Chapter Six: Divorce Law Reform: The Trouble with Properly Valuing Women's Contribution to the Marital Unit

Cases dealing with employment discrimination on the basis of maternity or family status (e.g. presence of small children at home) get at one aspect of the legal-institutional framework for the gender gap. Legal responses to divorce get at the private life, familial side of gender inequality, as women who have contributed to the unpaid work of running a home and raising children to the detriment of their ability to earn a good living in the workforce are put in financial jeopardy if their marriages end. This chapter deals with divorce law, a branch of family law, governed by state law. It begins with a bit of discussion and commentary, then turns to two divorce cases, one from New York (*O'Brien v. O'Brien*) and one from Connecticut (*Wendt v. Wendt)*, and a law review article, Williams' 2000 "Winning for Wives After Wendt."

> She take my money, when I'm in need. Yea she's a trifflin friend indeed. Oh, she's a gold digga, way over town. That digs on me...18 years, 18 years-She got one of yo' kids, got you for 18 years! I know somebody payin' child support for one of his kids, His baby momma's car and crib is bigger than his. You will see him on TV, any given Sunday, Win the Superbowl and drive off in a Hyundai. She was spouse to buy ya shorty TYCO with ya money. Instead she went to the doctor and got lipo with ya money. Now she walkin' around lookin' like Michael with ya money. Should of got insured, got Geico for ya money. If you ain't no punk holla. We want Prenup! WE WANT PRENUP! Yeah, It's something that you need to have-Cause when she leave yo' ass, she gone leave with half! 18 years, 18 years-And on her 18th birthday, he found out it wasn't his (Kanye West, quoted in Steiner, 2007).

While Kanye West would suggest that divorced women are the recipients of large amounts of financial support from their ex husbands, the reality for many divorced women is not quite what rapper West portrays. Divorce puts many women in a vulnerable financial situation. But, as with West's rap, the burden divorce puts on the wife is often understated. Mothers and their children are often put in financially compromising situations upon divorce, a phenomenon Elizabeth Steiner discusses in her essay "Why Are Divorced Mothers Economically Disadvantaged? And What Can Be Done About It?":

> While there may be women who fit the stereotype of the "gold digger" in West's song, this portrayal is not indicative of the situation of most divorced mothers, since most divorced mothers in this country do not benefit economically from their divorce or their status as a mother....Yet, beyond possibly paying child support and, even less likely, alimony, the father does not have to share his income with his former wife or children, even though it is only because of her work during the marriage and her continued rearing of his children after the marriage that he is able to continue to perform as a full-time worker in the marketplace.... It assumes that any laws allowing spouses to benefit from the human capital of their spouse after divorce would actually cause those spouses not to invest in their own human capital before or during marriage...It is not difficult to hypothesize that if the almost two-thirds of custodial parents in this country who do not

> receive the full child support that they are entitled to under the law began receiving full child support, then at least some of the forty percent of divorced mothers living below the poverty line would be pulled out of poverty.... Researchers have found that consistent, developmentally-sound and emotionally-supportive care has a positive effect on both children and families...Compare these statistics with the median net worth for all households in the United States ($55,000), the median net worth for all households under 35 ($7,240), the median net worth for households aged 45 to 55 ($44,275), and the median net worth for "female" heads of household ($23,028).... Nonetheless, our society still demands that we pay these individuals a wage (Steiner, 2007, 1).

The problems related to divorce are connected to the common assumption that "he who earns it owns it," that is, that one's income belongs to the person who earns it and is not the joint property of the marital unit (spouse, children). This tends to shut off women from post-divorce earnings, despite the fact that women's unpaid labor allows men to perform as the ideal worker, a point that Ann Crittenden addresses in her 2001 book, *The Price of Motherhood*:

> The key problem for mothers ... is the fundamental assumption that the income flowing into families does not belong to all family members, but only to the individual who earns it... Traditionally, under English common law--which became the basis for marriage law in the majority of states in the United States--a husband had sole ownership of all family property and income, including any wages the wife might earn. This was the legal doctrine of coverture, by which a wife was legally subsumed under her husband after marriage. Wives literally did not exist as independent citizens, able to make contracts or own property of their own. As we have seen, American wives did not win the right to own their own property and keep their own wages until the mid-nineteenth century, although most still had neither. To this day, mothers have no legal right to the greatest single financial asset that most families possess: the primary breadwinner's income. Nothing exposes this truth more starkly than divorce...Even if a woman relinquishes her career entirely in order to care for her children and support her husband career, he will not necessarily have to reimburse her. Her unpaid services to the family are considered a "gift" (Crittenden, 2001, 153-54).

Inequity in divorce settlements is a problem for women who take time off from paid work or take a secondary-earner role in their families because of the time they spend on childrearing and other unpaid domestic work, which makes it difficult to fit into the ideal worker norm. Doing so requires a delicate balancing act that most of their male counterparts with wives do not have to worry about. Stay-at-home mothers are even more marginalized: society values neither the contributions they make to the family wage, nor to their husbands' ability to fit the ideal worker norm.

If a marriage were essentially a business partnership, we might expect a failed marriage to affect both parties equally. Crittenden tested this hypothesis out on an economics class taught by Professor Bartlett at Denison University in Ohio, asking students what would be the fairest way to settle affairs financially between a divorcing couple, "Jack and Jill":

Jill, like the great majority of married mothers, was financially dependent on Jack. He earned $49,774 a year as a truck driver, and she made about $4,500 a year from baby-sitting. She had never had any other paid job during the marriage. Bartlett's class calculated that the family's pre-divorce standard of living was 2.5 times the poverty rate for a family of six. They figured out that after the couple separated, Jack's standard of living--one person living on $49,774--would be 5.88 times greater than the poverty level. Jill and the children--five people living on $4,500--would have a standard of living only one-fourth (.26) of the poverty level.

The students figured that Jack would have to transfer to Jill three-fifths of his income--that is, $30,000 a year--to equalize the two households' living standards after the divorce. He would be left with $19,744 putting him at 1.98 times the poverty level (for a single individual). The children and Jill would have $34,500 and also be at 1.98 times the poverty level (for a family of five) (Crittenden, 2001, 150).

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Questions.

1. Do you agree that giving Jack and Jill (plus the four kids) the same standard of living is the fairest resolution here? Is it fair to *Jack* to have to give up so much of his income to Jill and the kids? What might be some other candidates for fair divisions of property and income?

