels, but where home reflects values derived relationally.

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[120] Young, above n 119, 124.
[121] Arendt, above n 118, 81.
[122] The difference is noted for example, in *Stack v Dowden* [2007] 2 AC 432, 475–6.
[123] Fox, 'Conceptualising Home', above n 3, 380.
[124] See eg *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 416.

Most couples for example would tacitly assume that their mutual home would continue into the future, without ever expressing to one another the 'conscious present'.[125] In Ms Eves' words, 'I never thought anything was going to happen while we were building the home up.'[126] Even when Ms Oxley was given the opportunity to bring the exchange into the present by taking security over Mr Hiscock's sole interest, she chose not to instead saying that, 'I know Mr Hiscock well enough not to need written legal protection in this matter.'[127] These examples illustrate a relational understanding of the parties' exchange intimately associated both with their relationship and with 'home'.

Where parties do communicate in terms of exchange they are still likely to comprehend 'home' differently, even as they work together to build and preserve it, and despite agreeing that they share a home. In any relational context communication sent is not necessarily communication received[128] but for the intimate couple different interpretations are compounded by gendered experiences of 'home'. Appreciating the possible values attributed to 'home' can expose the limitations inherent in the courts' application of the term, and help interpret 'home' as claimants use it in their arguments, to shed light on the parties' intended distribution of beneficial interests.

This part of the chapter adapts Fox's five constructs of 'home' to analyse its potential relevance for the law.[129] As a starting point, 'home' is 'house plus "x"'[130] where the 'x factor' relates to values imported by 'home' beyond 'home as physical structure', namely: 'home as financial investment; …home as territory; home as identity; home as social and cultural unit.'[131] Although ostensibly discrete interpretations, they function on a continuum. Further, one's interpretation of 'home' might involve many of these categories at once, and it may alter over time.

This analysis consolidates Fox's five categories into three. While financial investment remains discrete, 'home' as physical structure is amalgamated with Fox's additional category of territoriality, under the rubric of 'boundaries'. 'Home' as identity includes both its personal and socio-cultural construction — discussed separately by Fox — recognising the close connection between the two.

1. Financial Investment

The judgments treat 'home' principally as financial investment. Many expressly distinguish between the house as capital asset and the parties' shared home[132] where the former as the object of a transaction justifies a beneficial interest, but the latter will not. Interpreting 'home' this way obviates the need to engage with other more emotional understandings of 'home' and aligns with a transactional approach to the exchange.

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[125] Ian R Macneil, 'The Many Futures of Contracts' (1974) 47 *Southern California Law Review* 691, 754.
[126] *Eves v Eves* [1975] 1 WLR 1338, 1340.
[127] *Oxley v Hiscock* [2005] Fam 211, 216.
[128] Macneil, above n 125, 727.
[129] Fox, 'Conceptualising Home', above n 3, 117. See also D Geoffrey Hayward, 'Housing Research and the Concept of Home' (1977) 4(3) *Housing Educators Journal* 7.
[130] Fox, 'Conceptualising Home', above n 3.
[131] Ibid. Each of these is expanded in Chapter Four of her book.
[132] See eg *Stack v Dowden* [2007] 2 AC 432, 475.

Importantly for the law, as a financial asset, 'home' is a tradeable commodity that is clearly measurable at the point of exchange. Without measuring what it is exchanged for (ie contribution) the 'home' itself satisfies Macneil's measurability indicium of transaction. By contrast, claims centred on 'home' in its other senses lack a meeting of minds to satisfy the 'conscious desire to gain by exchange' or the 'consciousness of reciprocity'[133] that are features of transaction as measured, reciprocal payment. Where the court finds 'home' to be a financial asset, the concept fails to coalesce with an opposing argument involving a professed intention to share a home.[134]

In contrast, courts have refused some claims based on an interest in 'home' as a financial asset. Ms Cummins' financial stake was ignored because the object of the claim was the matrimonial home, found to imply equal interests.[135] Ms Muschinski's capital contribution did not support a beneficial interest, because the Court found that her partner's assurance — even unfulfilled — was sufficient quid pro quo for a property interest.[136] The courts are selective in applying a financial-asset understanding of 'home' to the parties' circumstances. As these two cases indicate, lack of a principled understanding of 'home', even in financial terms, has implications for equality.

Investment in real property remains a principal source of wealth through enforced saving for 70 per cent of Australian households, with equivalent trends in other jurisdictions.[137] This data does not explain intra-household wealth distribution that underpins equity in the home, however the sociological literature discussed in Chapters Three and Four reveals that intra-relationship financial distribution tends to favour men. Where men hold a legal interest to the exclusion of women, and women's claims for a beneficial interest are excluded from consideration, women's underlying financial contribution is not captured in 'home' as financial asset. Enforcing 'home' as financial asset in one respect but not another reinforces a skewed distribution of wealth.

2. *Physical Boundaries*

While 'home' might represent both shelter and territory, the two conceptions are related[138] and are thus considered here together as aspects of boundaries. The boundaries of 'home' 'shelter and protect each [household] but separate them from

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[133] Macneil, above n 125, 700.
[134] Thus in *Walker v Hall* [1984] Fam Law 21 (1983, WL 215565), 6, while the Court was tempted to reject the 'purely financial approach' it was obliged to find that without specific evidence, it could not declare equal beneficial interests simply because the parties bought the place as their family home.
[135] *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278.
[136] *Muschinski v Dodds* (1985) 160 CLR 583.
[137] Australian Bureau of Statistics, 'The Australian Residential Property Market' (Australian Bureau of Statistics, 2015) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/6416.0Feature+Article1Sep%202015>; Susan Smith, ''Banking on Housing? Speculating on the Role and Relevance of Housing Wealth in Britain' (Joseph Rowntree Foundation, 2005); Statistics New Zealand, 'Home Ownership by Households' (Statistics New Zealand, 2013) <http://www.stats.govt.nz/Census/2013-census/profile-and-summary-reports/quickstats-about-housing/home-ownership-households.aspx>; Office for National Statistics, 'Housing and Home Ownership in the UK' (Office for National Statistics, 2015) <http://visual.ons.gov.uk/uk-perspectives-housing-and-home-ownership-in-the-uk/>; Trading Economics, 'Canada Home Ownership Rate 1997-2016' (2016) <http://www.tradingeconomics.com/canada/home-ownership-rate>.
[138] Fox, 'Conceptualising Home', above n 3, 157.

each other.'[139] Similarly, and reflecting the territorial aspect of 'home', property is one's location in a part of the world.[140] Home and property both imply control over a bounded area, allowing for 'regulation of social interaction'.[141] Importantly for 'home', the resulting privacy promotes 'predictable environments with an accompanying sense of order and security'[142] referred to as 'ontological security'.[143]

'Home's' boundaries however, separate the unindividuated occupier from the outside world. Of interest here are individual occupiers' perceptions of 'home' not only in relation to outsiders, but also as between themselves — a dynamic complicated by claims of differential property interests. Intimate partner claims for a beneficial interest necessarily constitute a territorial claim nested within the external boundaries of the shared home, revealing the tension between 'home' and property. Property is public, bounded, and enforceable against the world, and home is interior, private, permeable, and ostensibly beyond the reach of law.

In sole-owner cases the legal holder enforces territory through lawful exclusion of their partner despite the joint home. For joint legal owners however, the unity of possession denies territorial distinction within the house, and 'property' generates a boundary only as between co-owners and outsiders. In a legal sense, those who share a home control their environment contingent upon their property interests *inter se*. Partners who have neither a legal estate nor a leasehold interest have no 'territory' at law.

For the sole interest holder at law who understands 'home' as a secure boundary, claims for a beneficial interest represent more than a competing financial stake; they are an ontological threat. But the same can be said also about the property-less claimant facing losing her home. As Arendt observes, 'the greatest threat is the abolition of the tangible worldly place of one's own.'[144] The framing of the law around the 'shared home' indicates a tacit acknowledgement of this facet of 'home' — albeit one that the courts feel constrained in converting to a property interest.[145] Where 'home' is territory, the claim seeks to reassert the importance of one's 'tangible worldly place'.[146] This intangible interest fails to be comprehended in the law of property, which instead demands direct measurable reciprocity indicative of the exchange transaction.

While shelter might be measurable in market terms, the ontological security of 'home' is not. Nor is it amenable to transactional exchange[147] — despite unquestionably holding value for the occupier. Considering the implications of homelessness

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[139] Arendt, above n 118, 63.
[140] Ibid 61.
[141] S N Brower, 'Territory in Urban Settings' in I Altman, A Rapoport and JF Wohlwill (eds), *Environment and Culture* (Plenum Press, 1980) 180, 181.
[142] Ibid.
[143] Ann Dupuis and David C Thorns, 'Home, Home Ownership and the Search for Ontological Security' (1998) 46(1) *The Sociological Review* 24; Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Stanford University Press, 1991).
[144] Arendt, above n 118, 70.
[145] See eg *Stack v Dowden* [2007] 2 AC 432, 473; *Oxley v Hiscock* [2005] Fam 211, 248; *Lankow v Rose* [1995] 1 NZLR 277, 286; *Lloyds Bank Plc v Rosset* [1991] 1 AC 107, 130.
[146] Arendt, above n 118, 70.
[147] See generally discussion in Michael J Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Farrar, Straus and Giroux, 2012).

highlights what is at stake in losing 'home' as territory — in particular for women. 'Women are at risk of homelessness, largely as a result of the entrenched social and economic advantage that continues to separate the experiences of women and men.'[148] Further, 'homelessness amongst women is more likely to stem from family crises such as separation, widowhood or domestic violence.'[149] Given that women as a demographic disproportionately experience housing insecurity arising from intimate relations themselves, 'home' is likely to represent ontological security for women and their children in a way that it may not for men.

This sheds light on some of the claims in the trusts cases. For example, Ms Cossey's need for personal security is likely to have been highly relevant in her dealings with Mr Bach in their house purchase. Her desire for 'a little home back to how I was'[150] refers to a time when she was not sharing a two-bedroom flat with her three daughters, and before her former partner sexually assaulted them. It is likely that for Ms Cossey 'home' represented both physical and ontological security that accompanies not mere shelter, but territory and the boundaries it entails: in other words, a property interest. This possible interpretation did not, however, feature in the Court's analysis.

Instead, Ms Cossey told the Court that she was not concerned with the extent of the parties' property interests. Her response to Mr Bach's claim for a full beneficial interest was to cite an exchange that was not measurable in a directly reciprocal way and the Court interpreted this to negate an intention as to a shared interest. Alternatively, it likely reflected her intention — a tacit assumption of the exchange with Mr Bach — that she and her daughters would be secure into the future. Without understanding the way in which 'home' expressed her intention, the Court instead preferred the transactional basis of Mr Bach's significantly greater financial contribution.

Courts fail to apprehend the possible meaning of 'home' as a discrete location in which the claimant has understood they have an interest by virtue of that location. The putative interest, frequently, though ambiguously, termed 'home', is not made concrete through any formal process or transaction. Instead, the claimant has perceived it into the future[151] based on the assumption of ongoing relations both with their partner and with the place. Women, predominantly claimants in the trust cases, tend to be the party that cites 'home'. Rather than indicating the absence of a beneficial interest, 'home' reflects claimants' understanding of the parties' exchange. Ignoring 'home' excludes the way in which many women express their understanding of the interest they were to receive from their relational exchange that might feasibly equate with property. Where their claim is unsuccessful because of courts' gendered interpretation of the parties' exchange and its consequences, the implications for equality are clear.

3. Identity

[148] Maree Petersen and Cameron Parsell, 'Older Women's Pathways out of Homelessness in Australia' (Mercy Foundation, 2014) 13.
[149] Ibid 15.
[150] *Cossey v Bach* [1992] 3 NZLR 612, 634.
[151] Macneil, above n 125, 800.

The gendered effects of 'home' go beyond women's experiences of ontological security, and include the way in which identity can be constituted by 'home' in both personal and in socio-cultural contexts. In the personal sense, the relationship between person and place is two-way: 'place takes its identity from the dweller, and the dweller takes [their] identity from the place.'[152] The house becomes home as the occupier invests themself in it, and it comes to evidence their persona. [153]

Within the home and in turning house into home, individuals also create and perform their self-perception as part of a couple. Financial management and specialisation of household labour constitute personal and communal identity for the intimate couple,[154] and so too does 'home'. Domestic activities undertaken by each party — which do not occur other than in the home — are integral to their understanding of home and of the self as spouse. Thus a breadwinner model of intimate relations[155] might characterise man's role as paying for the physical place occupied as home, while the wife is responsible for its decoration, furnishing, and maintenance. Gender roles and their concomitant identities also reflect Heidegger's distinction between construction and preservation[156] where construction constitutes discrete (transactional) performance, and preservation of the home continues into the future, adapting to the needs of the occupants and their relations.

Construction and preservation roles equate with identities implicit in 'home' and those evinced through money management,[157] with consequences for property. Unsurprisingly the court's perception of the individual's relationship with 'home', and consequently how it construes that person's identity, influences the finding as to beneficial interests — albeit informed by the transactional predisposition of the law. Where a party's identity is constituted through 'preservation', without more, their claim is unlikely to succeed. On the other hand, a 'construction' role related to 'home' is more likely to find support. The correlation between 'home' as identity and traditional gendered relationship roles subsumes both intention and contribution within the 'private', obscuring the relevance of 'home' in understanding the nature of intention and contribution as markers of property.

