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# Who Gets the House? Renegotiating Property Rights in Post-Socialist Urban China

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## Abstract

Privatization of urban housing in China has altered the basic parameters of household dissolution from those that prevailed before 1980. For several reasons, divorce was rare during the Mao years, but one critical barrier was employer control over urban housing. Thirty years later, employers no longer supply new flats and the majority of urban couples are homeowners. Simultaneous with the privatization of urban real estate has been a divorce revolution. In 1978 there was one divorce for every twenty marriages and courts handled half of the cases. By 2008 there was one divorce for every five marriages and courts finalized less than 30 percent of cases. Through a comparison of the changes in black letter law and arguments made by ordinary citizens in 24 focus groups, the article illustrates how ordinary citizens are negotiating with black letter law to institutionalize post-socialist property rights.

## Keywords

divorce, housing reform, property disputes, privatization

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The conditions under which urban couples establish households in contemporary China differ radically from those at the end of the Mao era. In the late 1970s, when homeownership was rare, employers allocated housing as a welfare benefit and families established claims to their home as supplicants to bureaucratic redistributors (Davis, 1993).<sup>1</sup> Thirty years later, most urban couples were homeowners; in 2005 only eight percent of urban households rented public housing and another twelve percent lived in private rentals (Chinese Census, 2005: table 11-7a). Thus, rather than queuing for a rental flat on the basis of seniority, couples strategized how best to accumulate a down payment to purchase a condominium. Between 1998, when the central government announced the end of welfare housing (*fulifang*), and the 2005 census, China became the largest homeowner society in the world. As a result, decisions about “who gets the house” after divorce are no longer marginal events in unhappy families, but rather an increasingly common setting where urban citizens and state agents actively renegotiate property rights in post-socialist China.

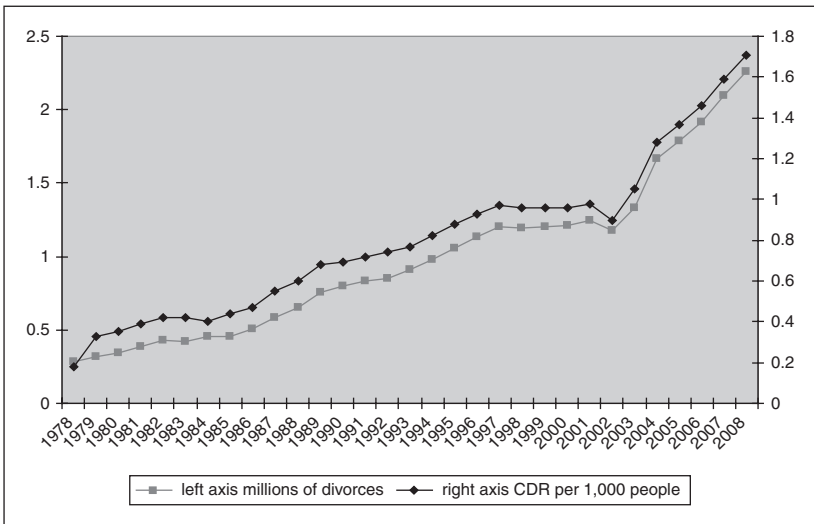
Previous analysis of property rights in the newly commercialized or privatized workplace (Oi and Walder, 1999; Putterman, 1995; Upham, 2009) stress how willingness to tolerate fuzzy property rights has been integral to rapid economic growth and may in fact have been the optimum route for the Chinese economy to “grow out of the plan” (Naughton, 1995). In my own earlier work on inheritance disputes, I also found that the law and the general public not only tolerated fuzzy logics but also handled disputes by toggling between market and nonmarket assumptions (Davis, 2004; Davis and Lu, 2003). However, when couples divorce, the property under dispute is the primary dwelling of the two parties and the law clearly specifies a 50:50 partition. In addition, since 2004, home prices have risen faster than wages. Not only has a home become a couple’s most valuable asset, but replacement is beyond the budgets of most. Therefore, because most divorcing couples own a home and it is their only residence, disputes over ownership of the conjugal home are as relevant for understanding the emerging mores of the post-socialist property regime as those over decollectivization of a factory or village land.