Although the resolution the class proposed for Jack and Jill seems fair, it isn't what actually happens in most divorce cases. Joan Williams notes that women and their children generally suffer a decline in standard of living post-divorce, while their ex-husbands' standard of living usually improves:

> The impoverishment of women upon divorce is an impoverishment of custodial mothers, who almost always suffer a considerable decline in economic well-being upon divorce. Commentators agree that men's standard of living increases while women's and children's decline sharply upon divorce. Poverty in families headed by divorced women not only is more common than poverty in two-parent households, but it is also more likely to be chronic. Even where mother-headed families' incomes do not fall below the poverty line, typically they decline sharply. Middle-class wives often do not have the resources to maintain a middle-class level. Wines of affluent men suffer the sharpest declines in standard of living (Williams, 2000b, 115).

Divorce laws differ from state to state as does the type of settlement. Most states permit courts considerable discretion in crafting divorce decrees, which can make it difficult to predict how a particular judge will rule in a given case. Ann Crittenden notes that

> Divorce is like a lottery, but in some states, the odds are better for the parent who is the primary caregiver.
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> Besides child support...the financial outcome of a divorce is dependent on two factors: the division of property and alimony (or spousal support maintenance, or compensation, as it is more often called today.

In most states, the divisible property includes everything acquired during the marriage, excluding personal gifts and inheritances. (Fourteen states, however, are so-called kitchen sink states, where everything, no matter when or how it was acquired, is considered joint property and divisible in the event of a divorce. These fourteen states are Washington, Oregon, Montana, Wyoming, North Dakota, South Dakota, Kansas, Mississippi, Michigan, Indiana, Vermont, New Hampshire, Massachusetts, and Connecticut.)

In only three states-California, New Mexico, and Louisiana-does marital property have to be divided fifty-fifty. These are therefore the safest places for a wife and a mother of substance. In six other states-Idaho, Nevada, Arkansas, West Virginia, North Carolina, and New Hampshire-judges start with a presumption that property should be split fifty-fifty.

In most states, martial property must divided "equitably" by the courts. This is supposed to mean "fairly" but in practice can mean anything from giving a caregiver more than half the marital property to giving her only a fraction, as often happens in cases involving great wealth.

If stock options are part of the assets, the wife would be best off in the few states, including Maryland and Wisconsin, that are more likely to divide options between spouses. Corporate wives who can keep all of his stock options--though since the Wendt decision the treatment of options is changing.

Alimony is more important than property in divorces where the breadwinner's income is relatively high but the couple has not been married long enough to have accumulated much property. Yet, if anything, alimony is even more of a crapshoot. The laws vary from jurisdiction to jurisdiction, and a caregiver is subject to the whims and vagaries of whatever judge she happens to draw. The only generalization are these: the great majority of awards are of short duration, and alimony is generally awarded only after a long-term marriage. It is also safe to say that a wife who has an affair has kissed her chances of alimony goodbye (Crittenden 2001 157-158).

Why is it women and children must carry the financial burdens of divorce, along with the obvious emotional traumas? The biological children of a mother and a father become the primary--often the sole--responsibility of the mother, who often gets physical custody without much financial help from the father to back it up. In divorce courts, women are perceived as beggars or charity cases (Williams, 2000b, 120). If women are told they ought to be good mothers, caretakers, and support their husbands, but in divorce settlements their hard work becomes invisible, clearly something fishy is going on. This is frequently the case with decisions about property division, alimony, and child support. Support for ex-wives is seen as an act of charity, not the claim due to an equal contributor. Americans typically are reluctant to redistribute property post divorce, which tends to hurt women and children. The father's wages, even though they are not solely a reflection of his own work, are usually seen as belonging solely to him, as part of the "he who earns it, owns it" rule. Because courts tend to embrace the "clean break" approach to divorce, ex-husbands generally get to maintain control over most of their income: although we tend to think of alimony as a given for most divorced wives—eighty percent think that they will get it—only *eight* percent actually do (Williams,

2000b, 122). Two divorce cases, *O'Brien v. O'Brien* (1985) and *Wendt v. Wendt* (2000), illuminate some of these themes.

1. *Michael O'Brien v. Loretta O'Brien* (Court of Appeals of New York, 489 N.E.2d 712, Dec. 26, 1985)

OPINION OF THE COURT, **SIMONS, Judge.**

In this divorce action, the parties' only asset of any consequence is the husband's newly acquired license to practice medicine. The principal issue presented is whether that license, acquired during their marriage, is marital property subject to equitable distribution under Domestic Relations Law § 236(B)(5). Supreme Court held that it was and accordingly made a distributive award in defendant's favor. It also granted defendant maintenance arrears, expert witness fees and attorneys' fees. On appeal to the Appellate Division, a majority of that court held that plaintiff's medical license is not marital property and that defendant was not entitled to an award for the expert witness fees. It modified the judgment and remitted the case to Supreme Court for further proceedings, specifically for a determination of maintenance and a rehabilitative award. The matter is before us by leave of the Appellate Division.

We now hold that plaintiff's medical license constitutes "marital property" within the meaning of Domestic Relations Law § 236(B)(1)(c) and that it is therefore subject to equitable distribution pursuant to subdivision 5 of that part. That being so, the Appellate Division erred in denying a fee, as a matter of law, to defendant's expert witness who evaluated the license.

I

Plaintiff and defendant married on April 3, 1971. At the time both were employed as teachers at the same private school. Defendant had a bachelor's degree and a temporary teaching certificate but required 18 months of postgraduate classes at an approximate cost of $3,000, excluding living expenses, to obtain permanent certification in New York. She claimed, and the trial court found, that she had relinquished the opportunity to obtain permanent certification while plaintiff pursued his education. At the time of the marriage, plaintiff had completed only three and one-half years of college but shortly afterward he returned to school at night to earn his bachelor's degree and to complete sufficient premedical courses to enter medical school. In September 1973 the parties moved to Guadalajara, Mexico, where plaintiff became a full-time medical student. While he pursued his studies defendant held several teaching and tutorial positions and contributed her earnings to their joint expenses. The parties returned to New York in December 1976 so that plaintiff could complete the last two semesters of medical school and internship training here. After they returned, defendant resumed her former teaching position and she remained in it at the time this action was commenced. Plaintiff was licensed to practice medicine in October 1980. He commenced this action for divorce two months later. At the time of trial, he was a resident in general surgery.

During the marriage both parties contributed to paying the living and educational expenses and they received additional help from both of their families. They disagreed on the amounts of their respective contributions but it is undisputed that in addition to performing household work and managing the family finances defendant was gainfully employed throughout the marriage, that she contributed all of her earnings to their living and educational expenses and that her financial contributions exceeded those of plaintiff. The trial court found that she had contributed 76% of the parties' income exclusive of a $10,000 student loan

obtained by defendant. Finding that plaintiff's medical degree and license are marital property, the court received evidence of its value and ordered a distributive award to defendant.