Ms Burns for example, in 'giving up work and rais[ing] the two children of the association [sic]',[158] undertook a traditional wifely role of preservation. She 'ran the house, even though the contribution to the fabric was minimal.'[159] Her identity, as construed by the court, was constituted by her home and her place in it — as Mr Burns' 'mistress'.[160] But this left her in a weak position relative to her partner whose identity was constituted outside the home. He engaged not just in paid work — Ms Burns did too — but in paid work that was more readily comprehensible by the Court

[152] Kimberly Dovey, 'Home and Homelessness' in Irwin Altman and Carol M Werner (eds), *Home Environments* (Springer, 1985) 33, 40.
[153] Fox, 'Conceptualising Home', above n 3, 169.
[154] See discussion in Chapter Four.
[155] In the context of money management, see eg Carolyn Vogler, Michaela Brockman and Richard D Wiggins, 'Managing Money in New Heterosexual Forms of Intimate Relationships' (2008) 37 *Journal of Socio-Economics* 552.
[156] See Young, above n 119, Chapter 7 'House and Home: Feminist Variations on a Theme'.
[157] Stefanie Sonnenberg, 'Household Financial Organisation and Discursive Practice: Managing Money and Identity' (2008) 37 *Journal of Socio-Economics* 533.
[158] *Burns v Burns* [1984] Ch 317, 325.
[159] Ibid 326.
[160] Ibid 327.

as contribution. Furthermore his paid work positioned him as the provider, he who built the home.

> The price of the house was £4,900. Of that, about £4,500 was raised by [Mr Burns] on a mortgage. The mortgage was in his own name; he assumed responsibility for the debt. The balance of the purchase price and the costs of the purchase were paid by [Mr Burns] out of his own moneys.[161]

Ms Burns' paid work on the other hand, was no more than personal: she was 'free to do as she liked with her earnings'.[162] In terms of the acquisition of the property, or her 'contribution' necessary to establish a beneficial interest, she 'made no financial contribution; she had nothing to contribute'.[163] Thus any identity Ms Burns may have had beyond the home was subsumed by her constitutive identity as homemaker. The parties' identities were each measured according to home, and ranked, so that as provider of home there was a cognisable property interest, but as preserver there was none.

The result in *Burns* arose because Ms Burns' contribution was intrinsically bound up with her identity as homemaker, derived from and located within the home. She 'had not acquired any interest in the family home as none of her earnings were devoted to the acquisition or maintenance of the home.'[164] Indeed the primacy of identity as one invested in 'home' was recognised by the Court as necessarily excluding a property interest:

> [I]f the woman makes no 'real' or 'substantial' financial contribution towards either the purchase price, deposit or mortgage instalments by the means of which the family home was acquired, then she is not entitled to any share in the beneficial interest in that home even though over a very substantial number of years she may have worked just as hard as the man in maintaining the family in the sense of keeping the house, giving birth to and looking after and helping to bring up the children of the union.[165]

Similarly, Ms Rosset 'urged on the builders' and 'planned the design of the large breakfast room' amongst other similar contributions to the couple's home renovation[166] but her identity was enmeshed in 'home', masking her contribution as one relevant to determining the beneficial interest. The Court's assumptions about Ms Rosset's identity were forged through her role in the home, with direct consequences for her ability to succeed in a claim for a beneficial interest.

> [I]t would seem the most natural thing in the world for any wife, in the absence of her husband abroad, to spend all the time she could spare and to employ any skills she might have, such as the ability to decorate a room, in doing all she could to accelerate progress of the work quite irrespective of any expectation she might have of enjoying a beneficial interest in the property.[167]

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[161] Ibid 327.
[162] Ibid 328.
[163] Ibid.
[164] Ibid 319.
[165] Ibid 345.
[166] Detailed in *Lloyds Bank Plc v Rosset* [1991] 1 AC 107, 129.
[167] Ibid 131.

The activities of preservation undertaken by these women expressed both their spousal identity, and their connection with home. Their activities might thus be construed as relational. Such a construction explains why the courts may have disregarded their activities as shedding light on questions of intention and contribution, but also how precluding the possibility of relations masks the possibilities of 'home' to explain the parties' distribution of the beneficial interest. Despite the courts' pronouncements, it does not necessarily follow that identities correlated with 'home' throw no light on beneficial ownership.[168] On the contrary: understanding the meaning of 'home' as identity may assist courts to interpret the parties' intention as to property, including through a better understanding of their evidence. Indeed courts already effectively give meaning to identity invested in 'home', but only when considering the construction role and not preservation activities.

Ms Eves for example,

> painted the brickwork of the front of the house. She also broke up with a 14 lb sledge hammer the concrete surface which covered the whole of the front garden and disposed of the rubble into a skip, worked in the back garden and, together with the man, demolished a shed there and put up a new shed. She also prepared the front garden for turfing. To add to it all, they had their second child, a girl, on December 29, 1970.[169]

Lord Brightman found it

> difficult to suppose that the woman would have been wielding the 14lb sledge hammer and so forth except in pursuance of some expressed or implied arrangement and on the understanding that she was helping to improve a house in which she was to all practical intents and purposes promised that she had an interest.[170]

Similarly Ms Becker lugged 80-pound beehives on the couple's farm,[171] and Ms Parianos 'assisted in the building of the flat with her own physical labour. She cleaned and carried the bricks and pulled wires down cavities.'[172] These women's identities — no more or less than Ms Burns and Ms Rosset — were intimately associated with 'home'. However their activities went beyond wifely preservation, positioning each of them within a sufficiently transactional construction narrative to support their claims. In each of these cases, it might be said that the women's (more 'masculine') construction role in the home informed the courts' perception of their identities, giving form to their claims in terms of both intention and contribution. On this reading, identity thus played a part in determining the requisite intention as to property.

The way that these women performed their identities as dwellers in the shared home is differentiated from the preservation role that the courts do not understand in intentional terms. For those whose identity is bound up in the home as preserver, such as Ms Rosset and Ms Burns, not only do the courts find no contribution: such women lack the requisite intention. The presumption appears to be that intention might only

[168] Paraphrasing ibid, 130.
[169] *Eves v Eves* [1975] 1 WLR 1338, 1340.
[170] Ibid 1345.
[171] *Pettkus v Becker* [1980] 2 SCR 834.
[172] *Parianos v Melluish* [2003] FCA 190, [18].

be supported through what might be perceived as the 'purposeful' (masculine) identity of construction, rather than the passive identity of unseen, assumed, day-to-day and feminine preservation of domestic life.[173]

Identity invested in 'home' may therefore indeed be relevant — courts do apparently tacitly acknowledge such identity in their inquiry into property. But the law will only recognise, or is only equipped to interpret, those identities that meet the masculine benchmarks of the law. If this is the case, in the interests of equality identities bound with 'home' must afford a basis for understanding both intention and contribution, regardless of how they manifest.

Instead of privileging one 'home' identity over another (ie construction over preservation), 'home' can instead be conceptualised through its role in the parties' relational exchange. The parties' obligations, notably as to the grant of a beneficial interest in land, 'arise out of the ongoing processes of the relation'[174] where both the processes and the relation are intertwined with the parties' individual and collective identity associated with 'home'. Thus in a claim for a beneficial interest based on a promise to provide a home,[175] the likely source of obligation is generated internally as an incident of the parties' relations both with each other and with 'home', and according to their own norms. In this case, relations might become the source of obligation that might animate the application of the law, in particular through a clearer understanding of the parties' intention where that intention is itself expressed through the values inherent in 'home'. Where parties invoke the language of 'home', they are likely to be referencing an intention that reflects those values: values that have been understood and given form by the parties through their relations, including through their specialisation of labour.

By way of contrast, the sale of real property creates no obligations internal to the vendor/purchaser relationship. Such an exchange demonstrates transactional traits wherein obligations exist external to the relationship, for example by force of law. The parties' might ultimately perceive their obligations with reference to legally enforceable responsibilities rather than with reference to their future relations together.

Courts are accustomed to search for sources of obligation external to the parties' relations, obscuring the possibility of identifying relational norms in a promise to provide a home. Thus courts might identify a moral imperative to fulfil a duty to provide a home—for example the moral duty of a husband to a wife[176] — or otherwise search for an appropriate law such as contract, that might found the obligation, as was done in *Muschinski*.[177] Both of these are sources of obligation external to the relationship. So long as the court relies on external sources of obligation and remains ambivalent as to the legal implications of 'home', there is no need to search for intention and contribution implicit in the parties' own relations, and situated within their home. In other words, the law predicates against a relational

[173] In the way described by Arendt in the differentiation between labour and work: Arendt, above n 118.
[174] Macneil, above n 125, 785.
[175] Such as occurred in *Oxley v Hiscock* [2005] Fam 211, 248; *Springette v Defoe* [1992] 2 FLR 388; *Walker v Hall* [1984] Fam Law 21; *Murdoch v Murdoch* [1975] 1 SCR 423, 431.
[176] As Mahoney JA found might have been owed in *Green v Green* (1989) 17 NSWLR 343, 367.
[177] *Muschinski v Dodds* (1985) 160 CLR 583, 591, 596.

approach in favour of identifying transactions known to the law that might themselves give rise to an interest.

'Home' *per se* is no barrier to recognising a beneficial interest. However, the failure of 'home' arguments to represent the dominant 'financial asset' interpretation will defeat such a claim. The predominant market standard excludes exchanges enmeshed in the home because they arise from relations generating relational rights and obligations. Failing to consider domestic exchanges, or even in some cases to characterise them as exchanges, courts obscure the experiences and understandings predominantly of women parties, particularly those engaged in activities of preservation of the home — again with consequences for equality.

Conclusion

When a claimant says 'home' she means any or all of financial asset, security, identity and territory. She means 'this is my place, and our place' and 'the arrangement we had was to secure my tangible place in the world and all that this means'. Her role in the ongoing exchange that built the shared home has frequently involved 'preserving' this place, and the couple's relations with each other and their children within the dwelling — which she does with her labour, her care, and her money.

But the court is deaf to these meanings because there is no interest in the home. The claims insofar as they lie in promises of home, and home-making contribution, do not fulfil the law's measures of property, nor the measures of the transaction that is its prerequisite. Yet saying 'this is our home' embodies a host of meanings reflecting the couple's existing relationship, and anticipating their ongoing association.[178] If the law were instead attuned to diverse meanings of 'home' — including the parties' own differential interpretations — there may be different consequences.

The courts skirt around the relational connotations of 'home': 'the common endeavour … matrimonial home usually has a central place in the marriage resulting in sharing';[179] 'the property was bought as a family home and the couple expected that they would live together for life'.[180] Other decisions invoke the family purpose of the home acquisition, suggesting the arrangement as provision of home into the future not only for the couple's relationship, but their 'nested' relations with children.[181] Yet the role of 'home' in jurisprudence in intimate partner trust cases lacks clarity, compounding the courts' challenge.

The inconsistent treatment of 'home' suggests two things. First, it requires courts to make sense of 'home' as the *object* of a property transaction. To do this, courts apply a bounded conception of 'home' as a tradeable capital asset. Such conceptualisation refuses the possibility that 'home' otherwise might support a claim for property. The fact of the parties' relationship both with each other and with the dwelling has no place in the transactional approach.

Secondly, such approach is gendered where it fails to comprehend the experiences of women in the home. For women whose relationship and identities are forged within

[178] Ibid 803.
[179] *Miller v Miller: Mcfarlane v Mcfarlane* [2006] UKHL 24.
[180] *Walker v Hall* [1984] Fam Law 21 (1983, WL 215565), 3.
[181] See eg *Stack v Dowden* [2007] 2 AC 432.

the ‘private’ sphere of ‘home’, their perception of the parties’ intention as to their interest is likely to reflect multiple meanings of ‘home’. The courts struggle it seems to translate arguments concerning ‘home’ in a way that is acceptable to support a claim for a beneficial interest. Women who attempt these arguments cannot therefore uphold a property distribution that they may have comprehended through their relationship and the locus of home.

A relational approach can assist in overcoming existing doctrinal limitations. The indicia of exchange are present — albeit not transactionally. Thus a promise of ‘home’ evidences a claimant’s understanding of the exchange, and her contribution through homemaking is referable to that exchange. Women such as Ms Baumgartner and Ms Rosset might comprehend the promise of ‘home’ to align with the indicia of property, regardless of the courts’ insistence on a legal difference. A ‘home interest’ might not be defensible in property terms, but understanding ‘home’ as informing the parties’ intentions as to property, is. Similarly, contributions representing exchange over time support both an intention as to the beneficial interest *in property in the home* and the potential to measure that interest.

The courts utilise the language of ‘home’ in various ways, indicating that accommodating it more consistently and equitably need not substantially deviate from doctrine but might instead correct a skewed interpretation and application of the law. To do so requires a restatement of the role of ‘home’, and its genuine application to the parties’ exchange beyond transaction.

‘Home’ is thus more than the context within which a property claim is made, and more than simply the abstracted object of rights. The values imported by ‘home’ render it the focal point for the parties’ shared purpose: a focal point for their exchange relations and inherently tied to the recognised elements of intention and contribution necessary to establish a beneficial interest. All that remains now is to tie together ‘home’ with intention and contribution, to illustrate how the courts might reframe their inquiry to give effect to the parties’ exchange relations, and to move away from their limited transactional approach. The final chapter achieves this synthesis of the arguments in this thesis by rewriting the decision in *Baumgartner* through a feminist sensibility.

CHAPTER 6 — YOURS, MINE, OR OURS?