From the mid-1950s through the late 1970s, urban couples rarely divorced.<sup>2</sup> One barrier to divorce was a conservative judiciary that privileged social stability; another was employers’ control over urban housing stock. Not surprisingly, under the extreme housing shortages of the 1970s and early 1980s, employers preferred to keep households intact. Furthermore, because courts required that petitioners for divorce first get permission from the employers of

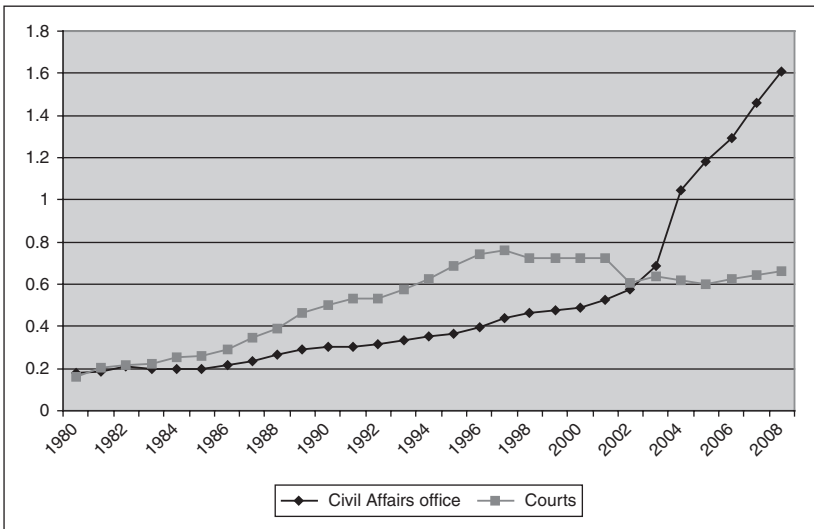
both parties to file for divorce, employers' preferences routinely trumped those of even the unhappiest couples.

Had there been no change in the legal framework for marriage and divorce after 1978, disputes over homeownership could be interpreted primarily in terms of the response to the privatization of real estate and the surge in homeownership. However, between 1980 and 2003, the statutes and administrative regulations regarding divorce and property claims within marriage changed substantially. The new Marriage Law of 1980 made divorce easier and the revision in 2001 elaborated definitions of personal property within marriage as well as introducing provisions for financial compensation (see the section below for a more detailed discussion of the revisions in the law). Equally decisive was a 2003 State Council regulation eliminating the power of employers (or village heads) to block divorce petitions. Henceforth, once a couple had mutually agreed to the terms of their divorce (including child custody and division of conjugal property), they could dissolve their marriage by simply registering their agreement or *xieyi* at a local office of the Civil Affairs Bureau (Minzhengju) (Palmer, 2007: 676).<sup>3</sup> Not surprisingly, given these legal and administrative changes, divorce rates rose and an increasing percentage of couples bypassed the courts and dissolved their marriages at a local office of the Civil Affairs Bureau. In 2008, the crude divorce rate (CDR) was double that of 1998 and more than 70 percent of divorces were settled outside the courts.<sup>4</sup> (See Figures 1 and 2.) In addition, the increased reliance on *xieyi* means that to understand "who gets the house," researchers must go beyond scrutiny of black letter law or administrative regulations and probe the unofficial logics that guide individuals as they consider a court petition or as they draft a *xieyi*.<sup>5</sup>

To capture those unofficial logics, this study of divorce disputes relies on transcripts from 24 focus groups I organized in Shanghai and Beijing between 2004 and 2008. Focus groups are not routinely used to study legal disputes, but I have found that they give insights into the dynamics of moral arguments that cannot be captured in either court documents or standardized survey instruments. In particular, because participants in a focus group elaborate their reasoning in response to the questions of other participants, the transcript allows researchers to "hear" the development of a moral argument. In this way, focus group transcripts contribute to the earlier scholarship that has demonstrated the critical role of multiple, sometimes contradictory, logics that drive the evolution of Chinese legal practice and modes of expression (Huang, 2005, 2006a, 2006b, 2007; Ng, 2009; Tran, 2008).



**Figure 1.** Number of divorces (in millions) and crude divorce rate (CDR) for China, 1978–2008  
 Sources. Zhongguo linian lihun (1978–2007), Zhongguo linian shehui zuzhi (2004–2008).



**Figure 2.** Where divorces granted across the nation, 1980–2008 (in millions)  
 Sources. Zhongguo linian lihun (1978–2007), Zhongguo linian shehui zuzhi (2004–2008).