Defendant presented expert testimony that the present value of plaintiff's medical license was $472,000. Her expert testified that he arrived at this figure by comparing the average income of a college graduate and that of a general surgeon between 1985, when plaintiff's residency would end, and 2012, when he would reach age 65. After considering Federal income taxes, an inflation rate of 10% and a real interest rate of 3% he capitalized the difference in average earnings and reduced the amount to present value. He also gave his opinion that the present value of defendant's contribution to plaintiff's medical education was $103,390. Plaintiff offered no expert testimony on the subject.

The court, after considering the life-style that plaintiff would enjoy from the enhanced earning potential his medical license would bring and defendant's contributions and efforts toward attainment of it, made a distributive award to her of $188,800, representing 40% of the value of the license, and ordered it paid in 11 annual installments of various amounts beginning November 1, 1982 and ending November 1, 1992. The court also directed plaintiff to maintain a life insurance policy on his life for defendant's benefit for the unpaid balance of the award and it ordered plaintiff to pay defendant's counsel fees of $7,000 and her expert witness fee of $1,000. It did not award defendant maintenance.

A divided Appellate Division … concluded that a professional license acquired during marriage is not marital property subject to distribution. It therefore modified the judgment by striking the trial court's determination that it is and by striking the provision ordering payment of the expert witness for evaluating the license and remitted the case for further proceedings.

On these cross appeals, defendant seeks reinstatement of the judgment of the trial court. Plaintiff contends that the Appellate Division correctly held that a professional license is not marital property but he also urges that the trial court failed to adequately explain what factors it relied on in making its decision, that it erroneously excluded evidence of defendant's marital fault and that the trial court's awards for attorneys and expert witness fees were improper.

II

The Equitable Distribution Law contemplates only two classes of property: marital property and separate property (Domestic Relations Law § 236). The former, which is subject to equitable distribution, is defined broadly as "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held " (Domestic Relations Law § 236 see § 236). Plaintiff does not contend that his license is excluded from distribution because it is separate property; rather, he claims that it is not property at all but represents a personal attainment in acquiring knowledge. He rests his argument on decisions in similar cases from other jurisdictions and on his view that a license does not satisfy common-law concepts of property. Neither contention is controlling because decisions in other States rely principally on their own statutes, and the legislative history underlying them, and because the New York Legislature deliberately went beyond traditional property concepts when it formulated the Equitable Distribution Law. Instead, our statute recognizes that spouses have an equitable claim to things of value arising out of the marital relationship and classifies them as subject to distribution by focusing on the marital status of the parties at the time of acquisition. Those things acquired during marriage and subject to distribution have been classified as "marital property" although, as one commentator has observed, they hardly fall within the

traditional property concepts because there is no common-law property interest remotely resembling marital property.…

We made such a determination in Majauskas v. Majauskas, 61 N.Y.2d 481, 474 N.Y.S.2d 699, 463 N.E.2d 15, holding there that vested but unmatured pension rights are marital property subject to equitable distribution.… A similar analysis is appropriate here and leads to the conclusion that marital property encompasses a license to practice medicine to the extent that the license is acquired during marriage. Section 236 provides that in making an equitable distribution of marital property, "the court shall consider: … any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party" (Domestic Relations Law § 236). Where equitable distribution of marital property is appropriate but "the distribution of an interest in a business, corporation or profession would be contrary to law" the court shall make a distributive award in lieu of an actual distribution of the property (Domestic Relations Law § 236). The words mean exactly what they say: that an interest in a profession or professional career potential is marital property which may be represented by direct or indirect contributions of the non-title-holding spouse, including financial contributions and nonfinancial contributions made by caring for the home and family.

The history which preceded enactment of the statute confirms this interpretation. Reform of section 236 was advocated because experience had proven that application of the traditional common-law title theory of property had caused inequities upon dissolution of a marriage. The Legislature replaced the existing system with equitable distribution of marital property, an entirely new theory which considered all the circumstances of the case and of the respective parties to the marriage (Assembly Memorandum, 1980 N.Y.Legis.Ann., at 129-130). Equitable distribution was based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or homemaker. Consistent with this purpose, and implicit in the statutory scheme as a whole, is the view that upon dissolution of the marriage there should be a winding up of the parties' economic affairs and a severance of their economic ties by an equitable distribution of the marital assets….

The determination that a professional license is marital property is also consistent with the conceptual base upon which the statute rests. As this case demonstrates, few undertakings during a marriage better qualify as the type of joint effort that the statute's economic partnership theory is intended to address than contributions toward one spouse's acquisition of a professional license. Working spouses are often required to contribute substantial income as wage earners, sacrifice their own educational or career goals and opportunities for child rearing, perform the bulk of household duties and responsibilities and forego the acquisition of marital assets that could have been accumulated if the professional spouse had been employed rather than occupied with the study and training necessary to acquire a professional license. In this case, nearly all of the parties' nine-year marriage was devoted to the acquisition of plaintiff's medical license and defendant played a major role in that project. She worked continuously during the marriage and contributed all of her earnings to their joint effort, she sacrificed her own educational and career opportunities, and she traveled with plaintiff to Mexico for three and one-half years while he attended medical school there. The Legislature has decided, by its explicit reference in the statute to the contributions of one spouse to the other's profession or career (see, Domestic Relations Law § 236), that these contributions

represent investments in the economic partnership of the marriage and that the product of the parties' joint efforts, the professional license, should be considered marital property….

Plaintiff's principal argument, adopted by the majority below, is that a professional license is not marital property because it does not fit within the traditional view of property as something which has an exchange value on the open market and is capable of sale, assignment or transfer. The position does not withstand analysis for at least two reasons. First, as we have observed, it ignores the fact that whether a professional license constitutes marital property is to be judged by the language of the statute which created this new species of property previously unknown at common law or under prior statutes. Thus, whether the license fits within traditional property concepts is of no consequence. Second, it is an overstatement to assert that a professional license could not be considered property even outside the context of section 236(B). A professional license is a valuable property right, reflected in the money, effort and lost opportunity for employment expended in its acquisition, and also in the enhanced earning capacity it affords its holder, which may not be revoked without due process of law...

Turning to the question of valuation, it has been suggested that even if a professional license is considered marital property, the working spouse is entitled only to reimbursement of his or her direct financial contributions. By parity of reasoning, a spouse's down payment on real estate or contribution to the purchase of securities would be limited to the money contributed, without any remuneration for any incremental value in the asset because of price appreciation. Such a result is completely at odds with the statute's requirement that the court give full consideration to both direct and indirect contributions "made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker " (Domestic Relations Law 236). If the license is marital property, then the working spouse is entitled to an equitable portion of it, not a return of funds advanced. Its value is the enhanced earning capacity it affords the holder ….