> This essay has been an attempt to free contract from the myth of pure transactionism which so dominates many current concepts, to put exchange in real life context of relations and to show promise as the limited tool it is.[1]

As Macneil attempted to free contract from transactionism, so too has this thesis identified the role of transaction within the law of intimate partner trusts. In charting the way in which equity determines domestic partners' equitable proprietary interests, it has found that their distribution is skewed in favour of exchanges as transaction. Consequently, the law privileges circumstances that tend to be experienced by men, and ignores circumstances and behaviours more likely to be experienced by women. To that extent, equity embodies a gendered approach to property that operates to women's detriment.

This thesis concludes that the gendered approach of intimate partner trusts and its consequence of substantive inequality derive from the law's transactionism. Adopting the norms of human behaviour in the marketplace, intimate partner trusts fail to comprehend the complexities and consequences of gender and intimacy within the heterosexual domestic context. Indeed, in *Allen v Snyder*, Mahoney JA found that 'there are in matrimonial and analogous relationships, inequities, in the popular sense of the term, which are incidental to the relationships.'[2] In this statement, Mahoney JA seems to accept these inequities as inevitable without acknowledging the law's role in generating them in the first place. His argument illustrates the closed loop logic of law that is rejected here.

In ascertaining property distribution in the domestic context, courts apply principles derived from the context of arms-length transactional exchange, with two consequences. First, while ostensibly recognising the domestic context the transactional approach treats the parties as bounded subjects of law, ignoring the fact and consequences of their relations. Invoking the foundation indicators of property — intention and contribution — remains relevant to ascertaining property distribution in a legal system founded on liberalism. But understanding the exchange of intimate partners as one resulting in property requires a relational understanding of each element, and the additional factor of 'home'.

Further, in many cases the court's declaration itself marks the boundedness of property. Where property depends on structures of inequality, that boundedness is itself a tangible mark of gender inequality. Property is established through transaction, deemed necessary for recognisable distribution, and its boundaries are effected through the empowerment of the legal title holder *prima facie* to exclude the beneficial claimant. In both of these instances the gendered structure of relations plays a role. In the case of transaction, this occurs through courts privileging behaviours more likely to be undertaken by men. Consequently, where a man holds the legal title he is in a relatively stronger position from which to impose the boundaries that are the privilege of the property holder, to exclude his partner who must prove an underlying

[1] Ian R Macneil, 'The Many Futures of Contracts' (1974) 47 *Southern California Law Review* 691, 805–6.
[2] [1977] 2 NSWLR 685, 706.

beneficial interest. It is thus the process and frequently the outcome that represent inequality for women.

This thesis finds however, that it is possible to examine the couple's exchange in a way that both recognises their relations as the source of their property distribution, and supports the existing doctrinal framework. It suggests an alternative to focusing on the fact of a transaction supported by evidence of the twin doctrinal elements of intention and contribution: instead, the analysis turns to the couple's exchange relations as intimates, over time. Doing so will satisfy the two doctrinal elements, revealing intention and contribution within the couple's relations. Instead of ascertaining a property transaction, the inquiry is one as to whether the parties have through their exchange distributed property in their home. This shift in focus does not rend the fabric of property or of the law of trusts. But it does chart an alternative course through a couple's competing claims of what is 'yours, mine, and ours' that reflects the reality of their interdependence, and their independence too.

This concluding chapter synthesises the two recognised elements of intention and contribution, and the unacknowledged but implicit element of home, using a relational approach to demonstrate the practical possibilities of the findings of this thesis. This is undertaken through the production of a feminist judgment, a rewriting of the decision in *Baumgartner*,[3] followed by commentary in conclusion, which together tie together the arguments in this thesis and demonstrate how those arguments might be realised in the case law.

I. A Feminist Judgment

Feminist judging is a recognised tool of both critique and law reform.[4] It involves the rewriting of an existing appellate judgment according to the principles of judicial decision-making but with an eye to how the law might have been decided if viewed through a feminist lens.[5] This involves 'bringing a feminist consciousness to bear on one's understanding of litigants, facts, evidence and legal rules.'[6] Importantly, it involves 'deploy[ing] the techniques and substance of that jurisprudence in their processes'[7] including 'applying the law and theoretical knowledge available at the time the original judgment was written.'[8] The approach does, however, permit taking 'judicial notice' of a fact or consequence where it might arise from the 'common sense or social knowledge of the judicial officer.'[9]

The technique was developed through the Women's Court of Canada,[10] and has evolved into the Feminist Judgments Project in England[11] and Australia.[12] The Irish

[3] *Baumgartner v Baumgartner* (1987) 164 CLR 137.
[4] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20(2) *Feminist Legal Studies* 135.
[5] Rosemary Hunter, Clare McGlynn and Erika Rackley, 'Feminist Judgments: An Introduction' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart, 2010) 3.
[6] Heather Douglas et al, 'Introduction: Righting Australian Law' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 1, 7.
[7] Margaret Davies, 'Feminism and the Idea of Law' (2011) 1(1) *feminists@law* .
[8] Douglas et al, above n 6, 13.
[9] Ibid 25 (footnotes omitted). For an example of this, see Reg Graycar and Jenny Morgan, '*Dietrich v the Queen*: Judgment' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 75.
[10] 'Special Edition: Women's Court of Canada' (2006) 18 *Canadian Journal of Women and the Law.*

project has just been published,[13] and in late 2015 there was a call for expressions of interest for a New Zealand project.[14] The concept and application of feminist judging is therefore familiar across the four jurisdictions examined in this thesis, and beyond.

Integral to the method deployed in these projects has been collaboration between authors, 'mirroring collegial decision-making practices of appellate courts.'[15] By contrast thesis-writing is intentionally a solitary endeavour, albeit with the guidance of supervisors and discussion with friends and colleagues — in my case, some of whom have themselves been involved with the Australian project. The technique applied in this chapter does not then purport to replicate the collegial endeavours undertaken by the feminist judgment projects. It does seek however, otherwise to apply the principles of feminist judging developed in the international movement.

A. Selecting a Case

Baumgartner was chosen for two main reasons. First, it is a leading Australian decision in the field.[16] While this thesis has enlisted three other common law jurisdictions in its analysis, it takes its cues from the Australian jurisdiction and selecting an Australian case fits with the overall tenor of the thesis. It may not be the most recent — Sarmas for example has rewritten *Cummins*[17] — however, *Baumgartner* continues to be cited frequently in cases in both Australian and other common law jurisdictions,[18] as well as by law reform bodies[19] and in a host of scholarly articles.[20] That it remains so frequently referred to bears testament to its ongoing standing as a leading authority within the law of intimate partner trusts.

Its importance lies in its having 'signalled a dramatic change in direction' in the then 'brief history of the new [constructive] trust…[representing] an increasingly

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[11] Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart, 2010).
[12] *Australian Feminist Judgments Project* (2013) <http://www.law.uq.edu.au/the-australian-feminist-judgments-project>; Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Re-Writing Law* (Hart Publishing, 2014).
[13] Máiréad Enright, Julie McCandless and Aoife O'Donoghue (eds), *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart Publishing, 2017).
[14] New Zealand Law Society, 'NZ Feminist Judgments Project Seeks Contributors' (New Zealand Law Society, 2015).
[15] Hunter, McGlynn and Rackley, above n 5, 4.
[16] See an analysis of its impact at the time of the judgment, in Ashley Black, '*Baumgartner v Baumgartner,* the Constructive Trust and the Expanding Scope of Unconscionability' (1988) 11 *UNSW Law Journal* 117.
[17] Francesca Bartlett and Lisa Sarmas, 'Formal Equality and Third Party Interests in the Family Home: *Trustees of the Property of John Daniel Cummins, a Bankrupt v Cummins*' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 207.
[18] For example, it was cited in argument in *Stack v Dowden* [2007] 2 AC 432, by the Court in *Coffey v Coffey* [2012] NZHC 1765; *Lankow v Rose* [1995] 1 NZLR 277; *Phillips v Phillips* [1993] 3 NZLR 159; *Cossey v Bach* [1992] 3 NZLR 612; *Gillies v Keogh* [1989] 2 NZLR 327; and is frequently cited in Australian courts eg: *Hillman v Box (No 4)* [2014] ACTSC 107; *Draper v Official Trustee in Bankruptcy* [2006] FCAFC 157; *Sui Mei Huen v Official Receiver for and on Behalf of the Official Trustee in Bankruptcy* [2008] FCAFC 117.
[19] See eg Scottish Law Commission, *Family Law*, Report No 135 (1992); Northern Ireland Law Reform Advisory Committee, *Matrimonial Property*, Discussion Paper No 5 (1999); New South Wales Law Reform Commission, *Relationships* Report No 113 (2006).
[20] For example, a search reveals *Baumgartner* to have been cited in 57 journal articles of those journals catalogued in Austlii. See LawCite, *Baumgartner v Baumgartner*, (30 October 2016) <http://www.austlii.edu.au/cgi-bin/LawCite?cit=[1987]%20HCA%2059>.

unfettered vision of the trust's definition and ambit.' [21] *Baumgartner* is frequently read with the other leading and slightly earlier Australian decision of *Muschinski,* which it complements but extends beyond the ostensibly more limited commercial joint venture analogy applied in the earlier decision.[22]

In addition to developing the law of intimate partner trusts, *Baumgartner* also contributed to the development of Australian jurisprudence surrounding unconscionability — in this case as the foundation for the declaration of a trust. Despite *Baumgartner* being frequently cited with approval in New Zealand in particular, the unconscionability principle applied to intimate partner trusts, as propounded in *Baumgartner,* distinguishes the Australian approach from those of other common law jurisdictions. Notably however, Black suggests that the Baumgartner constructive trust extends the Lord Denning 'constructive trust of a new model', rejecting Lord Denning's abstract formulation of fairness, but effectively replacing it with the 'more precise criterion' of unconscionability.[23] On this basis, *Baumgartner* bears a relationship to the law in other jurisdictions, notably representing an advance on earlier English decisions[24] through a distinctly Australian jurisprudence.

The second key reason for selecting *Baumgartner* is that it lends itself to the application of the three key elements analysed in this thesis — intention, contribution, and home. Not all decisions examined here involve all three elements so clearly. As a case study in the way in which the principles derived might apply in a 'practical, real world exercise of judgment-writing'[25] it is important that as many components as possible of the analysis are available. *Baumgartner* fits this criterion.

There are other factors too, that justify the choice of *Baumgartner*. The New South Wales Court of Appeal decision is reported, and contains a wealth of verbatim evidence from which to draw.[26] Bearing in mind that a feminist judgment may only consider evidence that was before the Court, the reported appeal decision extends the available source material.

Further, the case may have broken new ground, but it is not seen as an outlier. Notorious decisions such as *Burns v Burns*[27] in one sense are low-hanging fruit for a feminist rewriting because of what has been observed to be the obvious injustice in the outcome. Indeed such cases have already attracted a great deal of feminist commentary.[28] By contrast, *Baumgartner* offers the opportunity for a more nuanced

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[21] Julie Dodds, 'The New Constructive Trust: An Analysis of Its Nature and Scope' (1988) 18 *Melbourne University Law Review* 482, 483.
[22] See eg Pamela O'Connor, 'Happy Partners or Strange Bedfellows: The Blending of Remedial and Institutional Features in the Evolving Constructive Trust' (1996) 20 *Melbourne University Law Review* 735, 744.
[23] Black, above n 16, 119–20.
[24] *Hussey v Palmer* [1972] 1 WLR 1286; *Eves v Eves* [1975] 1 WLR 1338.
[25] Hunter, McGlynn and Rackley, above n 5, 3.
[26] In the *Australian Feminist Judgments Project*, judgment-writers 'relied on information about the parties and what they said at trial, in addition to what is contained in the original judgment.' Douglas et al, above n 6, 27.
[27] *Burns v Burns* [1984] Ch 317.
[28] See eg John Mee, '*Burns v Burns*: The Villain of the Piece?' in R Probert, J Herring and S Gilmore (eds), *Landmark Cases in Family Law* (Hart Publishing, 2011) 175; Anne Bottomley, 'From Mrs Burns to Mrs Oxley: Do Co-Habiting Women (Still) Need Marriage Law?' (2006) 14 *Feminist Legal Studies* 181; Simone Wong, 'Constructive Trusts over the Family Home: Lessons to Be Learned from Other

reflection, notably as to the process by which the High Court arrived at its decision. Ms Baumgartner was (effectively) successful in her claim. Yet the foundation of the analysis in this thesis has been not that the law as it is currently applied will necessarily result in an incorrect outcome. Rather its focus is more that the processes involved in its application entrench inequality, where that inequality arises from the gender of the law. Consequently where women are successful in claims for a beneficial interest, it is through exceptionalism rather than as a result of a principled and systematic approach in the interests of equality. A feminist rewriting of the judgment deals with the shortcomings of exceptionalism through reframing the inquiry to account for women's experiences — at least the experience of the woman claimant in the case itself.

Of note, the order in which I analyse the elements in the feminist judgment differs from that adopted in the body of this thesis: I first address home, before intention and finally contribution. The organisation of this thesis reflects the law's prioritisation of the two recognised elements of intention and contribution, themselves echoing the liberal foundations of property. These elements were a necessary foundation from which to establish the role of liberalism and the elements of property that form the basis of the critique. Chapter Five then analysed 'home' as an unacknowledged yet ostensibly important aspect of the courts' inquiries. Its analysis was possible, in the abstract, based on the previous chapters.

In undertaking the more practical and situated task of judgment writing, 'home' seemed logically to come first. Unlike the body of this thesis, the feminist judgment does not require the theoretical grounding of the two recognised elements. Instead the concept of home forms a threshold for establishing the relevant exchange as integral to the parties' relations.