## Privatization, Commercialization, and Capitalization of Property Rights

When defining and evaluating distinctions among property regimes, scholars routinely draw on the conceptual language of bundled property rights first elaborated in the nineteenth century and more recently popularized by social choice economists (Alchian and Demsetz, 1973; Demsetz, 1967). In the study of post-socialist property regimes, disaggregating ownership into three distinct bundles of rights—the right of use, the right to derive income, and the right to transfer or alienate—facilitates comparisons across time and across different types of assets (Hann, 1998, 2002; Putterman, 1995; Oi and Walder, 1999; Verdery, 1999). Disaggregation also provides a heuristic by which to understand how individuals, including judges and officers of the court as well as ordinary citizens, may draw on more than one logic of ownership when confronted with a dispute over a home. Thus, for example, in earlier work on Chinese inheritance disputes (Davis and Lu, 2003; Davis, 2004), I found that when confronted with disparate needs or different levels of filiality, men and women arrived at what they considered to be a just division by distinguishing the right to dwell in the home from the right to the profits from its sale. Also of particular note was the way people grounded their arguments by first considering the character of the property relations at the time the family first occupied the dwelling.

If a home had always been a privately owned family property, a *sifang*, people stressed what I have called “a logic of the family estate” (Davis, 2004: 298–99) that articulated property claims within a web of family relationships and emphasized the right of parents to divide a family estate with regard to the particular needs of surviving descendants and expressions of filiality. Use-rights directly shaped right of transfer, and in some cases the former trumped the latter. By contrast, if the home had first been a *gongfang* (a residence rented from an employer or the city real-estate bureau) people stressed “a logic of the regulatory state” (299–301). Here they approached the disputes in terms of relationships to employers and the city government, and stressed the state logic of household registration and co-residency even after the property had been fully privatized. Again, the conditions under which family members had first occupied the home were decisive. When the home in dispute was a new *shangpinfang* (commercial flat bought on the market by an individual mortgage holder), a “logic of the law and market” (301–2) emerged. But even as they considered such market innovations as down payments or mortgages, people weighed use-rights and the rights of alienation within the broader context of past socialist practices as well as the Confucian norms of intergenerational reciprocity.

In contrast to these grounded and sometimes competing logics of ordinary citizens, legal judgment on inheritance disputes could be rather blunt. Once the full bundle of rights to domestic property had been privatized, courts adjudicated among competing claims in terms of contractual and market relations that privileged the individual owner. In disputes over parental homes, the formal law ignored conditions of original tenancy or relationships among the several claimants and favored the individual who had made the purchase and held legal title (Davis, 2004). In contrast, when one listened to unofficial discussions of disputed claims, ordinary men and women articulated multidimensional reasoning that stressed the necessity of guaranteeing shelter and thereby made use-rights as central as legal ownership. Because families rarely take inheritance disputes to court,<sup>6</sup> I believe that unofficial logics routinely played a key role in the institutionalization of inheritance claims in a post-socialist property regime.

Property disputes during divorce shift attention from the family of origin to the family and household that individuals create through marriage. In contrast to parental and sibling ties, the relationship between spouses is voluntary and may be of short duration. In marriage disputes, obligations of filial piety are not dominant, and questions of infidelity, innocence, and return on investment become decisive. However, as in inheritance disputes, during divorce negotiations couples and court officials distinguish different types of property claims and also invoke the specific history of the property to justify compensation or ownership. Thus juxtaposing the letter of the Marriage Law to the arguments articulated in focus groups identifies the multiple logics invoked during disputes over conjugal property. Moreover, because of increased reliance on *xieyi* for finalizing divorce settlements, the role of unofficial logics may become particularly decisive.

Contested divorces or disputes over custody still require court action and as the trend data in Figure 2 illustrate, the total number of court-adjudicated divorce cases has remained relatively stable since 2002. However, because the total number of divorces doubled from 1.17 million in 2002 to 2.26 million in 2008, the percentage of divorces settled by *xieyi* outside the courts surged. In 1998, 63 percent of divorces were settled by judges in civil courts and 37 percent were granted by functionaries of the Civil Affairs Bureau. Ten years later, 71 percent of divorcing couples dissolved their marriages outside the courts. (See Figure 2.) As court officers and employers retreated from direct oversight of marital dissolution, popular norms rather than the legal reasoning of a judge have guided reallocation of ownership rights to a previously jointly occupied home. In this way, juxtaposing the letter of the law with the unofficial logics of ordinary people highlights how everyday practices

interact with black letter law in the gradual institutionalization of China's post-socialist property regime. To illustrate the complexity and dynamism of these interactions, I first summarize the key elements in the changing legal environment as they relate to conjugal property and then turn to analysis of the focus groups I created between 2004 and 2008. I begin with a comparison between the provisions of the Marriage Law as drafted in 1980 and revised in 2001.