III

[P]laintiff notes that the statute requires the trial court to state the factors it considered and the basis for its decision in making distribution and that neither the parties nor counsel may waive that requirement (see, Domestic Relations Law § 236). He contends that the court failed to adequately do so in this case. We have held recently that [the court] must set forth all the factors it considered and the reason for its decision. Unless the trial judge reveals not only the factors he considered, but also his reasoning for the award made, intelligent review of the broad discretion entrusted to him is not possible….

Plaintiff also contends that the trial court erred in excluding evidence of defendant's marital fault on the question of equitable distribution…. Except in egregious cases which shock the conscience of the court, however, it is not a "just and proper" factor for consideration in the equitable distribution of marital property. That is so because marital fault is inconsistent with the underlying assumption that a marriage is in part an economic partnership and upon its dissolution the parties are entitled to a fair share of the marital estate, because fault will usually be difficult to assign and because introduction of the issue may involve the courts in time-consuming procedural maneuvers relating to collateral issues. We have no occasion to consider the wife's fault in this action because there is no suggestion that she was guilty of fault sufficient to shock the conscience….

Accordingly, in view of our holding that plaintiff's license to practice medicine is marital property, the order of the Appellate Division should be modified, with costs to defendant…

MEYER, Judge (concurring).

I concur in Judge Simons' opinion but write separately to point up for consideration by the Legislature the potential for unfairness involved in distributive awards based upon a license of a professional still in training…. a professional in training who is not finally committed to a career choice when the distributive award is made may be locked into a particular kind of practice simply because the monetary obligations imposed by the distributive award made on the basis of the trial judge's conclusion (prophecy may be a better word) as to what the career choice will be leaves him or her no alternative.

The present case points up the problem. A medical license is but a step toward the practice ultimately engaged in by its holder, which follows after internship, residency and, for particular specialties, board certification. …the degree of speculation involved in the award made is emphasized by the testimony of the expert on which it was based. Asked whether his assumptions and calculations were in any way speculative, he replied: "Yes. They're speculative to the extent of, will Dr. O' Brien practice medicine? Will Dr. O'Brien earn more or less than the average surgeon earns? Will Dr. O'Brien live to age sixty-five? Will Dr. O'Brien have a heart attack or will he be injured in an automobile accident? Will he be disabled? I mean, there is a degree of speculation…."

The equitable distribution provisions of the Domestic Relations Law were intended to provide flexibility so that equity could be done. But if the assumption as to career choice on which a distributive award payable over a number of years is based turns out not to be the fact (as, for example, should a general surgery trainee accidentally lose the use of his hand), it should be possible for the court to revise the distributive award to conform to the fact.

Questions.

1. Would it be more fair for Mrs. O'Brien to be reimbursed for the money she contributed to the family while Dr. O'Brien was in med school and interning (maybe $80,000 all told), rather than staking a claim in his earning potential as a surgeon? Explain your position.
2. In what sense is Dr. O'Brien's medical license *his*, the result of his hard work and effort, and not properly a form of property to be divided with his ex-wife post-divorce?

A focal point for recent conversations about fair property divisions upon dissolution of a marriage was the Connecticut state court decisions (trial, 1997, appellate, 2000) in *Wendt v. Wendt*. Lorna Wendt supported her affluent husband for 30 years and upon divorce was offered $8 million of his $100 million estimated net worth. Lorna believed that she was entitled to half of her husband's wealth for conscientiously executing her duties as mother and wife and contributing to his ability to become a high-earning chief executive officer (Crittenden, 2001, 131-33).

2. Lorna J. Wendt v. Gary C. Wendt (Superior Court of Connecticut, Judicial District of Stamford-Norwalk, 1997 Conn. Super. LEXIS 3104, 1997)

[The orders of the court from the original trial court case:]
Orders:
1. The defendant will transfer to the plaintiff all his right, title and interest in and to the marital residence
2. The defendant will transfer to the plaintiff all his right, title and interest in and to the real property located at [the vacation residence]. All rents and security deposits, if any, shall be assigned and paid to the plaintiff thereafter.
3. The defendant shall pay to the wife as periodic alimony the sum of $252,000 per year payable in equal monthly installments of $21,000.00 on the first day of each month.
5. The parties shall divide equally all of the currently available cash, stocks, bonds and mutual fund assets of the parties regardless of the registered title valued as of the date of this decision
9. The plaintiff shall be awarded all the right, title and interest in and to the membership and privileges of the Ocean Reef Club, Key Largo, Florida and the Stanwich Club, Greenwich,Connecticut.
10. The defendant shall be awarded all the right, title and interest in and to the membership and privileges of the Nantucket Golf Club.
11. Each party shall pay their own counsel fees, expert fees, witness fees and costs of litigation.
12. Any hold harmless order contained in these orders shall include the right by the other party to collect attorney fees incurred in defending the claim and/or in prosecuting any efforts to enforce said hold harmless agreement.
13. A separate new Foundation will be created with each half to be used for the same uses and purposes as the existing Wendt Family Foundation. Each new Foundation will be separate and apart from the other. Each party will tender their written resignation as trustee of the existing Wendt Family Foundation.
...
16. The General Electric Qualified Pension Plan, currently vested, will be divided by the parties equally. The plaintiff's fifty percent interest in the General Electric Qualified Pension Plan will be secured by a Qualified Domestic Relations Order.
17. The defendant is awarded all the right, title and interest in and to the General Electric Supplementary Pension Plan (nonqualified plan) including whatever "retirement allowance" payment that may be paid to the defendant by General Electric Corporation. Said Supplementary Pension Plan is payable to a GE executive who has worked for five years immediately prior to his retirement or 60th birthday, whichever first occurs.
18. The defendant holds 199,000 shares of restricted stock in General Electric Corporation that were granted to him at various dates. The restrictions will not start to lapse until June 1998...The 199,000 shares of restricted stock pay a "dividend equivalent" equal to the current dividend paid by GE on its common stock. The plaintiff is awarded one-half of the "dividend equivalent" and/or dividends on the entire 199,000 shares of GE restricted stock to be paid if and when received by the defendant.
19. The plaintiff is awarded one-half of 17/30th (i.e. 17/60th to plaintiff, 43/60th to defendant) of the $6,650,000 deferred portion of the defendant's General Electric Long Term Performance Award ("special bonus") to be paid out by GE, upon the defendant's retirement, over a twenty-year period.
20. The defendant shall be awarded all the right, title and interest in the General Electric Savings and Security Program (401K plan), free and clear of any claim by the plaintiff.