It will be of little surprise to learn that there is much in the High Court's decision in *Baumgartner* that accords with the principles articulated here.[29] Instead, as has been argued, and as will be demonstrated in the feminist judgment, the process taken to reach the decision differs when analysed with a feminist sensibility. Importantly however, feminist judging takes place within the parameters and constraints not only of judging, but also of the law.[30] As a method of critique it accords with the approach undertaken in this thesis, of accepting the parameters of the law of intimate partner trusts but 'reason[ing] from the experience of women … unmask[ing] seemingly neutral laws and show[ing] that prevailing approaches to fact-finding are contingent and often partial.'[31]

Commonwealth Jurisdictions?' (1998) 18(3) *Legal Studies* 369; N V Lowe and Andrew Smith, 'The Cohabitant's Fate?' (1984) 47(3) *Modern Law Review* 341.

[29] Similarly seven of the cases in the *Australian Feminist Judgments Project* were concurring judgments. Douglas et al, above n 6, 9.

[30] Davies articulates the tensions within these parameters, for feminist writing: Davies, above n 7.

[31] Douglas et al, above n 6, 8 (citations omitted).

B. Baumgartner v Baumgartner

BAUMGARTNER ..... APPELLANT;
DEFENDANT,

AND

BAUMGARTNER ..... RESPONDENT.
PLAINTIFF,

(1987) 164 CLR 137

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

GALLOWAY J. I agree with the conclusion of my fellow judges as to the imposition of a constructive trust at the suit of Ms Baumgartner. However I disagree with a fundamental aspect of the approach taken to reach this conclusion, and as to the extent of Ms Baumgartner's beneficial interest. I therefore give my own reasons for judgment.

The facts of this case have been set out in some depth by Mason CJ, Wilson, and Deane JJ. Briefly, the couple shared their lives between September 1978 when Mr and Ms Baumgartner moved in together, and August 1982 when Ms Baumgartner left their shared home. During this time they had a child together. To provide for the family, the couple bought land on which they built a home. But at Mr Baumgartner's insistence, he held the sole legal interest. The relationship appears to have been fraught, and Ms Baumgartner left the couple's home on numerous occasions, ultimately moving out with the couple's child in August 1982.

Ms Baumgartner now claims a beneficial interest in the couple's former home. Her claim is that there is either an oral agreement between the parties as to the beneficial ownership of the land, or that there should be inferred from the parties' conduct an actual intention on the part of Mr Baumgartner to hold his interest on trust for Ms Baumgartner as to a one half share. Her claim relies on her financial contribution that assisted in the acquisition of the property, made through the deposit of her pay packet each week into the couple's bank account. Further, she alleges that Mr Baumgartner maintained that the property was 'theirs', and that he would transfer it to their joint names when they were married. What Ms Baumgartner understood to be his promises of marriage however, were not fulfilled. Consequently she did not receive a legal interest, and now brings this claim.

Framing this claim in terms of an oral agreement or a trust depends upon notions of promise that are best suited to the world of commerce. The real question is not whether the court can determine a meeting of the minds at a discrete point in time as to the vesting of a property interest either then or into the future. In the setting of an intimate relationship, the parties' intentions will inevitably be expressed in a far less direct way, over time. Likewise, they will inevitably each contribute to the welfare of the family — materially and emotionally — in a way that lacks the direct exchange of a payment for an interest in property. The question is rather how the exchange within the relationship, according to its entire context, indicates intention as to the distribution of property.

At the heart of both mechanisms — agreement and trust — is the question of the distribution of property between the parties. Faced with the clear implications of the legal interest vested solely in Mr Baumgartner, Ms Baumgartner's challenge is to establish that the parties have differentially distributed the beneficial interests in their former home. If she can show that there is a differential beneficial distribution then it is open to this Court to declare a trust to protect that interest.

Importantly it is not within the power of any court, in the absence of legislation, to redistribute the property of those who appear before it — this would be contrary to law.[32] This principle lies behind the consistent rejection of the application of abstract notions of justice and fairness in claims for a declaration of a beneficial interest in the estate held by a former intimate partner.[33] However the nature of Ms Baumgartner's application is such that it implies the parties' own creation of a property interest and in my view this is consistent with the true purpose of this Court's inquiry.

My brief précis of the facts identifies three elements that must be considered in determining the parties' distribution of beneficial interests. The first of these is 'home,' a central feature of the law of intimate partner trusts. Generally the courts do not explore this element as a question of law. I note however, that most judgments commence with an overview of the parties' relationship with their shared home. For this reason, I regard home as a discrete element of the case, and I will consider it before turning to the explicitly recognised elements of intention as to the distribution of property, and finally the contribution that would support the requisite intention and indicate the extent of the interest held.[34]

Before canvassing these in turn, I will first clarify the foundation purpose of this inquiry — ascertaining a property interest between intimate partners — and address issues of evidence raised in the Court of Appeal and by my fellow judges.

Property distribution

At the heart of this decision and others like it, is the distribution of property — Ms Baumgartner says the couple's former home is theirs, while Mr Baumgartner maintains that it is his. As the sole owner at law Mr Baumgartner is in a strong position that places the onus on Ms Baumgartner to prove that the beneficial title is otherwise distributed. Ms Baumgartner has appealed to equitable principles in her claim for a declaration that the property in the couple's home is distributed equally as between the parties.

I make this point to distinguish my reasoning from that of my fellow judges. While there are certainly intersections between my reasoning and theirs, the distribution of property is an alternative point of departure and is the more accurate interpretation of Ms Baumgartner's claim. While a trust may serve many purposes, importantly in my view, the relevant purpose giving rise to a constructive trust is the recognition of an underlying beneficial interest. The trust is simply a means of protecting that interest — so the primary task of this Court is to identify that property interest.

[32] *Gissing v Gissing* [1971] AC 886, 899.
[33] Including in the Court of Appeal: *Baumgartner v Baumgartner* (1985) 2 NSWLR 406.
[34] See eg *Muschinski v Dodds* (1985) 160 CLR 583.

Following *Allan v Snyder*,[35] the majority in the Court of Appeal found that

> the property interests of parties in such a context as the present are to be determined by the application of the ordinary rules of law and, where the plaintiff seeks to establish a trust or other equitable interest, the ordinary principles of equity governing the creation of such interests.[36]

The majority in this case uses the principle of unconscionability to find in favour of Ms Baumgartner: it would be unconscionable of Mr Baumgartner to 'assert ownership of that asset to the exclusion of *any interest* in the other contributor(s).'[37] I agree with the application of the principle and its conclusion. However, in reaching the conclusion that Mr Baumgartner behaved unconscionably, with respect, my fellow judges have omitted to explain what the *other interest* is. To my mind, this is the foundation of the inquiry; it must be determined to meet the purpose of the trust.

Toohey J, in this case, observes that the same outcome — a constructive trust — might be arrived at whether using the unconscionability framework or that of unjust enrichment. Unjust enrichment serves a remedial purpose, to 'fix' the injustice of one party having paid something for nothing. I am aware of the controversy surrounding remedial vs institutional constructive trusts. I do not need to go into this here. My point rather, is that if this Court imposes a trust for an ostensibly remedial purpose, then we need not grapple at all with the question of property or its distribution. And this is a question, as I have said, central to this case.

Thus a trust that is imposed in the interests of conscience to protect financial payments, such as that declared in *Muschinski,*[38] does not require the Court to engage with the question of the parties' property distribution. Instead its role might be characterised as equivalent to a security that salves the conscience (of the defendant) that would otherwise refuse to repay funds invested by the plaintiff for no benefit.

Imposing a trust on this basis is one option for Ms Baumgartner. Indeed this option has brought a finding in her favour by my colleagues albeit, with respect, somewhat ambiguously as to the identification of Ms Baumgartner's interest. Such a declaration is worth less to the claimant however, than a declaration of trust over a property interest that is clearly identified by the Court.

If the Court fails to declare a property interest, it leaves claimants such as Ms Baumgartner in a more vulnerable position than if the interest is declared. In *Muschinski* for example, the Court declared a charge over Mr Dodds' half interest to secure repayment of Ms Muschinski's significant capital investment.[39] The value of this security when compared with a property interest — even an equitable proprietary interest — is limited. In the first place, it fails to capture the capital appreciation that is generally a significant benefit of investment in real property. Further, the quality of the interest in terms of priorities is less than a declared property interest.[40] All other things being equal, a charge to secure repayment will exist subject to interests created

[35] *Allen v Snyder* [1977] 2 NSWLR 685.
[36] *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 422.
[37] *Baumgartner v Baumgartner* (1987) 164 CLR 137, 156, per Gaudron J (emphasis added).
[38] *Muschinski v Dodds* (1985) 160 CLR 583.
[39] Ibid.
[40] See the comments by Deane J in ibid, 623.

prior to the court's declaration.[41] By contrast, finding an equitable interest as created between the parties enhances the priority of the interest in terms of time — legitimately in my view, despite the comments by Deane J in *Muschinski*.[42]

Finding a trust to satisfy unconscionability, without more, need not involve property at all if the debt can be satisfied without recourse to a sale of the relevant asset. Instead, what is required as a first step and what Ms Baumgartner is seeking, is for this Court to ascertain the parties' own property distribution.

This does not require me to deviate significantly from the framework of inquiry adopted by my colleagues. However the purpose of the inquiry is somewhat different. The property interests as between the parties, we know, are to be determined according to the general law. They are not to be determined according to what is fair between them.[43] To avoid the pitfall of guesswork and the apparent scourge of 'fairness', the law requires indicia of exchange to mark as property the subject of a claim such as this. In the first place, it requires evidence of intention as to distribution of the property. For the Baumgartners, this is an intention that the couple's home be owned by them jointly despite the solely owned legal title. Further, the law requires evidence of quid pro quo: some kind of contribution moving from the claimant of the beneficial interest that evidences the exchange and the extent of the interest.

Despite the views expressed in the dissenting opinion of Mahoney JA in the Court of Appeal, I do not see the principles in this case departing from the principles of general law. It is brought before us as not as a court enforcing the *Family Law Act (1975)* Cth, but to do equity. There are no baseline assumptions of sharing or entitlements according to 'social philosophy'.[44] There is only the application of the law in a principled way.

The Evidence

Rath J at trial is said to have preferred the evidence of Mr Baumgartner to that of Ms Baumgartner where the two were found to have differed. As her evidence was central to her case that there was a common actual subjective intention to create a trust, this finding is fatal to that case. I consider instead that there is much of value in Ms Baumgartner's evidence in particular as to the nature of the parties' long-term exchange relations. There are reasons why her evidence may appear to deviate from that of Mr Baumgartner, but these reasons lie not in the credibility of witnesses or veracity of evidence, but in the primary judge's misinterpretation of how to read the parties' evidence together. As Kirby P pointed out in the Court of Appeal, 'neither is there stated a rejection of particular evidence of the appellant and an indication of the reason for that rejection, as one would have expected had Rath J formed the opinion that she was dishonest or given to exaggeration.'[45] In contrast to Rath J and to my colleagues in this appeal, I find that there is no discrepancy between the parties' evidence, and that therefore there is no need to prefer one party's evidence to that of

[41] *Rice v Rice* (1854) 61 ER 646.
[42] *Muschinski v Dodds* (1985) 160 CLR 583, 623.
[43] See eg *Pettitt v Pettitt* [1970] AC 777; *Gissing v Gissing* [1971] AC 886; *Allen v Snyder* [1977] 2 NSWLR 685.
[44] See the discussion by Mahoney JA in *Baumgartner v Baumgartner* (1985) 2 NSWLR 406.
[45] *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 417.

the other. The explanation for the court's perception of the discrepancy is relevant to the context of this case.

Ms Baumgartner's evidence forms the background to the requisite intention to share beneficially. However for this Court to make sense of her evidence requires an understanding of the context of the parties' relations, and the primary judge's own implicit assumptions about Ms Baumgartner that ignore her circumstances and therefore the message she conveyed in these proceedings.

In the first instance, Ms Baumgartner gave clear evidence as to the power dynamic that operated against her within the couple's relationship. The Court of Appeal recited Ms Baumgartner's evidence as to the way in which Mr Baumgartner controlled her earnings.

> From about just after I began to live with Leo I started to give him my weekly pay packet. During the first week that I lived with him I banked some of my money into the Rothman's Credit Union. At about the end of that week when Leo came home from work he said to me words to the effect — 'Where's your money?' I handed over my pay envelope to him and he said words to the effect — 'Where's the money that should be here in your pay packet? What have you done with it?' I said words to the effect — 'I've put $50 into the Credit Union in my account'. When I said this to Leo he became quite angry and said to me words to the effect — 'Look if we're going to work together then bring all your full pay packet home. We'll pool all the money and I'll pay out what we need to each week for the car and the other things'.[46]

Mr Baumgartner corroborated the couple's pooling system in his evidence — including disclosing how he would take Ms Baumgartner's wages.

> Q. On those occasions when you had, as you say, $100 to spare those were the occasions frequently *when you had just taken Frances' pay packet* were they not? A. When there was money left over after all the expenses we had in the household.[47]
>
> …
>
> When we started to live together after April 1979…[s]he used to come and give me the pay packet and I used to sometimes [go to her workplace on pay day and] *see her before she had a chance to come to me* and I used to get it then.[48]

Even though Ms Baumgartner's pay was deposited into the joint account each pay cycle, Mr Baumgartner did not permit her to access those funds — her funds — even for the purpose of personal purchases. Ms Baumgartner recounted in evidence:

> During the time that I lived with Leo and gave him my pay, Leo never used to tell me what he was doing with my money or any that he earned himself. If ever I wanted anything, either for myself in the way of clothing or other personal items, or for the unit in which we first lived and later in the house which we built on a block of land at Leumeah, I always had to ask Leo for money for whatever it was I wanted, and if he agreed that what I wanted was either reasonable or necessary, he would generally buy it himself. It was only on very rare occasions that he would give me the money to buy what it was that I wanted, myself.[49]

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[46] Ibid, 436.
[47] Ibid 432 (emphasis added).
[48] Ibid 438 (emphasis added).
[49] Ibid 437.