## **Divorce and Property: The Shifting Legal Parameters**

### *1980 Marriage Law*

In 1980, the National People's Congress (NPC) passed a marriage law that some have called China's first "no fault divorce law" (Ogletree and Alwis, 2004). In fact, during the Jiangxi Soviet (1931–1934), the Chinese Communist Party (CCP) had allowed no-fault divorce, and even the Marriage Law of 1950 placed such minimal formal restrictions on divorce that during the first years after its passage, divorce rates soared.<sup>7</sup> However, for most of the Mao years couples were required to first seek mediation with the goal of reconciliation for the well-being of the children and the stability of the larger community. Employers, parents, and neighbors were routinely involved and in most jurisdictions divorces were granted only in cases of egregious abuse (Buxbaum, 1978; Huang, 2005; Meijer, 1978; Palmer, 1995).

By the late 1970s, however, post-Mao leaders were ready to revisit issues of marriage and divorce within the context of a larger effort to improve the rule of law and refocus government attention on economic development. Colleagues in Shanghai have also suggested that party leaders prioritized the need to liberalize divorce as a result of pressures on their own marriages and that of their children. Regardless of the exact reasons, it is notable that the new Marriage Law was promulgated in advance of the new Constitution (1982), the Civil Procedure Law (1982), or the first inheritance law (1985). In terms of property rights, the new law replaced the concept of family property (*jiating caichan*; 1950, Articles 10 and 23) with a new formulation of conjugal property (*fuqi de gongtong caichan*; 1980, Articles 13 and 31) and also allowed couples to abjure joint ownership through a mutual agreement (*yueding*; Article 13). In terms of divorce, there were two key changes. First, in cases of *ex parte* divorce (where only one party wishes to divorce), the 1980 law established "breakdown of mutual affection" (*ru ganqing queyi polie*) as sufficient grounds for divorce if court mediation failed (Article 25).



Second, in cases where a couple cannot agree on division of property, the court shall make a judgment considering the actual circumstances and the interest of wife and child (Article 31). The previous 1950 statute had imposed an additional requirement that in dividing conjugal property, the court consider the principle of benefiting the development of production (*youli fazhan shengchan de yuanze*; 1950, Article 23). Although the number of changes in terms of the wording between the 1950 and 1980 statutes was modest,<sup>8</sup> eliminating consideration for production, replacing family property with conjugal property, and most important, explicitly including “breakdown of mutual affection” (*ru ganqing queyi polie*) as a sufficient grounds for divorce reflected significant revisions. Henceforth, the law could not privilege either necessity or community stability to routinely override the personal suffering of unhappy couples.

### April 2001 Revision of the Marriage Law

Given the reduced barriers to divorce introduced by the 1980 Marriage Law, it was expected that divorce rates would rise from the extremely low rates of 1978–1980. However, when the divorce rate failed to stabilize after the initial surge upward, legal professionals, party officials, and scholars began to debate whether the new Marriage Law had made divorce too easy and whether there was a level at which the state needed to take corrective action. Did higher rates indicate a collapse of the moral and social order, as many conservative party officials argued, or did they indicate that Chinese “culture is developed and civilization advanced,” as some feminists and liberal intellectuals concluded?<sup>9</sup> Regardless of where they stood in this debate, both conservatives and liberals came to agree that China needed a marriage law better suited to the property relations of market-socialism (Alford and Shen, 2004). In 1995, the Politburo decided that the Marriage Law would be revised, and for the next six years the NPC solicited opinions for proposed amendments (Palmer, 2007). Finally, in April 2001, the NPC endorsed a revised, rather than new, Marriage Law.