21. The defendant shall be awarded all the right, title and interest in the General Electric Deferred Incentive Compensation Plan, free and clear of any claim by the plaintiff.
22. The defendant shall be awarded all the right, title and interest in the General Electric Executive Deferred Salary Plan, free and clear of any claim by the plaintiff.

[The plaintiff, Lorna Wendt, received around $20 million out of his $100 million estimated net worth in this judgement. She then appealed her case to the Connecticut Appellate Court]

***Lorna J. Wendt v. Gary C. Wendt* (Appellate Court for Stamford, Connecticut, AC 18388, Lavery C.J., 2000)**

Opinion by Lavery, C.J. The plaintiff in this action for the dissolution of a marriage appeals from the judgment of the trial court. The plaintiff claims that the court improperly (1) utilized dates prior to the date of the dissolution of the marriage in making various calculations and divisions regarding contingent and deferred assets of the marriage, (2) divided the defendant's supplementary pension plan, (3) excluded from division the passive appreciation of various assets that occurred while the action was proceeding, (4) concluded that General Statutes § 46b-81 was interpreted consistently with article first, § 20, of the constitution of Connecticut,(5) considered sources outside the record in reaching its decision, (6) excluded evidence and testimony regarding the values of termination and severance packages and (7) demonstrated gender bias in favor of the defendant. We affirm the judgment of the trial court….

The following facts are relevant to the resolution of this appeal. As of the date of the articulated memorandum of decision, the defendant, Gary C. Wendt was the chairman, president and chief executive officer of GE Capital Services, Inc. (GECS), with principal offices in Stamford. GECS is the largest division of the General Electric Corporation (GE), which is believed to be one of the largest corporations in the world. The plaintiff, Lorna J. Wendt, has been throughout most of the parties'marriage a mother, homemaker and corporate wife who entertained GE customers and other business associates in various social and business settings. The plaintiff was neither employed nor paid by GE or GECS.

The plaintiff and the defendant were married in 1965. Thereafter, the plaintiff worked as a music teacher in Massachusetts while the defendant studied for his master's degree in business administration at Harvard University. The plaintiff stopped working as a music teacher after the first of the parties' two daughters was born in December, 1968.

After working in various positions, the defendant joined GECS in July, 1975, as the vice president of the real estate department. The defendant's employment with a major international corporation triggered an increased workload and extensive social duties. Entertainment grew more formal and on a larger scale, and the plaintiff commonly hosted events.

The defendant met with continuous success at GECS,successfully rescuing various financially troubled divisions within GECS, which gave him increased prominence within GE and culminated in his promotion to chief executive officer of GECS. The plaintiff's entertainment duties increased with the expansion of the defendant's corporate responsibilities. She traveled extensively with the defendant to numerous countries. During these years, she raised the children, cleaned house, paid bills, attended various functions and participated in their local church. Both parties acknowledged that the other party substantially contributed to instilling in their children high moral and family values.

As chief executive officer, the defendant proved to be highly effective and was well deserving of his high level of compensation. The defendant's career as chief executive officer is marked with success after success. The defendant also participated in the parties' family life and in raising their two children. He drove the children to camp and college, helped with homework, attended school functions, cared for them when they were sick, and helped them plan for college and graduate school. The defendant was active in civic affairs and received awards for his accomplishments.

Eventually, the marriage eroded and the parties were separated on December 1, 1995. The plaintiff filed a dissolution complaint on December 19, 1995. During an eighteen day trial, virtually every aspect of the parties' financial relationship over the thirty-two and one-half year marriage was examined. There were more than 100 exhibits, and numerous witnesses and multiple expert witnesses. Briefs of counsel, and citations to foreign cases and law review articles added an additional 1500 pages of material for the court to review. On December 3, 1997, the court entered orders regarding property distribution, alimony and related financial matters. A subsequent memorandum of decision more than 500 pages long containing comprehensive factual findings and legal analysis was issued on March 31, 1998. The plaintiff appealed on May 8, 1998. Additional facts will be discussed where necessary to the issues on appeal.

I

The plaintiff claims that the court improperly valued various contingent and deferred assets of the marriage. We disagree. ''Our standard of review is well settled. We review financial awards in dissolution actions under an abuse of discretion standard. . . . [T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did. . . . [T]he factual findings of a trial court on any issue are reversible only if they are clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . [W]here the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous.''…

The plaintiff claims that the court improperly valued and divided assets of the marriage as of the date of the parties' separation, December 1, 1995, instead of the date of dissolution, December 3, 1997, as it is required to do. We disagree…. The plaintiff's claim fails because the court did exactly what § 46b-81 and interpreting cases require: The court valued the marital property at the date of dissolution. As the court stated in its memorandum of decision: ''This court has attempted to value the assets as of the date of the decree, December 3, 1997….

The court properly valued the assets at the date of dissolution and allocated them after taking into consideration post-separation contributions. The court acted well within its extensive discretion regarding financial awards in dissolution actions, and we see no reason to disturb these findings….

IV

The plaintiff contends that the court improperly failed to find that division of marital property pursuant to § 46b-81 should be based on a presumption that each partner to the marriage is entitled to an equal share and that the absence of such a presumption violates the equal rights amendment (ERA) to our state constitution. See Conn. Cont., art. I, § 20. We disagree….

A

The plaintiff contends that the ERA engrafts a presumption onto § 46b-81 that the property be equally divided between the spouses. The plaintiff concedes in her principal brief that ''the statutes relating to dissolution provide no baseline or initial presumption from which the court is to operate,'' and she cannot and does not point to a single Connecticut appellate decision that states, advocates or implies that a fifty-fifty presumption is appropriate. Yet, in spite of this jurisprudential void of support, she in essence argues as follows: The statute does not contain any guidelines on how to apply its criteria. The application is left to judicial discretion. Consequently, the results have been unfair to the economically deprived spouse and, thus, a set rule must be created to right this wrong. We disagree.

We start with the plain meaning of the statute…. § 46b-81 (a) permits the farthest reaches from an equal division as is possible, allowing the court to ''assign to either the husband or wife *all* or any part of the estate of the other. . . .'' (Emphasis added.) The claimed equal division presumption is not part of the statutory criteria. On the basis of the plain language of § 46b-81, there is no presumption in Connecticut that marital property should be divided equally prior to applying the statutory criteria….