While the primary judge may have considered Mr Baumgartner to have denied this claim, his evidence in fact corroborates his controlling approach to Ms Baumgartner's personal expenditure:

> I agree that at times when the plaintiff and I were out together she would see something that she would like and mention it to me and *if we agreed after discussion* then I would buy it with the money that I had in my pocket. If it was a more expensive item then we would look around and *some arrangement would be made for its purchase*. I admit that *I assumed responsibility for most household and personal expenditures* and say that this was done because the plaintiff was unable to budget with the money that was available.[50]

The Court of Appeal obliquely mentioned the troubled nature of the parties' relationship, which was 'rocky from the start'.[51] I note that Ms Baumgartner left the home some seven or eight times,[52] including on two occasions in late 1978 and early 1979. Finally in August 1982 she left for good with the couple's child. Relevantly, my colleagues in the majority described Mr Baumgartner euphemistically as having

> a strong emotional attachment to the respondent, though the judge thought that the strength of the respondent's attachment to the appellant was doubtful. The appellant's jealousy was aroused in circumstances which need not be recounted.[53]

In fact those circumstances do bear recounting. Mr Baumgartner believed that Ms Baumgartner had entered into a relationship with another man. Rath J found this belief to be 'erroneous but sincerely held.'[54] Regardless, this belief and Mr Baumgartner's jealousy together with the evidence as a whole, assist me to understand both of the parties and of their relationship. Mr Baumgartner's behaviour was at the very least, controlling and financially abusive. Consequently, Ms Baumgartner's capacity for autonomous financial decision-making in the way assumed by the courts in questions of contract and property was circumscribed by the way in which her partner treated her. The power and dominance Mr Baumgartner exercised over Ms Baumgartner and her affairs must inform any discussion in this judgment about intention.

My finding in this regard informs my reading of Rath J's assessment of Ms Baumgartner's evidence. As the majority here has observed, Rath J did not accept that Ms Baumgartner was a credible witness.[55] In dismissing Ms Baumgartner's claims on 8 June 1984, he said:

> The plaintiff stressed in her evidence her attitude that it was not 'fair' for her to have to work and keep paying off the house if her name was not going to be on the deed also. But it is one of the features of this case that the plaintiff came to the defendant's home — a place in which she then had no financial claim — with nothing by way of assets; and that she left that home of her own will (after 'arguments' she said) with a substantial quantity of furniture. I have been unable to find any circumstance of

[50] Ibid 437–8 (emphasis added).
[51] Ibid 409.
[52] Ibid.
[53] *Baumgartner v Baumgartner* (1987) 164 CLR 137, 139.
[54] *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 410.
[55] *Baumgartner v Baumgartner* (1987) 164 CLR 137, 145.

> unfairness if the legal position is as I believe it to be, namely that the plaintiff has not made out her case.[56]

Thus expressed, Rath J misapprehends the nature of personal autonomy and free will in circumstances of the exercise of power by a man over a woman in a domestic context. While we are not privy to Ms Baumgartner's circumstances before she moved in with Mr Baumgartner, we do know that she already had two children.[57] Apart from Kirby P's brief mention, these two children are otherwise absent from the account in the Court of Appeal and before this Court. While I can make no finding due to the absence of evidence, I observe that it is entirely possible that Ms Baumgartner's circumstances even before entering her relationship with Mr Baumgartner were sufficiently difficult to motivate her to leave her two children. It is plausible that Ms Baumgartner entered the relationship in a state in which she was only too aware of the need for security — physical, emotional, and financial — that can be hoped for from an interdependent intimate relationship.

It was only three months between her first meeting Mr Baumgartner and their moving in together. It took only one week of living together for Mr Baumgartner to make 'angry' demands for Ms Baumgartner's pay packet.[58] Shortly thereafter Mr Baumgartner displayed jealousy at his own imagined and erroneous perception that Ms Baumgartner was in a relationship with another man.

In light of all the evidence, it is difficult to understand the reason for Rath J's apparent sympathy towards Mr Baumgartner. For example, Rath J found that Ms Baumgartner's attachment to Mr Baumgartner was 'doubtful' while Mr Baumgartner had a 'strong emotional attachment' to her.[59] This does not account for Ms Baumgartner bearing the couple's child in furtherance of her hopes for a future together — surely evidence of commitment and attachment. By contrast, although Mr Baumgartner did not deny the couple's discussion about having a child, he denied they were a family and instead were 'like people'.[60] This does not seem to indicate a 'strong emotional attachment'. In fact Mr Baumgartner's evidence is internally incoherent, in particular relative to Ms Baumgartner's undisputed statements about the couple's decision to have a child together.

The primary judge found that Ms Baumgartner 'came to the defendant's home' — as though Mr Baumgartner had no role in the decision, and as though the residence did not become the parties' shared home to which Ms Baumgartner had contributed financially. Rath J's statement, following perhaps from Mr Baumgartner's assertion that the parties were 'just like people', appears to presuppose the parties to have been atomistic individuals with no ongoing relations. This finding effectively diminishes the fact of the parties' spousal relationship. The consequence is to quarantine the substance of Ms Baumgartner's claim attempting to invoke the relationship as a foundation for a property interest.

Rath J said that Ms Baumgartner came 'with nothing by way of assets' — as though this somehow bears relevance to the parties' decision to enter into an emotionally and

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[56] *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 411.
[57] Ibid 408.
[58] Ibid 436.
[59] As recited here. *Baumgartner v Baumgartner* (1987) 164 CLR 137, 139.
[60] *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 430.

materially entwined domestic relationship, or even that it somehow bears relevance to her claim for a property interest in their home. That she left 'with a substantial quantity of furniture' might imply that she took something to which she was not entitled. Kirby P in the Court of Appeal notes however that she took the furniture 'with consent,'[61] affording a different complexion to the facts as recounted by the trial judge. Rath J's aside and his use of quote marks '(after "arguments" she said)' appears to indicate his equivocation at her evidence that there was friction — or perhaps his doubt that the friction between the parties had prompted her departure. Rath J appears to single out this evidence and in doing so, perhaps indicates that he does not really understand Ms Baumgartner's situation. In particular, he is possibly indicating his reluctance to see her evidence as consistent with an abusive relationship. Further, his language appears to diminish somewhat the way in which she exercised agency in departing that abusive relationship.

Applying the norms of the general law of the man [sic] of the market, Ms Baumgartner's motivations may not resonate as rational, and the Court may well be predisposed to rejecting the relevance of domestic arguments or abuse in ascertaining decisions as to property. However, for a woman in a financially abusive relationship with a partner who promises but refuses to extend to her even the slim legal protection provided by de jure marriage, her decisions are entirely rational. The parties' methods of managing their money and the way in which their relationship evolved, can only be understood in this context.

It is not clear whether Rath J in his judgment was aware of the cumulative effect of the conclusions he drew or the assumptions he made about Ms Baumgartner's role in the relationship. I do observe however that it is not uncommon for courts to interpret parties in an intimate relationship according to widely held assumptions about men and women. The consequences of such assumptions are not necessarily favourable to women.

I draw attention in this regard, to the decision in *Hepworth v Hepworth.*[62] In this case a wife applied for a declaration that she held the sole title to the former matrimonial home free from any differential underlying beneficial interest. The husband challenged her claim. Like the Baumgartners, one spouse took charge of the couple's finances and demanded that the property be registered in their sole name. The difference between this case and *Hepworth* is that in *Hepworth* the party who exercised this control was the wife. Her behaviour was described as dominant, with the implication that she was oppressive towards the husband.

> The moneys in the Savings Bank were under the control of the appellant and it is consistent with the evidence that she took it upon herself to apply practically the whole of it in payment of the balance of the purchase money and that, in taking the title in her own name, she did so in spite of her husband's expressed wish to the contrary.[63]

The trial judge found that 'the wife had the dominant personality, particularly in regard to financial matters. The husband does not appear to me to have the quick intelligence of the wife. In general I thought the husband a more credible witness than

[61] Ibid 419.
[62] (1963) 110 CLR 309.
[63] *Hepworth v Hepworth* (1963) 110 CLR 309, 316.

either the wife or her father.'[64] Ultimately the Court in *Hepworth* found for the husband. The Court could not see any logical reason why the husband would have wished his earnings to be applied towards the acquisition of property that remained vested in the wife's name alone.

I make two observations about *Hepworth* that are relevant to the case before me. First, the passage I quote above could be used to describe the Baumgartners' situation, and the same conclusion could be drawn for the same reasons: that there is no reason why Ms Baumgartner would permit her earnings to be applied towards a property that remained vested in Mr Baumgartner alone.

Further however, while the decision in *Hepworth* may well have been correct, the reasoning rests upon gendered assumptions about men and women and their roles as husband and wife. As I have discussed, these same gendered assumptions appear to have been made in the primary decision in this case, and in the dissenting opinion in the Court of Appeal — yet because the roles of the parties are switched from those in *Hepworth* so that the man is dominant over the woman, these assumptions work for the (male) legal titleholder here, instead of against the (woman) legal titleholder as in *Hepworth*.

Evidence about marriage

Mahoney JA in dissent found that

> the thrust of the respondent's case at first instance was that at all material times it was the intention of the parties that they should marry, that they both intended that the Leumeah property be owned by both of them, that when they married the property would be transferred into their names and that the reason why title was not acquired in their names was to avoid expense. The appellant denied each of these matters, conceding only that if they married, title to the property might be transferred.[65]

On this analysis, Ms Baumgartner was required to demonstrate Mr Baumgartner's 'actual subjective intention' to marry her as a necessary condition to her proving the parties' differential distribution of the beneficial interest. As Mr Baumgartner's evidence was preferred, all he had to do was to deny he ever wanted to marry — and her case was immediately destroyed. Yet Mr Baumgartner expressed his views on marriage ambiguously at best: 'she knew we never get married and I never putting it in her name until if we ever get married in the future [sic]. You never know what the future can bring.'[66]

He continued, even after the relationship had broken down, to admit to having left open the possibility of marriage at the same time asserting that he regarded them 'not like a family, but like people'.[67] With this belief, Mr Baumgartner made plans with Ms Baumgartner to have a child together, to share a home, to buy land, and to build a house together — one that she would be happy with. It is easy to see how Mr Baumgartner may have led Ms Baumgartner to misapprehend his intention, allowing her to form the view that marriage was indeed likely — or at the very least, that the couple were in a marriage-like relationship and not simply 'like people'.

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[64] Ibid, 312.
[65] *Baumgartner v Baumgartner* (1987) 164 CLR 137, 145.
[66] *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 430.
[67] Ibid 430.

While I am not privy to the demeanour of Ms Baumgartner as a witness, the conflict perceived by Rath J, accepted by Mahoney JA on appeal, and minimised by the majority in the Court of Appeal, appears to me to be internal to Mr Baumgartner's evidence rather than as between the two parties' evidence. Consistent with intimate relationships generally,[68] the parties appear to have genuinely held divergent views of the state of their relationship: Mr Baumgartner in denial of any relationship at all ('just people') and Ms Baumgartner ever hopeful of marriage and all it signified. There is no need to prefer the evidence of one party to the other to 'resolve' any 'inconsistency'.

There is no suggestion, for example, that the trial judge found Ms Baumgartner to be lying. Instead, he perceived inconsistency because each party offered a different account of their own perceptions of their relationship. Preferring Mr Baumgartner's evidence as to their relationship had adverse consequences for Ms Baumgartner. It meant that her own perception of their relationship — that they were planning to be married and that when they married he would transfer her interest in the property — was rejected. Because this factual matter lay at the heart of Ms Baumgartner's argument, in failing this evidential threshold her case became at the very least, much more difficult.

It is questionable whether there is any objective 'truth' as to the state of a relationship. Instead, as each party offered their own understanding as to their relationship, if each were telling the truth then each understanding was likely to be correct. Although their perceptions of their relationship differed, this does not necessarily raise a question of inconsistency of evidence per se. Instead, it might demonstrate inconsistency in how each party understood their relationship based on their own perceptions and experiences. Indeed this is reflected in how both the majority in the Court of Appeal and the majority in this Court find corroboration for the true state of the parties' intention as to marriage — regardless of their divergent approaches to interpreting Rath J's findings on evidence.

Despite Mr Baumgartner's reluctance to see the couple as family and his declaration that they were only ever atomistic individuals ('just people'), he also clearly indicated that he saw their future together. He was a party to the decision to have a child together. He included Ms Baumgartner in decisions about acquiring the land and the house that would be their home. In other words, *his own evidence* shows clear intention as to a longstanding intimate domestic relationship, and it shows at least one reason why Ms Baumgartner might have persisted in her belief that one day this would be regularised before the law, as marriage.

