

Curl

Property law | women and law | contemporary legal issues

WEDNESDAY, 4 JANUARY 2012

The Invisibility of Marriage



By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs every thing ([Sir William Blackstone](#), *Commentaries on the Laws of England*. Vol. 1 (1765), 442

In the contemporary debate in both [Australia](#) and internationally over same-sex marriage, I have been torn between my antipathy towards the institution of marriage and my desire to see a more [inclusive society](#). In this post I consider this tension in an attempt to articulate a consistent basis from which to understand 'marriage' in a way that respects all as individuals in their own right and likewise affords respect at law to the domestic partnerships they enter into.

Blackstone's position on marriage, cited above, forms the foundation for my objection to the role of marriage: it was designed to render women invisible at law and in society while elevating the relationship, in the form of their husband as their sole identity and status. As the connection between law and society is a close one, married women's legal position continues to have social ramifications.

Many married women may feel satisfaction or security in having their legal or social status determined according to their legally validated domestic relationship. Some may seek the retention of our existing understanding of marriage *at law* because it is [ordained by their god](#), or that marriage validates and represents their love for their spouse. I do not take issue with these views, and acknowledge their validity for the individuals or communities involved - but these views not provide any basis for the retention *at law* of the presently conceived institution of marriage.

In contrast to these experiences of marriage, I have experienced and observed women's marital status determine their in/eligibility to open a bank account, to [secure finance](#) and affect their employment opportunities including promotion and salary increase. I myself prefer not to be known as somebody's wife: I prefer to be known as me. I do not see that my marital status is relevant to the supply of services or my employment conditions and I do not see why the law would be interested in determining my social or legal status according to my being married. I do accept that laws relating more widely to domestic relationships and concerning children, violence, property and welfare are essential.

It might be suggested that my stance is rather too harsh on the basis that Blackstone's work no longer can be considered current. In response, I observe that the law continues to make assumptions about the nature of a marriage that represent a contemporary version of Blackstone's work. In [Cummins v Cummins](#) [2006] HCA 6 for example, the court said at [71]:

The present case concerns the *traditional matrimonial relationship*. Here,

ABOUT ME



[Kate Galloway](#)

I lecture in land law at James Cook University and I write and think about the nature of property and its representations in the law; about issues affecting women; about justice generally; and about legal education.

[View my complete profile](#)

SUBSCRIBE TO CURL

-  Posts ▼
-  Comments ▼

FOLLOW ME ON TWITTER

[Tweet](#)

LABELS

[women marriage](#) [property legal profession private/public same-sex marriage feminism human body land legal education public/private](#)

MY BLOG LIST

[A Barrister's Blog \(by Paul Cutler\)](#)
[Amicae Curiae](#)

the following view expressed in the present edition of Professor Scott's work respecting beneficial ownership of the matrimonial home should be accepted:

"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."

To that may be added the statement in the same work:

"Where a husband and wife purchase a matrimonial home, each contributing to the purchase price and title is taken in the name of one of them, it *may be inferred* that it was intended that each of the spouses should have a one-half interest in the property, regardless of the amounts contributed by them." (emphasis added)

In this case, the court made a number of assumptions and inferences based on its own understanding of the nature of a marriage relationship. Scholarly work (itself based on assumptions about the marriage relationship) was cited to support the legal validity of the assumptions. The Court in this case may well have reached a correct conclusion but what strikes me about this is the power of historical presumptions about the nature of the marriage relationship and that these presumptions, as recently as 2006, go unquestioned by the law.

Through all this, the foundation of the legal construct of marriage remains - the joining of man and woman for life to the exclusion of all others. The institutionalised hetero-normative subsuming of women's individual identity embodied in marriage echoes today in those who suggest that this one model represents the sole valid means of recognising relationships at law. In the past, this has led me to the conclusion that the institution itself needs to be removed from the law altogether as it has become redundant and its retention could only hope to sustain women's invisibility whether at law or socially.

In the contemporary push towards same-sex marriage, I have felt ambivalent. While not wanting to discriminate against same-sex relationships, nor have I wanted to legitimise the institution of marriage.

Sue-Ann Post has recently written strongly about her objections towards same-sex marriage. She presents a cogent argument that gay marriage is 'not a progressive social issue [but rather] it's a thinly-veiled policy of assimilation.' In this vein, Karen Andrews, a Canadian lesbian activist, says:

It's as if the feminist critique of marriage doesn't exist. And you know feminism is near and dear to the hearts of lesbians. It's as if it's all been forgotten -- and it's a very legitimate critique that [marriage] is an institution that is beyond rehabilitation.

My feminist views about the institution of marriage align with queer critiques of marriage - though not it seems with the mainstream debate in Australia at the moment, which frames same-sex marriage within a human rights discourse. In this discourse, a legal marriage represents social (and residual if not central legal) status for a heterosexual couple and therefore the parties to that marriage, but a same-sex relationship has no such status. Same-sex couples thus suffer discrimination under the law on the basis of their sexuality. While public attitudes towards same-sex marriage are changing it seems, there remains a vocal, public, hurtful opposition to same-sex marriage.

Like Sue-Ann Post, I see marriage as a tool of social control. However having felt invisible because of my marital status, I have sympathy for those who feel invisible because of their exclusion from the institution of marriage. I wonder therefore if in recalibrating the definition of marriage we could likewise re-constitute the identities of those presently rendered invisible by it: whether by inclusion (women) or by exclusion (same-sex couples).

...legalisation of same-sex marriage would radically denaturalise the social and political construction of male/female difference. (Feargha Ní Bhroin citing Nan Hunter)

On this argument, the institution of marriage could perhaps be reclaimed. We could rewrite the definition of marriage that has (so it is said) been in place since the 'dawn of humanity' and in doing so, reject the identity construction implicit in it. This would not address objections to the normativity of exclusive relationships, but it might go some way to supporting the visibility of those otherwise masked by the discriminatory cloak of

[Castan Centre for Human Rights Law's Blog](#)

[CDU Law and Business Online](#)

[cearta.ie](#)

[Charon QC](#)

[Law Geek Down Under](#)

[Marshall Chambers - Blog](#)

[PleagleTrainer Blog](#)

[Private Law Tutor](#)

[PropertyProf Blog](#)

[RAW/ROAR](#)

[simonmckay](#)

[Skepticlawyer](#)

[Survive Law](#)

[The Australian Professional Liability Blog](#)

[The Ed Techie](#)

[THE TRIAL WARRIOR BLOG](#)

[The Volokh Conspiracy](#)

[The Watermelon Blog](#)

BLOG ARCHIVE

▼ 2012 (22)

► [September](#) (1)

► [August](#) (4)

► [June](#) (3)

► [May](#) (3)

► [April](#) (4)

► [March](#) (1)

► [February](#) (3)

▼ [January](#) (3)

[Sex & Immorality: The Court's Take](#)

[Professionalism and Sustainability in Lawyering](#)

[The Invisibility of Marriage](#)

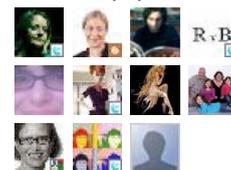
► 2011 (5)

FOLLOWERS

Join this site with Google Friend Connect



Members (11)



Already a member? [Sign in](#)

the dated institution of marriage.

Image © Copyright [william](#) and licensed for reuse under this [Creative Commons Licence](#)

Posted by [Kate Galloway](#) at [15:44](#)

Recommend this on Google

Labels: [identity](#), [invisibility](#), [law](#), [marriage](#), [same-sex marriage](#), [women](#)