Allowing the plaintiff's argument to persuade us would be, in effect, to write a community property law by judicial fiat. See *Fischer* v. *Wirth*, 38 App. Div. 611, 612, 326 N.Y.S.2d 308 (1971) (''[w]hat appellant really seeks is a community property division under the guise of equitable relief''). In sum, in the absence of specific statutory language, there is no presumption of an equal property distribution in Connecticut. ''The legislative intent is to be found, not in what the legislature intended to say, but in the meaning of what it did say. . . . We must construe a statute without reference to whether we feel that it might be improved by adding to it or interpreting it differently. . . . It is our duty to apply the law, not to make it.''…

''An equitable award does not require that the marital estate be divided equally.'' ... The plaintiff has submitted no supported argument that persuades us to create a fifty-fifty presumption of property division in our state. The court properly found that no such presumption exists, and we agree with its conclusion….

B

...

''The equal protection clause does not require absolute equality or precisely equal advantages . . . . Rather, a state may make classifications when enacting or carrying out legislation, but in order to satisfy the equal protection clause the classifications made must be based on some reasonable ground. . . . To determine whether a particular classification violates the guarantees of equal protection, the court must consider the character of the classification; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. . . . Where the classification impinges upon a fundamental right or impacts upon an inherently suspect group, it will be subjected to strict scrutiny and will be set aside unless it is justified by a compelling state interest. . . . On the other hand, where the classification at issue neither impinges upon a fundamental right nor affects a suspect group it will withstand constitutional attack if the distinction is founded on a rational basis.'' (Internal quotation marks omitted.) *State* v. *Matos*, 240 Conn. 743, 760–61, 694 A.2d 775 (1997).

The plaintiff also has provided no evidence to support her argument that § 46b-81 disparately impacts women. The court found that ''[n]o evidence in this case was offered of de facto discrimination against women by reason of the failure to read a fifty-fifty presumption

into the equitable distribution scheme.'' We agree. Even assuming, arguendo, that the plaintiff could prove that a disparate impact exists, an equal protection challenge cannot be supported on that basis alone. Intentional or purposeful discrimination must be shown to make a successful equal protection challenge….

As the court in this case rightly stated: ''The plaintiff would have the decision in this case take its place along with the great events making changes in women's rights: the 1848 Seneca Falls [New York] Convention; the Married Women's Act of 1877 in Connecticut [Public Acts 1877, c. 114, now General Statutes § 46b-36]; the nineteenth amendment to the United States Constitution, ratified in Connecticut on September 14 and 20, 1920; and the ERA to the Connecticut constitution, adopted November 27, 1974. This historical progression, while compelling, does not warrant the results the plaintiff seeks. The plaintiff seeks, by judicial fiat, to declare unconstitutional, statutes in order to correct an economic disorder.'' We agree with the court and conclude that the plaintiff has not successfully proven a violation of the ERA….

VII

The plaintiff's final claim involves an accusation that the court improperly exhibited gender bias at trial in favor of the defendant and against the plaintiff. We disagree…. Of course, ''[g]ender bias, particularly bias based on stereotypes, has no place in the courtroom.'' (Internal quotation marks omitted.) *State* v. *Figueroa*, 235 Conn. 145, 185, 665 A.2d 63 (1995). The plaintiff points to various events that she believes constitute gender bias against her. First, the court denied her motions seeking to limit the defendant's freedom to transfer assets. Second, the court awarded her an allegedly insufficient portion of the defendant's long-term performance award. Third, the court refused to grant her exclusive possession of the marital home. Fourth, the court refused to recognize, in the plaintiff's words, that ''the marriage relationship is a partnership of equals similar to an economic partnership.''

Rather than raise these claims of alleged bias at the time of their occurrence, the plaintiff decided to wait nearly one year after the trial was completed to make these challenges….

It is an elementary rule of law that the ''fact that a trial court rules adversely to a litigant, even if some of these rulings were to be determined on appeal to have been erroneous, does not demonstrate personal bias.''… The plaintiff's own trial pleadings reveal that her counsel knew or should have known that there were no good grounds to support this challenge….

The plaintiff's efforts to smear the court with charges of gender bias have absolutely no foundation whatsoever. The plaintiff has failed to provide a single shred of evidence showing gender bias or even an inference or the appearance of gender bias by the court. We suggest that the plaintiff's counsel review rule 3.1 of the Rules Professional Conduct, which states that a lawyer shall not bring a frivolous claim, and rule 8.2 of the Rules of Professional Conduct, which states that ''[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . .'' ''The lawyer codes express a special obligation not to criticize judges through false accusations . . . .'' C. Wolfram, Modern Legal Ethics (1986) § 11.3.2, p. 601. Raising the specter of judicial bias should not be used, as it is here, as a last resort argument to resurrect a losing appeal or to manufacture cause for remand.

In sum, a charge of gender bias against a trial judge in the execution of his or her duties is a most grave accusation. It strikes at the heart of the judiciary as a neutral and fair arbiter of disputes for our citizenry. Such an attack travels far beyond merely advocating that a trial judge ruled incorrectly as a matter of law or as to a finding of fact, as is the procedure in appellate

practice. A judge's personal integrity and ability to serve are thrown into question, placing a stain on the court that cannot easily be erased.

''Attorneys should be free to challenge, in appropriate legal proceedings, a court's perceived partiality without the court misconstruing such a challenge as an assault on the integrity of the court. Such challenges should, however, be made only when substantiated by the trial record.'' *United States* v. *Brown*, supra, 72 F.3d 29. In this case, the plaintiff's challenge is completely unsubstantiated by the trial record. The judgment is affirmed.
(Full text of this opinion found at http://www.jud.ct.gov/external/supapp/Cases/AROap/ap487.pdf)

Questions.

1. Despite the hype about Mrs. Wendt claiming that a 50-50 division of property was fair, how in fact did the Connecticut courts deal with her claim to half of her ex-husband's wealth? Do you think that the resolution here was in fact fair? Why or why not?
2. What is the principle guiding the appellate court in responding to Mrs. Wendt's claim that $20 million was not a fair settlement, given her 30+ years of devoted contribution to the family and her husband's position?
3. From what you can tell from this opinion, do courts continue to exercise a fair amount of discretion over divorce awards? Is that a good or a bad thing?

Responding to the trial and appellate court decisions in *Wendt v. Wendt*, Professor Joan Williams, head of the Hastings College of the Law Center for Work Life Law, makes an intellectually sound argument for a 50-50 division upon termination of a marriage in her 2000 law review essay "Winning for Wives After Wendt: Do Wives own Half?"