At one level the 2001 Revisions represented a compromise to satisfy both those who wanted to restrict divorce and penalize the “guilty” party and those who wanted to standardize the settlement process but not impose new restrictions or punishments. For example, the 2001 Revisions retain loss of mutual affection (*ganqing queyi polie*) as sufficient grounds for dissolving a marriage. However, in response to those who felt that by singling out loss of mutual affection, the 1980 law had encouraged impulsive dissolution of long-established marriages and did nothing to protect a spouse who was abused,

Article 32 expands grounds for ex parte divorce. Henceforth, if mediation fails, the court must grant a divorce if one spouse has committed bigamy or cohabitated with someone other than the spouse, inflicted domestic violence, maltreated or abandoned the other, persists with incorrigible gambling or drug addiction, lived apart for two years or more due to loss of affection, or anything else that has destroyed marital affection.

Of greater consequence, particularly in the eyes of those who wanted to reduce the frequency of divorce, was the introduction of the concept of the innocent party (*wuguocuo fang*; Articles 12, 33, and 46), a term absent from both the 1950 and 1980 laws.<sup>10</sup> Thus, while those who had been particularly concerned with redress for abused or abandoned wives did not gain the provisions they had wanted on criminalizing adultery or outlawing marital rape, they did get more elaborate provisions prohibiting domestic violence (Article 3) and granting financial compensation (Article 46) to the injured or innocent spouse.<sup>11</sup>

In terms of property rights and criteria for division of conjugal assets after divorce, the 2001 Revisions went beyond the 1980 law in several areas. Article 12 established legal procedures for handling property disputes in cases of cohabitation, citing the principle of favoring the innocent party (*zhaogu wuguocuo fang de yuanze*). Article 17 explicitly defined what qualified as communal property and Article 18 for the first time specified what qualified as personal property (*yifang caichan*) within a marriage. Article 19 elaborated the role of contractual agreements for premarital and marital property that had existed in Article 13 of the 1980 law but had not previously been as salient.

## Who Gets the House? Focus Group Discussions in Shanghai and Beijing

I turn now to the conversations I facilitated among the 110 men and women who participated in the 24 focus groups I ran between 2004 and 2008 in Shanghai and Beijing. As in the previous project on inheritance disputes (Davis and Lu, 2003; Davis, 2004), participants were divided into small groups homogenous by gender, occupation, and generation.<sup>12</sup> Because participants were contacted via a name list created by market research firms, they are in no sense randomly selected. Although about ten percent were migrants, all were well established in the interview city and were perhaps especially self-confident and curious individuals. None was wealthy, none impoverished, but all accepted the invitation because a payment of 100 yuan (approximately US\$12) was a sufficient incentive to spend three hours on a weekday evening or weekend afternoon chatting with strangers about housing disputes. Appendix A lists the age, gender, and job of each participant.

A review of the list indicates that they occupy a wide range of blue-collar and white-collar jobs. Based on their demographic profiles and their consistent willingness to answer all questions raised by the facilitator, I am confident that through these 24 conversations I have captured a meaningful, if not statistically representative, sample of everyday conversations about the challenges of dividing conjugal property in two of China's largest cities.

At the start of each session, we prompted discussion by asking each participant to respond to the query about dividing conjugal property drawn from a local newspaper advice column. Then after about a half-hour of discussion, we circulated a picture I had previously taken of an old *sifang* cottage and asked if they would alter their views if the house under dispute resembled the old *sifang*. After fifteen to twenty minutes of discussion of the *sifang*, we showed them a photo of an old *gongfang* and asked if they would alter their views, and finally after another fifteen to twenty minutes, we showed them a photo of a new high-rise *shangpinfang*. (Appendix B includes copies of the three pictures.) In this way we could not only reinvigorate the discussion of the core question about dividing conjugal property with a new stimulus, but also observe if the character of a home might alter the logic or emotional valence of their previous reasoning. Below is the initial query.

In the western district of Hangzhou Mr. Zhang and Ms. Feng together bought an apartment after their marriage that is currently valued at 350,000 yuan. Now they are considering a divorce, how should the property be divided?<sup>13</sup>

### *Reaction of Participants to the Query*

In 2004, most participants ( $N = 27/37$ ) advocated a 50:50 division of the property on the grounds that the home was communal property (*gongtong de caichan*) to which each spouse had equal claim. However, six men and four women rejected such a division because they focused immediately on the possibility that one spouse—generally presumed to be the husband—had made a larger financial contribution to the purchase price or they worried that one spouse had greater burdens, or one had initiated the divorce, or one had had an affair.<sup>14</sup> Moreover, as the conversations developed in all groups, even those who had initially stated that there should be a single 50:50 division began to consider who was at fault, who had made a larger contribution, or any situation which justified unequal division. Their most common concern was for the party who took primary responsibility for raising a child, and in all groups participants agreed that the custodial parent should get a larger share. But they

did not take this position because it conformed to the law, but rather because it seemed obvious to them that the parent with the child had greater need for the home in the immediate future. Moreover, they distinguished between the need to remain in the apartment and the right to ownership.