Evidence about intention to share the property

The Court of Appeal found variously the need to demonstrate a 'common intention'[69] and a 'common subjective intention,'[70] as to the existence of a trust in Ms Baumgartner's favour. The evidence supports Mr Baumgartner's contention that he did not ever hold a subjective intention to vest in Ms Baumgartner an interest in the

[68] This is reflected in similar cases where women have understood that the couple will marry, for example: *Eves v Eves* [1975] 1 WLR 1338; *Walker v Hall* [1984] Fam Law 21; *Pettkus v Becker* [1980] 2 SCR 834.
[69] *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 446.
[70] Ibid 428.

property. By contrast, Ms Baumgartner gave evidence that the reason the property was in Mr Baumgartner's name alone, was due to the expense of holding it jointly. This claim did not preclude an intention, but accounted for the fact of the failure to show the joint interests on the legal title.

The primary judge rejected Ms Baumgartner's claim, preferring Mr Baumgartner's evidence as to the reason for his sole interest, namely that he believed the property was his alone. This is what Mr Baumgartner said:

> My intention of having it in my name was because the deposits, the money for the land, come from the half profit I made from the unit plus the deposit for the house come off the other half from the profit.
>
> …
>
> Q. Mrs Baumgartner was present and she said 'Why can't the house be in my name as well?' and you said 'We are not married and the loan is in my name and it is coming from the sale of the unit'. At that time did you say to her anything like 'It is my money, it is coming from my unit, it is my unit, I am putting it in'. Did you say anything like that to her? A. *In some way rather*, [sic] yes.
>
> Q. Do you remember what it was you said to her? A. Like '*I am the one that takes the responsibility*…'
>
> HIS HONOUR: Q. Is this what you said to her? A. Yeah '*I am the one who takes the responsibility to pay off the loan* and the deposit for the land and for the house come from the sale of the unit'.
>
> MR EASSIE: Q. That is not entirely correct? A. Doesn't that answer your question?
>
> Q. What I am putting to you is it was not entirely correct at the time that the responsibility for the paying out of the mortgage of the home was going to be entirely yours? A. I would say so.
>
> Q. *Mrs Baumgartner was giving you her pay packet, you were using that to make payments, were you not?* A. *This was still my responsibility* to make the payment from the unit. I took the loan out so I made it my responsibility to pay for it. Q. What you mean is that you were accepting your responsibilities simply as head of the family that was in the process of being formed. *You were not referring to financial responsibility, were you?* A. *I did*.[71]

This passage demonstrates that Mr Baumgartner expended the pooled funds as though they were his own, including to acquire and to pay off real estate for his personal benefit. His evidence can be fully understood in the context of the relationship as a whole, including as to his controlling behaviours and financial abuse.

On a literal reading, and disregarding the context of the Baumgartners' troubled relationship, there is no common subjective intention to hold on trust.[72] Yet as is clear from the Baumgartners' situation, if the law requires such a threshold it rewards coercive and abusive behaviour of men such as Mr Baumgartner to the detriment of their partners. The effect of applying such a standard is to uphold the legal title while

[71] Ibid 429–30 (emphasis added).
[72] *Allen v Snyder* [1977] 2 NSWLR 685; *Baumgartner v Baumgartner* (1985) 2 NSWLR 406 per Mahoney JA in dissent.

allowing for, at best, a refund of money provided by applicants such as Ms Baumgartner.

The common subjective intention benchmark would catch some cases where there was evidence of that subjectively held common intention.[73] The majority of cases by contrast, are far more likely to entail evidence that denies such an intention, as this is the very substance of the dispute and the reason it appears before the court.[74] If the law is, as I understand it to be, to be applied to uphold property interests as they are generated through human exchange, it must account for the context of the intimate relations, and the parties' actions as interpreted by the parties themselves.

In this case, Mr Baumgartner must consider himself in a very strong position from which to prosecute his defence. He put himself in charge of all money coming into the household, and he alone determined its expenditure. He said that this was because Ms Baumgartner was not good at budgeting. Regardless of his own professed motivation, his control meant that he alone was in a position to determine the distribution of resources within the family, including property. In the face of the exercise of such power, it is impossible to see the utility of the quest for a 'common subjective intention' to hold on trust. If 'intention' is to have any meaning at all, it must be read in the context of the exercise of power: Mr Baumgartner's exercise of coercive power must be brought to account, and that is the role of unconscionability in this type of case.

I therefore do not accept that Ms Baumgartner is precluded from bringing a claim that she holds a beneficial half interest in the former shared home. In this case, adopting Rath J's interpretation of the evidence and ignoring the power dynamic in the Baumgartners' relationship, the law has upheld a version of the parties' relationship that does not equally value the role played by each in their exchange, with consequences for the distribution of their property. To resolve this inequality, it is incumbent on me to analyse the evidence as to a property interest through the lens of the parties' relationship wherein lies the genesis of their exchanges, their material interdependence, and therefore the distribution of property.

Home

At the heart of cases such as this is the object of the claim: home. This is the common object of the claims in the English decisions such as *Pettitt v Pettitt*,[75] and *Gissing v Gissing*,[76] the Canadian decision of *Pettkus v Becker*,[77] the New Zealand decision of *Hayward v Giordani,*[78] and the Australian decisions of *Muschinski v Dodds*[79] and its predecessors such as *Allen v Snyder*,[80] and *Wirth v Wirth*.[81] Alongside home as the object of the claim, the subjects of the claim — the applicant and respondent — are or

[73] See eg *Hayward v Giordani* [1983] NZLR 140.
[74] See eg *Muschinski v Dodds* (1985) 160 CLR 583; *Pettkus v Becker* [1980] 2 SCR 834; *Hepworth v Hepworth* (1963) 110 CLR 309.
[75] [1970] AC 777.
[76] [1971] AC 886.
[77] [1980] 2 SCR 834.
[78] [1983] NZLR 140.
[79] (1985) 160 CLR 583 ('*Muschinski*').
[80] [1977] 2 NSWLR 685.
[81] (1956) 98 CLR 228.

have been party to an intimate relationship that is integral to the case and the rationale for the acquisition of a shared home.

Despite the central role of 'home' in these cases, the law does not tend to find any real purpose of 'home' as an element necessary to determine property — the two concepts do not equate. While 'home' may be relevant to ascertain domicile for the purposes of succession law or taxation, it does not equate to a property right known to the common law. It would be a mistake however to dismiss or to understate the role of 'home' in these cases and which it must therefore play in applying the law.

There is necessarily something qualitatively different about investigating claims for a beneficial interest in arms-length transactions, and claims emerging from a long-term, emotionally and materially intertwined domestic relationship such as that of the parties. The importance of the parties' relations in the context of the application, and the central role of the home both in their relations and in the proceedings, suggests that the law must accommodate both. The majority reasoning in this case achieves this to some extent. However its pronouncement on the application of unconscionability while ostensibly denying an inquiry into intention as to property, fails to articulate the basis for Ms Baumgartner's interest and the target of the unconscionable conduct — and it fails to comprehend the relevance of 'home' to Ms Baumgartner's evidence.

The majority in this case finds that there was no subjective common intention to hold property jointly on trust. It goes on however, to recite the parties' daily contributions, financially and in kind, and their collaborative search for a new home and its acquisition for the future of their relationship together. As a result of these circumstances, the majority concludes that it would be unconscionable for Mr Baumgartner to deny Ms Baumgartner an interest.

This aspect of the majority decision is important, and I agree with its tenor. In contrast to the majority however, I find that the circumstances recited are inseparable from the parties' connection with their home. These circumstances demonstrate home and their family relations as a shared purpose that speaks to intention, but where that intention can only be understood as arising from home itself.

Home is both a place and a set of values. It is the literal and figurative centre of domestic life, and in the case of an intimate relationship, it is the physical embodiment of the emotional connection shared by intimate partners. A property claim involving the home — in particular a claim by one former partner against the other — speaks to more than the proverbial bundle of rights incorporated in a property interest, although it might overlap with those rights.

The value of home can be understood through a number of intersecting ideas. It is physical security, a financial investment, one's own place or territory, a representation of one's self to the world, and a place of self-expression and intimacy. It offers a physical and emotional barrier between the person, the elements, and those outside. While 'home' does not at law equate to 'property' we can nonetheless recognise within the concept of property, aspects of these values invested in 'home'. A claimant's suggestion that the parties were to share their home is likely to overlap considerably with that claimant's understanding of shared property — despite the misapprehension of the lack of legal meaning attributed to 'home'.

In contrast to 'home,' property brings with it the considerable benefits of transferability, alienability, and capital and profit. In claims such as that before this Court, the question is whether the parties intend that all the indicia of property are to be available to the claimant, or only a subset thereof. In this case, it is clear that the claimant has understood that the full suite of these values belonged to both the parties — the home was 'theirs' including in a proprietary sense. By contrast, Mr Baumgartner maintained the property was 'his,' refusing to countenance Ms Baumgartner's claim and implicitly calling upon a differential interpretation of both 'home' and property.

Having suggested that the home is a place of security, I recognise that this applies to the resident vis-à-vis those external to the home. Courts frequently make assumptions of the home as a haven of safety and security but the sad reality is that this is not the case for so many women, including for Ms Baumgartner as I have outlined. The very lack of security likely experienced by Ms Baumgartner in the couple's home is important in appreciating her intention and her anxiety, shown through her evidence, that she would be a co-owner in the property — to have her name 'on the deeds'.[82] Ownership implies the security that was otherwise lacking in her domicile. Further, the alienability of property represents capital, providing financial security for Ms Baumgartner and her child, and reflecting the investment of her weekly pay in the couple's economic exchange.

Without the direction of Parliament, it is not the role of this Court to look into the likely future needs of the parties. I am therefore not suggesting that as a single parent, Ms Baumgartner 'deserves' or is entitled to a property interest to shore up her future personal and financial security. In particular I am not suggesting this Court lapse into the realm of 'palm tree justice,' in doing what *seems* fair.[83] My reason for recognising Ms Baumgartner's likely precarious situation as a single mother lies in the importance she placed on 'home,' and the convergence for her of 'home' with the indicia of property. She knew that she was vulnerable — relevantly, she changed her name by deed poll to that of Mr Baumgartner when she realised that his promises of marriage were unlikely to transpire. Her marital status was just one of many incidents of her vulnerability.

This colours Ms Baumgartner's evidence about home, and how this Court must understand her evidence as evincing an intention as to beneficial ownership. She invoked the full spectrum of the value of home to her. She identified the need for a physical place for the new family when she said that the unit they shared would be too small once the baby arrived.[84] It was these comments that prompted the couple to view land, and inspect designs of the house they were to build there. Her desire for financial security was evidenced through her persistent questioning about the title 'deeds', and querying when her name would be included as a joint owner. Further, there is evidence of a constant discourse around the couple's future security — Mr Baumgartner said that '[it would] be good, you know, if we pay it off as quick as possible so we get an easier future.'[85]

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[82] *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 428.
[83] See eg *Wirth v Wirth* (1956) 98 CLR 228, 237.
[84] *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 439.
[85] Ibid 438.

As 'home' is a social marker of one's place in the community, so too was the question of title a signifier of the *couple's* standing within their social circle. Evidence was adduced as to conversations with friends, the Schneiders, about the title to the property.[86] Mr Baumgartner's desire that Ms Baumgartner was happy with the choice of the block of land and the house to be constructed[87] is evidence of his own recognition of the importance of place as a representation to the world of one's self. Overall, one gets a sense of Ms Baumgartner's desire for ontological security through the couple's home:

> on one occasion while the house was being built Leo said to me words to the effect — 'I'm doing this all for us you know. While we're working together we'll soon be able to have everything paid off we'll be alright and then you will be able to stop work.'[88]

These factors together, and especially in light of her vulnerability within her relationship with Mr Baumgartner, 'home' for Ms Baumgartner equated with the indicia of property. The Baumgartners were an intimate couple, however fraught or dangerous their relationship for Ms Baumgartner. Their intimate connection is central to understanding the state of the beneficial interests in the property they shared, and the values it represents. It is through this lens of relationship, of connectedness, notably manifested materially in the shared home, that this Court must locate the existence or otherwise of a beneficial interest.

The challenge is how to interpret the parties' differing views as to whether home was no more than a shared space, or whether it represented a convergence of rights enforceable at law. This will be addressed through the two further principal elements required to demonstrate the parties' own differential distribution of the beneficial estate. In analysing these elements, I draw on their relations and the meanings elicited from them.

Intention

This Court in *Muschinski* searched for the parties' intention as to the effect of their joint purchase and the arrangement they made as to capital contribution and joint title. It did so not to ascertain a common intention, as do the English courts, but to ascertain whether it would be unconscionable for the defendant to assert or retain the benefit of property contributed to by the other party.[89]

Similarly my colleagues in the majority judgment here cite with approval Mahoney JA in *Allen v Snyder*:

> It will be necessary, from time to time, to determine whether, in such situations, the failure to recognize that the one or the other has a proprietary interest in the home is so contrary to justice and good conscience that a trust or other equitable obligation should be imposed.[90]

This statement does not however indicate how the proprietary interest is derived. It is not this Court's role to create a proprietary interest in the applicant, but rather to

[86] Ibid 441.
[87] Ibid 439.
[88] Ibid 436.
[89] *Muschinski v Dodds* (1985) 160 CLR 583, 623.
[90] *Allen v Snyder* [1977] 2 NSWLR 685, 706.

ascertain it according to law. It is up to the parties to create a property interest, and that requires an intention to do so. Where the applicant fails to prove such an intention, the Court must find that there is no beneficial interest.[91] Intention as to the creation of a legal or a beneficial interest via express trust is not troublesome to prove. But in the domestic context, such expression is unlikely. Not only must the law recognise this, but it must also advance a principled response to determine intention as to property within primary relations.

