Engendering Partial Personhood

MARGARET THORNTON*

The Erasure of Her Will

Davies and Naffine are aware of the gendered character of legal personality that parades as a neutral abstraction within the discourses of legal positivism. So far as women are concerned, however, the authors' focus tends to be on corporeal specificity, which may have the inadvertent effect of reconstituting the Cartesian mind/body split – despite their criticism of the artificiality of the dualism.[1] I am not contesting their pointed treatment of heterosex or the relationship between a pregnant woman and the foetus, for these issues are of crucial importance, but suggest that an exclusive focus on corporeality may deflect attention away from the manifold ways in which women's personhood continues to be socially constructed as defective.

I propose to confine my observations to two points emanating from heterosexual relations. I question the significance for personality and property of, first, the metaphysical notion of indivisibility between a husband and wife in marriage and, secondly, the assignation to women of unpaid domestic labour, particularly caring for others. The two points are interrelated. Although caring for others is neither a necessary corollary of marriage, heterosexuality or the feminine, I suggest that the conflation between these phenomena lies at the heart of the personality problematic.

At common law, marriage represented an indivisible union in which 'the husband and wife are one person in law'.[2] Despite the changes that occurred with the Married Women's Property Acts, noted by Davies and Naffine (40, 103),[3] I submit that the presumption of indivisibility has

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* Professor of Law and Legal Studies, La Trobe University, Melbourne.

1 Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates About Property and Personality* (2001) 77. The paradox of simultaneously producing that which is being deconstructed has been noted elsewhere. Eg, Frigga Haug, *Female Sexualization: A Collective Work of Memory* (trans Erica Carter, 1987) 196.

2 William Blackstone, *Commentaries* (Facsimile of 1st edn of 1765-69) (1979) 442.

3 Davies and Naffine, above n 1, 40, 103.

continued to inhibit the independence of married women and the crystallisation of their wills; the formal conferral of legal personality was by no means the end of the matter. Indeed, the intransigence of the presumption of indivisibility has continued to permit married men to enhance their own legal personalities through autonomous action and the acquisition of property.

Mary Lyndon Shanley suggests that the idea of married women's property legislation posed a much greater threat to the notion of the marital unit than divorce when it was mooted in the late 19th century because it formally acknowledged the existence of two separate wills within an ongoing marriage.[4] Disaggregation of the wills on divorce was accepted more readily because it recognised that the relationship had come to an end. The presumption of indivisibility *during* marriage has been difficult to dislodge, despite factors such as married women's pursuit of careers, the overall decline in the marriage rate and the increasing popularity of alternative family formations.

The resistance to domestic contractualism illustrates the point, even if the husband and wife are living apart.[5] Binding financial agreements during marriage may now be made in Australia, providing that certain conditions are met,[6] but the situation falls well short of freedom of contract in which two autonomous wills come together and determine the substance and conditions of their pact. A husband and wife cannot enter into a binding contract to determine who should take responsibility for housework and childcare, for example. Since the social expectation is that women will undertake this work, the restrictions on domestic contractualism disproportionately impact on the wife's legal personality, while affirming the husband's property interest in the unpaid labour of the wife, a point to which I shall return.

The intransigence of the presumption of indivisibility of the two wills is also evidenced by the phenomenon of sexually transmitted debt (STD), whereby a wife may be held liable for the debts of her husband. In reviewing such actions, some judges sanction the actions of husbands in securing the signatures of wives without explanation, as well as the failure by financial institutions and lawyers to consult with the wife. In cases where property is jointly owned and the husband pressures the wife to act as guarantor for a debt, or enters into a mortgage without her knowledge, she may have difficulty in severing her interest from his.[7] Superficially, such a

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4 Mary Lyndon Shanley, *Feminism, Marriage and the Law in Victorian England, 1850-1895* (1989) 46.

5 *Balfour v Balfour* [1919] 2 KB 571.

6 *Family Law Act 1975* (Cth), pt VIIIA. The amendment was effected by the Family Law Amendment Bill 1999.

7 See *Gough v Commonwealth Bank of Australia* (1994) ASC 56-268

course may appear to be an equalisation of the common law position whereby a husband could be held liable for the debts of his wife because of her contractual disabilities under coverture, but the conceptual basis of STD is quite different. In this scenario, the husband has autonomously contracted the debt, and the wife is held liable by dint of her relationship alone, which is not a relationship of dependency. Most notably, there is no exercise of her will any more than there was in the former instance. Thus, just as the wife was assumed to have consented to marital sex at common law, regardless of the conditions under which it was sought – because she had consented to the marriage – she is assumed to have consented to the debt in the modern variant.