In 2006 and 2008, the responses were similar. Most participants ( $N = 27/37$  and  $N = 25/36$ ) endorsed the principle of equal division of property rights, and even a higher percentage agreed that some arrangement should be made so that the spouse with custody of the child stayed in the house. In addition, in 2006 and 2008, participants were quick to raise questions about which spouse had more income or who had made the larger contribution to a down payment. Not surprisingly, given the sudden surge in home prices in Shanghai and Beijing after 2004, these participants spoke at great length about how to sell the house and split the profit. Among the working class men and women there was immediate concern with escalating real-estate prices. An example of a working class young man in 2006 illustrates the complexity of applying a 50:50 split even when a person clearly supports the legal principle of equal division of conjugal property:

I don't agree with the view of Mr. Wu [that whoever paid the most gets the larger share] because this house was jointly (*gongtong*) purchased . . . and conjugal money was used (*fuqi de qian shi gongyoude*). It doesn't matter who gave more, it's jointly owned. Anything bought after marriage is joint property (*shuangfang gongtong caichan*) . . . Think about the situation where a thermos bottle breaks, and then another one breaks. How can you know the source of all the water? So I think once the debts are settled, they should split it 50:50 . . . Now if one party wants to stay, then that's a different story. For example, I have a friend. They decided to divorce and the wife wanted to stay in the house, and was going to pay him half the price. But the value of the house had risen so much that she couldn't afford to buy him out. It was slated for demolition and they were waiting to be relocated. The original place had been his parents', but at marriage she moved her *hukou* into the household registry, so she had an equal property right. Now given their economic situation, neither can afford to leave. Since their divorce, each of them lives in one room and their child lives with the wife's mother. (ID #2109)

In the secondary literature on the social consequences of the 2001 revisions, scholars have stressed that the revisions left women unprotected from spouses who can easily hide assets or force a property settlement in

exchange for agreeing to child custody (Ogletree and Alwis, 2004; Woo, 2003). However, while not unaware of devious men who withheld assets, focus groups participants consistently assumed that wives as the custodial parent should in the short term have a greater claim to use rights, but that the decision on ultimate ownership of conjugal property could be delayed.<sup>15</sup> Moreover, as we see in the actual experience of Ms. Li, a 54-year-old divorcee in a 2006 focus group, women as well as men strategized how to maximize property claims over the long term.

Ms. Li worked for many decades in a state-owned watch factory. She and her husband had jointly bought a small apartment, and in addition she also had been assigned a two-room flat by her factory. Twenty years earlier, she and her husband first considered divorce. But at that time she needed to get permission from her employer to petition for divorce, and she didn't want to have everyone know about her husband's infidelity. Therefore she petitioned for divorce on the grounds of his unsavory business dealings. As a result, the judge ruled that he saw no reason to grant a divorce. Then in 2004, she again asked for a divorce. No longer did she need permission from her employer, and her husband quickly agreed to dissolve their marriage. But first she arranged to move her husband's hukou into the apartment that her factory had assigned her because she knew the building would eventually be demolished and they would receive compensation. In the *xieyi* they agreed to split the financial proceeds from the demolished flat but grant her full ownership of their previous home. On the other hand, because he had no other place to live and she wanted to keep the apartment as an investment, she agreed that he would continue to live in their previous home, while she and her adult daughter moved into the *sifang* that she had purchased for her mother. (ID #2201)

Beyond the "tilt" to favor the use-rights of custodial mothers, participants also imagined that if men could afford to be magnanimous they should. When participants raised this possibility, it was usually in reference to an abstract example of a wealthy man who had cheated on his wife, but one participant who had himself given up all property claims when he divorced (ID #2110) articulated another rationale. He explained that although he believed that he was legally entitled to half of the property, he had left the apartment to his ex-wife because a court settlement would have been time consuming and most importantly, it would have alienated the affection of his daughter. Thus to maintain a good relationship with his daughter, he abandoned his rights to

the conjugal home and allowed the wife to claim full ownership, a decision that he found less painful because he knew that ultimately the property would belong to his daughter. All the other men in his group nodded in agreement that maintaining good ties with children was of paramount concern.