My fellow judges dismiss the ingredient of intention, on the grounds that the trial judge had rejected Ms Baumgartner's credibility as a witness, and that therefore the basis of her claim failed. The basis of her claim was of course, that there was an actual subjective intention for Mr Baumgartner to hold on trust for Ms Baumgartner.[92] I do not disagree with my colleagues' finding that it is not the role of the appeal court to ignore the way the primary judge resolved questions of conflict between the witnesses. My view however is that, as I have already said, the primary judge found a conflict where there was none. There is little, if any, likelihood that parties to an intimate relationship would express their actual subjective intention as to a trust. It is however likely that such an intention is expressed through the parties' exchange in their day-to-day lives. By observing each party's own version of the facts against this context, it is possible objectively to ascertain their intention.

As foreshadowed, I believe the correct approach involves a true appreciation of the parties as man and woman in an intimate domestic relationship. To search for intention requires a contextual and fine-grained approach that differs entirely from assumptions made about the 'hard-headed businessman'.[93] There is nothing to suggest that the 'rational' behaviours of the 'man on the Bondi tram'[94] bear fruit in interpreting the behaviours of a married couple. In suggesting that the same law applies, the courts have conflated the need to apply consistent underlying principles requiring evidence of intention and contribution, with the way in which courts have tended to characterise those elements in commercial transactions.

I note that the law's preference for market transactions often requires the court to interpret domestic exchanges according to the indicia of market dealings. For example, in *Popiw v Popiw*[95] the married parties had separated. To induce Ms Popiw to return to the matrimonial home, Mr Popiw promised that if she resumed cohabiting with him, he would transfer sole ownership of their home into joint names. He subsequently reneged on the arrangement and Ms Popiw sought to enforce the promise.

In a perhaps strained interpretation of the facts, the Court found that because the parties had separated, the promise was not one between husband and wife. Seeing the parties as independent actors thus allowed for contemplation of legal relations. Further, and relevantly, because the parties had engaged a solicitor, the Court found that there was a level of formality commensurate with an intention to create legal relations. To bring this arrangement within the scope of contract law, the Court separated the parties from their conjugal nexus, and focused upon behaviour

[91] Subject to alternative remedial approaches such as proprietary estoppel or unjust enrichment.
[92] *Baumgartner v Baumgartner* (1987) 164 CLR 137, 146.
[93] A standard invoked in eg: *Hazeldell Ltd v Commonwealth* (1924) 34 CLR 442, 452.
[94] Referred to, for example, in *Nomikos Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7.
[95] *Popiw v Popiw* [1959] VR 197.

consistent with an arms-length transaction. If the Court had instead accepted Mr Popiw's argument and read this arrangement as the parties' attempt to rebuild their intimate relationship, there would have been less potential to uphold its terms.

Alternatively, citing *Balfour v Balfour*,[96] courts might exclude their consideration of the domestic altogether for want of the parties' intent to invoke the law. Had the Popiws not been separated, this might also have been their fate.

Unlike the reading of the Popiws' arrangement, one would hardly refer to the Baumgartners' interactions as transactional. They did not approach each other in the market to engage in exchange. Instead, as is generally the case in domestic contexts, over the years of their relations they learned about each other, and made off-hand comments, sometimes dressed as promises. On a daily basis they undertook specialised tasks for the betterment of their communal circumstances. Ms Baumgartner bore a child and as with most women in these times, probably undertook the majority of unpaid caring and domestic work, on top of her paid employment. In this way not only did the couple deposit their own finances in a joint account, but each of them also gave what they could in exchange for what the other had to offer. Such is the nature of home life and a materially and emotionally intertwined relationship.

Ms Baumgartner gave evidence that she believed that *when* the couple married, the property would be put into both names. Mr Baumgartner on the other hand said *if* the couple married, this would happen. Rath J found that Ms Baumgartner changing her name to his was evidence that she had given up on the possibility of marriage, thus defeating her argument as to her expectation of a property interest. Rath J gave no reason for this finding, which does not appear to be supported by evidence. In any event, his inquiry attempts to find a promise to transfer legal title in the future, a promise that does not lend itself to the circumstances of the parties' relationship.

Instead it is clear that the parties shared an intention to provide for a common future, including through the acquisition of a home and paying it off as quickly as possible — to 'make things easier' according to Mr Baumgartner. Ms Baumgartner's desire for marriage continued, I surmise, even in the face of Mr Baumgartner's denials. She was vulnerable. She believed they had a future together, and their planning a child indicates their intimate connection regardless of Mr Baumgartner's assertion that they were 'just people'. As a pregnant woman and then a mother of a small child, unmarried, and with little if any control even over her own pay packet, Ms Baumgartner faced social isolation and physical and financial vulnerability. It is no wonder that she changed her name by deed poll to deal with social mores in the face of her recalcitrant partner. This was no sign of giving up on marriage; it affirms her continuing belief in the couple's relationship and their future together.

Despite upholding the trial judge's findings on the evidence, I observe that my colleagues on this bench find that 'marriage was under continuous contemplation of the parties.'[97] They recite the togetherness of the parties in searching for the land and the house design, the pooling of the funds to advance the project. All of this points to the parties' intention that Ms Baumgartner hold a beneficial interest in the property. The implicit reason my colleagues find that it would be unconscionable in these

[96] *Balfour v Balfour* [1919] 2 KB 571. This was done in *Pettitt v Pettitt* [1970] AC 777, 796.
[97] *Baumgartner v Baumgartner* (1987) 164 CLR 137, 149.

circumstances for Mr Baumgartner to assert ownership to the exclusion of his former partner, is because of her existing beneficial property interest as intended by the parties, evidenced through the day-to-day exchange of their intimate relationship.

I therefore find that the parties intended Ms Baumgartner to hold a beneficial interest in the property.

Contribution

Having ascertained that Ms Baumgartner holds a beneficial interest in the property, the question is as to what extent. This aspect of her claim lies to be determined through her contribution. Not only do the law and the foundation principles of property require evidence of consent, achieved through intention, for transfer of title, but they also require some evidence of quid pro quo.[98] That is the nature of exchange upon which distribution of property is achieved. The case for intention will be made where a person who desires to pass an interest receives value from one in whom title vests. Further, the parties' respective contribution forms the basis for determining the extent of their interests.

The challenge for the courts in the context of intimate relations is that parties contribute in diverse ways to diffuse ends, and not necessarily in ways according to standard measurement in dollar terms — although financial contribution may well be involved. Instead, contribution occurs through multiple, daily exchanges, over years, and frequently through specialisation of labour — especially where one partner, usually the woman, might take the bulk of caring responsibilities while the other earns money outside the house. There may be direct exchanges: 'if you do this for me then I will do that for you' but more likely, each party plays a role in the couple's lives, expressed through the home, in a way that is enjoyed by both. The parties' contributions to the common endeavour of their own relations will often occur indirectly including through their respective relationships with their children, and with the place that is their home. That is to say, there is a network of relations that is relevant to considering contribution.

The Baumgartners' system of financial pooling is an example, in one sense, of a more direct exchange with each other — each contributed their pay to a common fund that was shared between them for purchases including for personal items. However as it catered for all of the family's financial needs, including the acquisition of the property, its overall purpose was diffuse. This assisted Mr Baumgartner's argument that Ms Baumgartner's payments could not be directly attributed to the property purchase.

The diffuse purpose of contribution need not be a barrier however, to arguing an exchange between the couple that would support a property interest. Mr Baumgartner consistently encouraged Ms Baumgartner to continue her financial contribution, and he cut her short in her requests for financial security via making a will in her favour or transferring the property to joint names. But in each case he invoked the couple's joint purpose, for an easier future together.[99] Counsel tried unsuccessfully in cross-examination to elicit an admission from Mr Baumgartner that he encouraged Ms Baumgartner to *contribute financially to the purchase of the home*. However, Mr

[98] Such as occurs, for example, in a resulting trust. See *Calverley v Green* (1984) 155 CLR 242; *Gissing v Gissing* [1971] AC 886, 896.
[99] See his evidence eg *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 438.

Baumgartner did no more than deny a direct exchange: 'I didn't say I used her money to pay off instalments of the unit. I said we make, put more towards things we like so things we easier for us [sic].'[100] Evidence such as this denies a direct exchange transaction.

It would be specious however, to deny Mr Baumgartner's understanding, expressed consistently in his statements, that the parties' contributions made together, financially and in kind,[101] were made for the couple's joint purpose including the acquisition of property. It is not simply then that it is unconscionable for him to deny Ms Baumgartner a beneficial interest — and it is unconscionable — or that he should be, say, estopped from denying her an interest. It is more that the nature of the parties' relations was such that their actions on a daily basis, and over time, contributed to the common purpose of acquiring real property as their family home — a purpose aligned with the indicia of shared beneficial ownership.

Mr Baumgartner gave evidence as to his actual subjective intention related to sole ownership. However, his actions — including the ongoing acceptance of Ms Baumgartner's financial contribution and contributions in kind — contradict his stated intention. This contradiction renders it unconscionable for him to deny the inevitable conclusion that there was, as between the parties, a beneficial distribution. He dominated the relationship, including taking control of the finances in a way that precluded Ms Baumgartner from exercising financial agency. So long as he refused to marry, he obtained a financial advantage. However, he continued to keep Ms Baumgartner's hopes alive: 'who knows what will happen in the future' he said. He took advantage of common and discriminatory banking practice — that would ostensibly only grant a joint mortgage to a married couple — as a screen for his denial of Ms Baumgartner's interest.

As to the extent of her interest, I agree with my colleagues' pragmatic approach. It is inappropriate in an intimate relationship to attempt to attribute monetary value to the minutiae of shared lives, however important is their cumulative effect. It is relevant that Mr Baumgartner contributed capital, and that both of them contributed their income towards repayment of the loan of both Mr Baumgartner's unit and the couple's land. I agree that in ascertaining the extent of Ms Baumgartner's interest, she should be credited the equivalent of her wages lost during the time she took maternity leave. I note that Mr Baumgartner contributed labour and building materials towards the construction of the couple's home — and anticipate that Ms Baumgartner likely also contributed to home making. As a starting point, I agree with the 55:45 split calculated by my colleagues.

Because the income pooling arrangements commenced while the couple resided in Mr Baumgartner's unit, I do not believe it is sufficient simply to repay Ms Baumgartner the money value of her contributions to the joint account during this time. Mr Baumgartner took her pay packet each week. There is an opportunity cost for Ms Baumgartner associated with the loss of her wages during this time. She might have saved her wages, for example, and had a lump sum to contribute to the acquisition of the couple's home. In any event, it was Mr Baumgartner who received a windfall at least in part from her contributions, receiving net proceeds of $12,883.41 from the

[100] Ibid.
[101] See eg ibid 439–40, where Ms Baumgartner gives evidence about the couple's joint decision-making about choosing a house design.

sale of his unit. Rather than attempt to calculate the value of Ms Baumgartner's contributions to the home unit, I find instead that the parties hold beneficially equally as tenants in common.

Orders

I find in favour of Ms Baumgartner. I find that the parties demonstrated an intention that the property be distributed between them. While Mr Baumgartner denies a subjective intention to that end, his conduct and the context of the parties' relations showed otherwise. The fact of the parties' shared purpose as a family to build a home together, and their equal mutual contribution to that end, suffices to demonstrate shared property. It would therefore be unconscionable for Mr Baumgartner to deny Ms Baumgartner's beneficial proprietary interest. I therefore declare that Mr Baumgartner hold the property on trust for the parties equally.

II. COMMENTARY

The decision in *Baumgartner* was handed down in 1987, and related to circumstances having taken place in the late 1970s until 1982. The decision was ground-breaking in terms of its contribution to Australian jurisprudence around unconscionability. But in consolidating the decision in *Muschinski*[102] from two years earlier, it also articulated a means by which cohabiting women might successfully claim an interest in the family home.

The consequences of *Baumgartner* for cohabiting partners have arguably become somewhat more muted since the enactment throughout Australia of legislation dealing with de facto relationship property.[103] Statutory reform has offered important redress for cohabitants that would otherwise require protracted court cases — as evidenced by *Muschinski* and *Baumgartner* themselves. Yet *Baumgartner* remains consistently cited in Australia and abroad, indicating an ongoing role for the common law in determining property between intimate partners.

Despite legislation, in practical terms the decision still ostensibly represents the basis on which the common law understands the allocation of property in intimate relationships.[104] But the feminist judgment highlights two shortcomings of the decision and therefore its impact. In the first place because it focuses on unconscionability, the original decision does not expressly find a beneficial property interest vested in Ms Baumgartner. Instead it frames the analysis and its conclusion such that that it would be unconscionable for Mr Baumgartner to deny that Ms Baumgartner held 'an interest'. On this basis, a constructive trust is awarded. This may seem a narrow difference. But in light of women's structural economic inequality, the Court's failure to find a property interest in a positive sense perpetuates the exceptional nature of women's claims to property at common law, thus contributing to broader, structural, gendered, economic inequality.

In the second place, the original decision was limited in its capacity to understand the dynamics of the parties' relations. This is at least partly a consequence of the era in

[102] *Muschinski v Dodds* (1985) 160 CLR 583.
[103] For example, under Part VIIIAB of the *Family Law Act 1975* (Cth) the court may redistribute property interests of parties to a de facto relationship upon separation.
[104] With the notable exception of *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278, discussed above.

which it was decided. It is important because, as the feminist judgment points out, Mr Baumgartner's oppressive behaviours are entirely relevant to understanding the parties' evidence, their money management, and therefore the intention and contribution that justified their property distribution.