Other judges, including a majority of Australian High Court judges, take the view that wives are still in a unique position of vulnerability by virtue of their marital relationship and that courts therefore have a special obligation to protect them. As a result, wives may not be held liable for their husband's debts arising from guarantees that they have given.[8] Although well-intentioned, paternalistic remedies of this kind also contribute to the construction of the wife as less than a fully autonomous legal person. The harm is comparable to that perpetrated by the husband, lawyers and financial institutions in failing to consult with her or to ensure that she had independent legal advice. She is still deemed to be under the wing or cover of her husband. The vitiation of the will of the wife, despite the abolition of rape in marriage, shows how ownership of the self transcends the notion of bodily integrity. Reincarnation of the idea of the defective will of the wife, albeit in a somewhat different guise, underscores the ideological role of legal personality. The active role of masculinist judges in discounting the will of the wife is also apparent.

How should one theorise this vitiation or diminution of the will of the wife? Does it flow from carnal possession of her, as the STD acronym pithily suggests, or does it highlight the malleability of the concept of legal personality, which can be selectively suppressed in light of supposedly more important social ends (such as the need to settle debts owing to powerful corporate third parties)? Alternatively, are STD and similar phenomena manifestations of what a relational approach to legal personality would look like? It would seem that it is power, not corporeality, that is the key determinant.

(NSWCA) and other cases discussed in Margaret Thornton, 'The Judicial Gendering of Citizenship: A Look at Property Interests during Marriage' (1997) 24 *Journal of Law and Society* 486. See also Belinda Fehlberg, *Sexually Transmitted Debt: Surety Experience and English* Law (1997).

8 *Yerkey v Jones* (1939) 63 CLR 649; *Garcia v National Australia Bank* (1998) 194 CLR 395.

The Commodification of Care

As with the presumption of indivisibility, the status elements of marriage, including the heterosexed identity of the parties, have been tenacious and resistant to modernisation.[9] However, the status elements are shaped not only by the terms on which the marriage contract is entered into but by the mundane reality of the substance of the marriage in which women are still expected to assume responsibility for nurturing, caring and housework. At common law, the loss of such 'services' could ground an action by the husband for loss of consortium because he had a possessory interest in her person – in respect of the labour she performed, as well as her 'sexual services'.[10] The presumption that women should shoulder the major responsibility for societal care has continued to inhibit the realisation of full personality for women. Judges have determined that housework cannot be the subject of contractualism because there is no reciprocal exchange; unpaid work of this nature is carried out for love and affection.[11] While loss of consortium has generally been repealed, it is notable that the wife's services attracted a monetary value only when the wife was injured and her (household and caring) services had to be replaced.

The carapace of the private sphere within liberalism has sought to occlude the identity of who takes responsibility for caring and housework. Anti-discrimination legislation, for example, permits a course of action regarding less favourable treatment to a person on the ground of sex in certain aspects of public life and the market, but precludes scrutiny of

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9 For a thoroughgoing analysis of the contract of marriage, see Carole Pateman, *The Sexual Contract* (1988). See also, Margaret Thornton, 'Intention to Contract: Public Act or Private Sentiment?' in Ngaire Naffine, Rosemary Owens and John Williams (eds), *Intention in Law and Philosophy* (2001). In 2000, the Dutch government was the first to enact legislation enabling gays and lesbians to marry. In Australia, the Family Court has upheld a transsexual marriage. See *Re Kevin (validity of marriage of a transsexual)* [2001] FamCA 1074. The decision was affirmed on appeal. See *Attorney-General for the Commonwealth & 'Kevin and Jennifer' and Human Rights and Equal Opportunity Commission* [2003] FamCA 94 (21 February 2003).

10 I do not agree with Davies and Naffine that the focus of the action at common law was directed to affection and companionship (81). The idea of companionate marriage reflects the attempt to modernise it, particularly within North American jurisdictions. The focus on loss of services within the Anglo-Australian common law tradition closely parallelled the similar action available for the loss of services of a servant: *per quod servitium amisit*. See also Margaret Thornton, 'Loss of Consortium: Inequality before the Law' (1984) 10 *Sydney Law Review* 259.

11 *Balfour v Balfour* [1919] 2 KB 571.

discrimination within the home.[12] The separation between public and private life and the issue of who takes primary responsibility for caring and housework produces different incarnations of legal personality and property according to gender. The assignation of responsibility for the realm of necessity to women, conventionally wives, has enabled men the freedom to participate in public life and the market. The symbiosis between public and private life in which the freedom of men is predicated on the unfreedom of women is a leitmotif of the Western intellectual tradition. It has enabled men to acquire political capital and power, which has enhanced their legal personality and property in themselves. In contradistinction, the work that women do in the home is dismissed as of no value.[13] This is so even when the nexus between the work and property is direct, such as in the case of the middle class woman who regularly entertains her husband's business associates in order to enable him to clinch business deals. Her unpaid contributions enhance his personality and property, not hers, although she may benefit indirectly in a material sense.