3. Joan Williams, "Do Wives Own Half? Winning for Wives after Wendt," Connecticut Law Review 32: 249-280 (2000)

One common understanding is that married couples own property jointly—what we call the joint property theory. Yet this co-exists with the sense of many homemakers that since they "don't work" they "have nothing of their own"—what we call the "he who earns it, owns it" rule. The resulting confusion affects the economy of gratitude in on-going marriages. The most profound implications of our confusion occur upon divorce; consider property division. Typically, courts treat property as jointly owned when dealing with modest estates, where splitting the property 50/50 often forces the sale of the family home in order to allow the husband to "get his equity out." Yet, where the estate is large, courts in Connecticut and elsewhere traditionally use the "he who earns it, owns it" rule, reflecting a sense that wives do not "need" half of, say, a billion dollars. Thus, in Wendt v. Wendt, the husband (CEO of a major subdivision of General Electric) offered his wife $ 8.3 million of an estate whose worth he estimated at $ 30 to $ 40 million, on the grounds that this amount would meet her reasonable needs. His offer reflected established practice in Connecticut, where (according to Professor Mary Moers Wenig) "the more [property] there is, the smaller [the] percentage the non-propertied spouse receives." In this country we do not ordinarily condition ownership on whether owners "need" their property. Why treat wives differently?

This sense is even more explicit in the context of alimony.... Alimony is conceptualized as a sort of privatized welfare system at the expense of the husband. Traditional approaches

justify wives' claims on one of three theories: market replacement value, opportunity costs, or human capital theory. The market replacement approach uses the market's depressed valuation of domestic work as the measure of the wife's contributions: what is the value of twenty-seven years of love and devotion when child care workers are among the lowest paid workers in the economy? The opportunity costs approach works well for one narrow category of woman: the wife who trained for, and then gave up, a lucrative professional career. But it leaves out in the cold the 80% of women who do low-paid traditional "women's work," which includes virtually all working-class women as well as middle-class women who trained for traditionally female careers instead of higher-paid traditionally male ones. The problems with the human capital approach are subtler. It was very difficult, under the 'human capital' theory, to come up with a dollar amount for the evaluation of the nonmonetary contributions… it was easier to come up with a percentage figure applying "equal efforts and equal sacrifice. The Wendt court also objected to the human capital approach for another reason... "[it has] the effect of objectifying both husband and wife and their relationship."… This essay shows how domesticity's peculiar organization of market work and family work first marginalizes mothers from market work, then limits their access to entitlements based on family work. The result is a system that is inconsistent with our commitment to gender equality, and leads to the widespread impoverishment of mothers and the children who depend on them.

A. The Economy of Mothers and Others: How Domesticity Limits Women's Access to Market Work

Wage gap data, which compares full-time women workers with full-time male ones, gives an unduly optimistic picture. If we look not at women in general, but at mothers of childbearing age, we find that two-thirds do not work full-time…and roughly one-fourth still are housewives. Moreover, in an economy where prestigious, fulfilling, and high-paid jobs often require overtime, 93% of mothers of childbearing age do not work substantial overtime. The implications of this statistic are rarely noted: mandatory overtime environments exclude these mothers virtually completely. The pervasive marginalization of mothers stems from a clash between two social norms. The first is the norm of parental care, the widespread sense that children should be raised by parents, not by strangers. The second is the ideal worker norm, which enshrines as ideal the worker who takes no time off for childbearing or child rearing and is available for work full-time and overtime. It is nearly impossible to fulfill both roles and this clash leads to significant differences in the wage gap. Women who can perform as ideal workers are on their way to reaching equality with men: single women without children earn about 95% of men's wages. Most mothers do not. In deference to the norm of parental care, most mothers of childbearing age remain off the "fast track" and on the "mommy track," either at home or in jobs where they work only part-time or part year or do traditional "women's work." Consequently, mothers as a group earn only 60% of the wages of fathers. In fact, while the wage gap between men and women has been falling, the "family gap" between mothers and others has been rising. In an economy where men's bodies and life patterns still define our work ideals, mothers remain marginalized as a group.

B. Men Own and Women Need: How Domesticity Limits Women's Access to Entitlements Based on Family Work

The most basic way domesticity disadvantages wives is through the "he who earns it, owns it" rule, as when a husband assumes that he is the sole owner of the family wage, and that

his wife's claims are based on welfare, charity, or gift. It's obvious, you might say, that a worker owns "his" wage…with respect to his employer, [but] it does not necessarily follow that he owns it with respect to his family. … one consequence of coverture was that wives' household labor was seen as husbands' property…. This conclusion was expressed in marital services cases striking down contracts in which husbands granted wives entitlements based on their household work on the theory that services already owned by the husband could not provide consideration to support a contract between husband and wife….

With the advent of domesticity, two different rationales emerged to justify men's ownership. The first recharacterized women's sewing, cooking, and childrearing as not "work." …The second argument that emerged to justify husbands' continued ownership of wives' household work was the view that awarding women entitlements threatened the integrity of family life, by introducing market motivations into the "Home Sweet Home." A staple of domesticity was the notion that women, and their domestic sphere, should not to be sullied by "that bank note world." The anxiety about commodification in the domestic sphere was a way of policing the boundary between home and work. … Both the erasure of household work and the theme of commodification anxiety present important challenges to lawyers representing wives in divorce cases. The erasure of household work creates the sense of mothers at home that the reason that they "own nothing" is that they "don't work." Said one:

> I get so sick of people asking me, "Do you work?" Of course I work! I've got five children under ten--I work twenty-four hours a day! But of course that's not what it means when people say, "Do you work?" They mean do you work for pay, outside your home. Sometimes I hear myself say, "No, I don't work," and I think: "That's a complete lie! I work harder than anyone I know!"

The issue [in divorce cases] is not whether the family wage will be owned, but who will own it. In addition, the issue is not whether negotiations will take place, but whether those negotiations will be so one-sided that they will involve overreaching by one of the parties. The effect of decisions that use commodification anxiety (or erasure of woman's worth) to justify awarding family assets to husbands is not to avoid strategic behavior but to strengthen the hand of the husband in on-going marital (and divorce) negotiations….

C. Selflessness for Mothers, Self-interest for Others: How Domesticity's Mandate of Selfless Motherhood Disadvantages Mothers in Custody Cases

Domesticity not only serves to make women economically vulnerable upon divorce; it also affects their claims to custody. "To force women into the marketplace and then to penalize them for working would be cruel," noted one court. The best known case is that of Marcia Clark, the prosecutor in the O.J. Simpson case, whose husband sued for custody of their two children after the trial on the grounds that she spent all her time at work. "Like all moms, Marcia Clark can't have it all," concluded an article in the Detroit News, glossing over the fact that fathers have always had both jobs and children. (Clark ultimately retained custody.) … [Such cases] "enforce domesticity's norm of selfless motherhood, the sense that "mothers should have all the time in the world to give." The ideal of selfless motherhood is in sharp contrast to the (equally widespread) view that adults are entitled to full self-development. …Mothers' "selflessness" is one way of coding the fact that we provide for children's care by marginalizing their caregivers…. Once custody as well as economic entitlements flow from family work, mothers won't have to be so selfless for a simple reason: they will have more rights.