A. Context

Baumgartner dates from a time when domestic violence was not yet a mainstream policy issue in Australia. The women's refuge movement of the 1970s had only just started to translate into government policy in the 1980s.[105] Rathus' gender critique of criminal justice in Queensland was not published until 1993,[106] the same year that saw the UN General Assembly pass a declaration on the elimination of violence against women.[107] The Australian Law Reform Commission *Report into Equality for Women* was not published until 1994.[108] It is only very recently that Australian policy makers have begun to recognise emotional and financial abuse as part of the spectrum of controlling and abusive behaviours in the home.[109]

Although feminist commentators have long recognised the role of violence and power in intimate relations[110] — and that they are ignored in private law[111] — at the time of *Baumgartner* the law itself did not recognise it. Even if the Court did perceive the relationship as oppressive, its attention was occupied instead by articulating the concept of unconscionability. As it was, in what was surely then a remarkable and progressive recognition of the need to accommodate women's experiences, the Court allowed a money sum in recognition of Ms Baumgartner's lost earnings while she was on maternity leave.

It is noted also that the case was handed down just over a decade after the enactment of the *Family Law Act 1975* (Cth). Changes to family law jurisprudence ushered in by the Act were still fairly new. Concepts of spousal property rights now familiar to the law were then still being developed and had not yet informed broader thinking about property between intimate partners, including de facto partners. Recognising the impact of family law concepts on the evolution of thinking about intimate relations more broadly, Hardie Boys J observed nearly a decade after *Baumgartner* that without recognition through parliamentary enactment, it is 'not a reasonable expectation that de facto couples should share in assets in the same way that married couples do.'[112]

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[105] Suellen Murray and Anastasia Powell, 'What's the Problem? Australian Public Policy Constructions of Domestic and Family Violence' (2009) 15(5) *Violence Against Women* 532.
[106] Zoe Rathus, *Rougher Than Usual Handling: Women and the Criminal Justice System* (Women's Legal Service, 1993).
[107] United Nations Declaration on the Elimination of Violence against Women, GA Res 48/104, 85th Meeting, UN Doc a/Res/48/104 (20 December 1993).
[108] Australian Law Reform Commission, 'Equality before the Law: Justice for Women' (Report 69, 1994).
[109] Murray and Powell, above n 105, 544.
[110] See eg Anne Summers, *Damned Whores and God's Police* (New South Books, 4th ed, 2016); Germaine Greer, *The Female Eunuch* (Fourth Estate, 1971).
[111] Dianne Otto, 'A Barren Future? Equity's Conscience and Women's Equality' (1992) 18 *Melbourne University Law Review* 808; Regina Graycar, 'Telling Tales: Legal Stories About Violence against Women' (1996) 7(1) *Australian Feminist Law Journal* 79.
[112] *Lankow v Rose* [1995] 1 NZLR 277, 286.

Inevitably however, as legislation has come to deal with de facto interests,[113] community expectations as to property are likely to have changed. This context did not exist at the time of *Baumgartner*.

While legislative reform has altered the distribution of property between intimate partners, the root causes of economic inequality between men and women have stubbornly remained. In the same way, the MWPA redistributed property but left untouched the structural conditions that predicated against women becoming property owners in their own right. Even as society broadly has become more educated as a means of widening opportunity, in Australia at least, women suffer a gender wage gap relative to men, insufficient paid parental leave, less superannuation, and disproportionate unpaid caring responsibilities.[114] Economic systems ostensibly retain the implicit assumption that women will be dependent upon men for their financial wellbeing.

In 1987 these same conditions existed, but were not yet widely acknowledged or understood. There was therefore no clear imperative for articulating substantive property rights for women in intimate relationships. Further, the subsequent development of legislative schemes of redistribution ie through family law, would seem to have addressed the question, leaving the common law to continue on its trajectory of conscience without addressing fundamental questions of a private distribution of property through relations.

B. The Feminist Judgment

In answer to the insufficiently articulated question of property, the feminist judgment rejects the Court's sole reliance on the application of the abstract concept of unconscionability. Instead it redirects attention to ascertaining the distribution of property in the couple's shared home. It contends that this is the true purpose of the inquiry: one that is avoided in the original judgments.

In reaching this conclusion, the feminist judgment renders practical that which is theorised in earlier chapters of this thesis. It starts by recognising the importance of 'home' as a threshold that triggers a relational analysis of the parties' property distribution. In contrast to the body of this thesis which analysed home as a third element, the practicalities of judging require that this be addressed initially before moving on to the explicitly recognised elements that establish property. It is the fact

[113] With the notable exception of England. See most recently The Law Commission, 'Cohabitation: The Financial Consequences of Relationship Breakdown' (2007), whose recommendations have not been adopted by the English Parliament.

[114] See eg 'Gender Equity Insights 2016: Inside Australia's Gender Pay Gap' (Bankwest Curtin Economics Centre and Workplace Gender Equality Agency, 2016) <https://www.wgea.gov.au/sites/default/files/BCEC_WGEA_Gender_Pay_Equity_Insights_2016_Report.pdf>; Workplace Gender Equality Agency, *Gender Pay Gap Statistics,* Series Gender Pay Gap Statistics (February, 2013); Australian Productivity Commission, 'Paid Parental Leave: Support for Parents with Newborn Children' (2009) <http://www.pc.gov.au/__data/assets/pdf_file/0003/86232/parental-support.pdf>; Hewitt, Belinda et al, 'Men's Engagement in Shared Care and Domestic Work in Australia' (Office for Women Department of Families, Housing, Community Services and Indigenous Affairs, 2011) <https://www.dss.gov.au/sites/default/files/documents/05_2012/men_engaged_in_shared_care_1.pdf>; Australian Human Rights Commission, 'Accumulating Poverty? Women's Experiences of Inequality over the Lifecycle' (2009) <https://www.humanrights.gov.au/sites/default/files/document/publication/accumulating_poverty.pdf>.

of 'home' that highlights the need for relational analysis, and establishes the requisite framing of the inquiry as the couple's relations. It sets the scene not only as to the subject matter of the claim, but also as the physical and ontological connection between the parties as a feature and a purpose of their relationship and therefore of their exchange.

Making explicit that which is implicit in courts' mentions of 'home' is a feature of this thesis that justifies using alternative interpretive lenses to assess the other elements necessary to establish property: intention and contribution. In *Baumgartner* therefore, intention takes on a new light as it becomes clear that the parties give expression to their relations through their home. Although Mr Baumgartner appears to deny relations altogether, his behaviour in taking and applying Ms Baumgartner's income towards the family home, and evidence of his comments about 'working for [the parties'] future comfort', together illustrate the point made here of the importance of ascertaining a couple's shared purpose arising from their relations. The shared purpose in turn indicates and reflects their long-term, financial and emotional interdependence — opening the possibilities for understanding the distribution of property.

Similarly, Ms Baumgartner's evidence takes on a different light when understood relationally. Her emphasis on home and family, while seemingly at odds with Mr Baumgartner's denials, actually align with his. Her commitment to the couple's future through her having their baby, and her day-to-day concerns about the family's living arrangements and building a home indicate the couple's shared purpose. Her consistent requests for the title to be in joint names not only highlight her own perceptions of the couple's joint purpose, but also show that she appreciated her own vulnerability as an unmarried woman with a young child at a time when she had few clear legal rights to property.

In terms of reconciling the parties' evidence as to their relations, Pahl's work (post-dating the judgment) finds that there is 'his marriage and her marriage'[115] so that intimate partners' accounts of their relationship will inevitably differ. Understanding this informed my feminist judgment of the parties' ostensibly conflicting evidence as to their relations. Yet, and reflecting imposed constraints of the *Australian Feminist Judgments Project,*[116] I did not expressly incorporate her work into the judgment itself.

Finally, the High Court judgments themselves spell out the parties' contributions. However, they frame contributions as supporting the finding of unconscionability rather than as supporting the parties' distribution of property. In contrast the feminist judgment sees beyond the negative framing of the woman's rights: protection of 'an interest' from the absence of conscience. This is indicative of the 'negative space' or 'otherness' of women that has inhibited women's full civic participation, including before the law.[117]

In contradistinction to a positive (male) assertion of property, on this analysis women claimants are relegated to the exceptional, as the 'other' to the masculine norm.

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[115] Jan Pahl, *Money and Marriage* (MacMillan, 1989), 5.
[116] That is, I was not able to refer to something not in evidence, or which occurred after the judgment — such as the work of Pahl. See discussion in Douglas et al, above n 6, 23–7.
[117] See eg Simone de Beauvoir, *The Second Sex* (1953 H M Parshley trans, Pan Books, 1988).

Women's very existence before the law falls short of the male standard[118] evidenced by the difficulty they experience in having the court recognise their intentions and contributions to spousal property — particularly where they lie within the experience of 'home'. The High Court thus declares it unconscionable to deny the (woman) claimant's 'interest' not as the positive assertion of property, but rather as its shadow. By contrast, the feminist judgment recognises the woman's contributions for what they are — integral to an exchange as part of a shared purpose to advance the parties' collective material wellbeing. This is the meaning of the beneficial proprietary interest at the heart of the intimate partner trust cases.

The feminist judgment deals with these issues in particular through reconsidering the primary judge's findings about the parties' credibility, affording Ms Baumgartner's evidence a context that was missing from the original judgment. Whether the primary judge's assumptions about Ms Baumgartner could have been knowable as stereotypes by male judges at the time of the judgment is perhaps debatable. In this respect, the feminist judgment benefits from the contemporary enhanced understanding, both empirical and theoretical, of women's experiences in intimate relationships. However, the feminist judgment does not make claims that are unsupportable, or that would not have been known on a feminist sensibility at the time.[119]

Conclusion

It is not enough for the law to proclaim that interests of intimate partners are dependent upon an identifiable transaction manifesting intention and contribution. To do so misapprehends the purpose of the doctrinal elements of intention and contribution as key indicators of property distribution. Focus on transaction concentrates the inquiry on selected markers of intention and contribution rather than intention and contribution *per se*. Because those markers presuppose a particular — transactional — form of exchange, the law is rendered unable to canvass the more extensive possibilities for ascertaining exchange that occur in the context of intimate relations.

The transactional emphasis will not necessarily lead to a perverse outcome. Couples whose shared intentions as to property are ascertainable through more transactional indicia of exchange will more likely see a finding reflecting that shared purpose. The problem exists for couples whose exchange — diffuse, and over time — fails to represent the indicia of transaction but instead is expressed through their relations with each other and with their home.

But there is a deeper problem that goes further than perverse outcomes for particular cases: that is the skewed understanding of intimate partners' property at common law. In Australia, and generally in the other jurisdictions canvassed here, common law rights to property exist before the redistributive mechanisms of family law. They set the benchmark of property ownership for individuals. Yet in doing so they fail to comprehend the way in which property distribution, as a question of private law, takes place between intimate partners. Of particular concern is that the transactional focus of private law tends to reflect and therefore uphold men's experiences and practices

[118] Ngaire Naffine, 'Sexing the Subject (of Law)' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 18.
[119] Douglas et al, above n 6, 13.

and not to accommodate those of women. The outcome is that the law determines property interests in a way that is skewed in favour of men.

The state of the law both reflects gendered understandings of spousal financial interests but also likely generates those understandings. Thus intimate partners may implicitly consider themselves to share property ('ours') while a couple is together but on separation, regardless of their capital contribution, men tend to claim that property is 'mine' and has been all along.[120] Depending on whether they have made a capital contribution, women may either claim property as 'mine'[121] or continue to maintain it is 'ours'.

To resolve the skewed foundations of the law as it stands — to chart a course through equitable proprietary interests — this thesis proposes an alternative framing of the inquiry into exchange in intimate partner cases. As the analysis in this thesis has shown, it is both conceptually possible, and desirable in the interests of equality, to understand intimate partner claims for a beneficial interest in terms of relational exchange.

In the first place it explains how the focus on transaction masks the true inquiry into exchange, and secondly, that exchange occurs as part of intimate relations. Thus, subject to express declarations, the key doctrinal elements of intention and contribution manifest through the parties' performance of their relations. Their exchanges, diffuse and long-term, prosecute a shared purpose that is inherently involved not only in their interpersonal relations, but also in their relations situated in the home.

The additional element of 'home' therefore makes explicit that which has been implicit in courts' inquiries across the four jurisdictions, rounding out the analysis necessary to ascertain the parties' distribution of property. 'Home', in particular through the diverse values it imports, assists in framing the parties' shared purpose, and how each has contributed to their exchange. In connecting the parties and the subject matter of the property claim, it provides the focal point for what might otherwise be ostensibly unrelated contributions, and an intention otherwise difficult to pinpoint in transactional terms.

That this analysis is feasible in practical terms is demonstrated through the feminist judgment in this chapter. Calling for an analysis of property rather than abstract 'interests' gives voice to the real claims of the women applicants in these cases. Applying the framework of relational exchange, the feminist judgment demonstrates how the parties' evidence can be interpreted so as to give effect to their shared purpose. Importantly, it accounts for power and the gendered experiences of intimate partners, that otherwise cloud courts' analysis — especially where they rely on transactional indicia of exchange.

Through these elements, and this framing, the feminist judgment applies the analytical tools established in previous chapters to clear the path for determining equitable

[120] Referring to Pahl, above n 115, 8.
[121] Contrast the outcomes for women in *Muschinski v Dodds* (1985) 160 CLR 583 and *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278, and in *Stack v Dowden* [2007] 2 AC 432 and *Hayward v Giordani* [1983] NZLR 140.

proprietary interests between intimate partners: ascertaining in practical terms what is ‘yours, mine, and ours.’

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