The gendered division of responsibility for care has enabled the husband to become an active citizen of the polity at the expense of the wife. Kant identified the attributes of the active citizen as freedom, equality and independence.[14] These are the very qualities that signify civil personality which allow the juridical pursuit of rights. Kant relegated all women, as well as some men, to the passive category because they lacked independence. Despite significant social and legal change, Kant's point retains its validity. Women have frequently had to live as dependants with no chance of acquiring property in land or things in their own right because affectivity has been deemed to be of no property value. In circular fashion, dependency has underscored the idea that women's personalities are defective, thereby strengthening the nexus between property in things, property in the self and personality in masculinist terms. Furthermore, men have been able to use their collective power in the polis and the courts to delimit the legal personality of women and to safeguard the congruence between women and domestic care through restrictive childcare and taxation policies, such as disallowing childcare as a bona fide work-related expense.[15] The conflation between bearing children and caring for them, as well as between caring for those unable to care for themselves and those

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12 Eg, Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990).

13 Waring has written persuasively of the invisibility of women's work. See Marilyn Waring, *Counting for Nothing: What Men Value and What Women are Worth* (1988).

14 Immanuel Kant, *The Metaphysics of Morals* (trans Mary Gregor, 1991) §46, 126.

15 Eg, *Lodge v Federal Commissioner of Taxation* (1972) 128 CLR 171; *Jayatilake v Federal Commissioner of Taxation* (1991) 22 AR 125.

who are perfectly able to do so, namely, adult men – the paradigmatic possessive individuals – has therefore been juridically and culturally instantiated.

I am not suggesting that such contributions should necessarily be commodified but question how unpaid work should be conceptualised. Does it signify a form of property in Lockean terms or does its affective basis preclude a property interest? Davies and Naffine do not address this vexed but central social issue of who cares and what its status is in the personality/property paradigm. Not addressing it could be construed as reaffirming the classic liberal view that affectivity and care are invisible and therefore of no consequence because they belong to the private realm and are feminised.

The commodification of care, about which one may well feel ambivalent, is inevitably occurring, albeit reluctantly, and is corroding the vestigial premodern status elements of marriage. The proposition that the husband's ability to earn income and acquire ownership over property is predicated on the wife's contributions as homemaker and carer is now recognised on divorce, that is, when their wills are disaggregated. However, this is not the case if the wife endeavours to assert an equitable interest *during* the marriage based on her unpaid contributions in property registered in the husband's name, even if she has spent 50 years not only caring for her husband and family, but contributing her labour towards the upkeep of the subject property, which may be the family farm.[16] The familiar tropes of love and affection are invoked to reject the conceptualisation of housework and care as property. Freeing men from the world of necessity, which is deemed to have no property value in a market-based political economy, enhances his ability to acquire property of the kind that is valued. Judges have been socially authorised to invoke their power to reproduce conventional understandings of property and conventional iterations of marital relations in which the legal personality of the wife is constructed as inferior to that of the husband.

Women as Not-quite-Persons

As women have struggled to slough off the bonds of a premodern status that has bound them to a husband, father or guardian, counter attempts have been made to prevent them from entering civil society, the paradigmatic sphere of freedom open to male citizens, and the domain where legal personality has substantive meaning. Attaining the age of majority for women has not secured the panoply of rights and freedoms that it has for

[16] *Lorna Pianta v National Australia Bank Ltd* (NSWCA, unreported, 23 May 1994). See also Thornton, above n 7.

similarly situated young men; such rights and freedoms have always been conditional for women. In the collective decisions of legislatures and judges, we can still discern the vestigial idea that husbands retain a selective property interest in their wives. If women are represented as not quite persons within marriage, the seeds of doubt are sown as to their autonomy as rational actors in the public sphere and the professions. The formal conferral of legal personality has not cured the substantive disability.

Davies and Naffine note the ambiguity running through the feminist literature in respect of property in the self and favour the alternative relational view of persons.[17] While superficially appealing, the relational approach also engenders ambivalence. It is not necessarily liberatory for women, particularly married women, since their legal incapacity stems primarily from their relationships with others, as we see with the examples of STD and caring. This is the case whether we consider relationships with sexual intimates, children or other dyadic relationships of care. We should not allow ourselves to be blinded by the gloss of love and affection infusing the relational. If a relational approach were to be mediated by an ethical sensibility, as Davies and Naffine suggest,[18] the ownership elements might be theoretically minimised, but who are to be the arbiters in a neoliberal environment in which appropriation and commodification are perennially privileged? Just as we see the positivistic mindset selectively filters out justice in the light of competing telei, the ethical is likely to be similarly subverted. The relational theory of personality may therefore prove to be a trap as well as a lure for women, as it legitimates the gendered constellation of property, personality and power. I have suggested that the meaning of legal personality is not biologically determined, but will continue to be determined by those men who are already the most powerful possessive individuals. It is in their interest to ensure that women, particularly married women, are not quite free.

17 Davies and Naffine, above n 1, 15.

18 Ibid 183.