D. Deconstructing Domesticity in Family Entitlements: The Joint Property Theory as a New Rationale for Income Sharing and Wives' Property Claims

The joint property theory begins from the principle that ideal workers who are parents are supported by a flow of family work from the primary caregiver of their children. If the ideal worker's performance depends on a flow of family work from his wife, then "his" wage is the product of two adults: his market work, and her family work. If an asset is produced by two family members, it makes no sense to award ownership to only one of them. We should abandon the "he who earns it, owns it" rule as an outdated expression of coverture, and give the wife half the accumulated family wealth based on her family work, without which that wealth would not have been created.

The joint property theory has implications both for property division and for alimony. Therefore, the key issue is income sharing: who owns the family wage after divorce…. Certainly, in this context, a 50/50 split should be the floor, not the ceiling. In assessing how to split the family assets of a middle class family, the court should take into consideration how such families use their assets: to buy housing that offers a secure home environment and access to good schools, and to send children to college. Children should not lose these entitlements simply because their parents divorce and fathers prefer to found a new family rather than support the old one. In dividing family property, courts should begin from the principle that parents have the duty to share their wealth with their children. They should award more than 50% of family assets if that is necessary to ensure that the life chances of the family's children, to the extent possible, are unaffected by divorce….

The joint property theory offers a new rationale for income sharing that begins from the observation that--after as well as before the divorce--the father can perform as an ideal worker only because the mother's family work allows him to do so. In an economy where ideal workers need to be supported by a flow of family work, a divorced father can continue to perform as an ideal worker only because his ex-wife continues to support his ability to be one by continuing as the primary caregiver of his children. The joint property theory mandates not a 50/50 split but an equalization of the standard of living in the post-divorce two households….

I … propose… that joint property in wages should equalize the standard of living of the two post-divorce households for the period of the children's dependence, followed by a period of years designed to allow the wife to regain her ability to recover her earning potential (if she is young enough) or save for her future (if she is not). This additional period should be set at one additional year of income sharing for each two years of the marriage. I want to note in passing that this formula is designed to give the father an incentive to support his former wife's return to nonmarginalized market work: the more she earns, the less income he needs to provide her. The formula also gives the mother herself the incentive to develop a career. Because income sharing does not last for life, mothers who are young enough to do so will have to prepare themselves for a time when income sharing has ended.

E. Deconstructing Domesticity in Market Work: Mothers' Choice or Discrimination Against Women?

The most basic shift required to deconstruct domesticity is to change the way we structure market work. Proposals to do so typically founder on the assumption that mothers' marginalization is an expression of their own personal priorities. Indeed, mothers themselves often talk about their decisions to marginalize as their "choice." But the rhetoric of choice deflects attention from the constraints within which women's choices are made. Mothers may

choose to drop out if they are faced with the "choice" of economic marginalization or an environment that means they feel uninvolved with their children's lives, but they did not choose the system that gives them only those two unacceptable alternatives. At the core of this way of structuring market work is the ideal worker norm, which defines the ideal worker as someone who takes no time off for childbearing or childrearing. This norm means that market work is designed around the bodies and traditional life patterns of men, a practice that favors workers with a flow of family work most men have but most women lack. In short, this way of designing work discriminates against women.

…if 93% of mothers of childbearing age do not work substantial amounts of overtime, it seems highly likely that workplaces exist where plaintiffs could prove that a promotion track that requires large amounts of overtime has a disparate impact on women. … it seems likely that plaintiffs will often be able to propose a less discriminatory alternative (LDA) to the kind of mandatory overtime environments that drive out virtually all mothers--and therefore virtually all women. The point is not that every women is a mother or should be, but that women will not achieve equality until mothers do, given that nearly 90% of women become mothers during their working lives.

F. Towards a New Family Morality

…As Professor Naomi Cahn has astutely pointed out, the question is not whether we will have moral discourse about the family, but whether traditional versions of morality, or new ones, will prevail.… [Let's look at what happens when children come into the mix.] Though some commentators cite the impoverishment of children as a reason to limit access to divorce, it is not divorce itself that impoverishes the children of divorced families; it is the allocation of post-divorce entitlements. Divorce impoverishes children not because of the lack of a male parent but the lack of a male income.… By cutting children off from the wealth of their fathers, U.S. divorce courts are a key engine of our society's massive disinvestment in children. The practice of limiting children's claims to fathers' wealth in the name of protecting fathers' sexual freedom violates our ethical obligations to children. Mothers have always recognized that having children limits future freedom; fathers need to learn this basic truth. A new family morality would change the rules allocating economic entitlements upon divorce, replacing the "he who earns it" rule with a joint property regime, not only on the grounds that it is unethical to award unilateral ownership of a wage that is the joint product of the ideal worker's labor and that of his children's primary caretaker, but also on the grounds that parents should be expected to share their wealth with their children. The claims of existing children should not be limited on the grounds that a parent might prefer to bestow his wealth on new children as yet unborn.

This system, where men own and women need, means that the fate of mothers and children rest on judges' willingness to redistribute what they see wealth that "naturally" belongs to men. Domesticity places many women--and the children who rely upon them--in this position: 80% of poor Americans are women and their children.…The most dramatic example is when a mother feels unable to leave a partner who batters her and/or her children because she cannot support either herself or them.…We need either to deconstruct domesticity or democratize it. Both alternatives would be better than what we have today: a refusal to provide public funds for childrearing combined with a system that first marginalizes mothers from market work, and then cuts them off from entitlements based on work performed within the family. Ending this system, and the childhood poverty and vulnerability that result, should be a strong imperative of the new family morality.

Questions.

1. Why is the “he who earns it owns it rule” so dominant in American divorce litigation? What consequences flow from this assumption about property?
2. What is the social ecology of “domesticity” that Williams describes here? What consequences flow from this organization of social life? Should it be changed, and if so, what can be done to change it?
3. Why do men feel less responsible for their children than women? Would reforming divorce settlements to avoid mass-scale disinvestment in our children help reduce the child poverty rate in the US?

Williams suggests some approaches to rectifying post-divorce outcomes via a joint property theory, income equalization, and eliminating mandatory overtime hours as part of the structure of ideal worker jobs. More institutional and legal proposals for reform will be surveyed in chapter eight, after we look at personal, non-policy, responses to gendered divisions of labor and their impact on women’s earning power in chapter seven.