In 2004, the ideal of magnanimous husbands eschewing their legal right to half the property occurred only among the young white-collar women, and first surfaced in the context of their animated discussion of prenuptials and surging real-estate values. By 2008, however, the magnanimous husband appeared in all groups, but only as examples of a wealthy man with a mistress, a profile that matched none of the participants but did accord with the account of one Shanghai lawyer specializing in divorce cases who told me he often had such settlements when the husband came from Hong Kong or Taiwan.<sup>16</sup>

### *Reaction of Participants to the Three Photographs*

During the focus groups on inheritance disputes, we discovered that housing type directly affected participants' attitudes. When a house was a *sifang* owned by one family, participants emphasized a "logic of the family estate." When the house had been first occupied as a *danwei gongfang*, they stressed a "logic of the regulatory state," and when the house in question was a commercial *shangpinfang*, participants articulated a "logic of the law and the market." In the focus groups to discuss the division of the home after divorce, I also expected that the character of the housing would affect participants' reasoning and indeed the photographs did affect participants, but not as consistently as in the earlier project on inheritance disputes.

In 2004, when participants saw the photo of the *sifang*, most expressed reservations about a simple 50:50 split.<sup>17</sup> The pattern and reasoning, however, varied by gender and age. Among the women, the majority saw the *sifang* as parental property, most likely that of the husband's parents. As a result, they presumed that others, namely parents (or in-laws) and siblings had claims equal to those of the spouses. The youngest men also understood that the *sifang* was family property, but they unambiguously saw it as their conjugal home to be divided 50:50. By contrast, young women understood their claim to a *sifang* as entry into a family estate where their individual claim was partial. By 2006, however, the situation had radically changed. In all the groups, the picture of the old cottages immediately raised questions about urban development and compensation for demolition. For those in Shanghai, every group presumed that the key was the *hukou*, and that as long as a person's *hukou* remained in the *sifang*, he or she would get a share of the monetary compensation or even a

separate apartment. Among the young white-collar participants and the young blue-collar men, there were animated discussions of how to use fake marriage or fake divorce to work the system to one's advantage. In short, no longer did the picture of the *sifang* evoke complex webs of family obligation and multi-generation reciprocity as it had in 2004. Instead it prompted strategies about how best to negotiate with the regulatory state over the inevitable demolition in the context of a hot real-estate market.<sup>18</sup>

In 2004, when participants first saw the picture of a *gongfang*, those who had focused on the multiple claims to a *sifang* shifted back to equal division between husband and wife. However, soon in all groups, the discussion focused on how complicated the division would be if the apartment had been assigned to one party before marriage, or if the couple held only partial ownership rights, or if the *danwei* had tied ownership to completion of a work contract by one or both of the spouses. In 2006 and 2008, participants also felt that dividing a *gongfang* was difficult, and the key concerns similarly focused on the original ownership by the *danwei*. Again respondents presumed that such apartments had complicated histories. Or as a middle-aged Shanghai manager summarized the complexity: "This kind of house actually is not really entirely private property; it still has an element of public ownership" (ID #2112).

In addition, participants often assumed that if a couple was living in a former *gongfang*, the original owner would have been the husband's employer and therefore only the man's name would be on the deed. Middle-aged respondents also assumed that if a couple lived in a *gongfang*, they had been married long enough to have a child. If the child was a minor, they assumed that the mother would get custody and should be able to stay in the home. If the child was already an adult, then participants tried to imagine what would happen to a middle-aged woman without a place to live. By contrast, when young women saw the picture of the *gongfang*, they focused on the negative impact of co-resident in-laws. But across gender and generation, participants disaggregated ownership claims in light of the specific needs of each spouse in context of the housing type. Thus when they saw the *gongfang*, several participants immediately focused on the woman's right to occupancy (*juzhu quan*) (ID #2118, 2211, 2212, 2215), regardless of whose name was on the deed or whose employer had originally supplied the flat.

In 2004, when participants saw the photo of the multistory *shangpinfang* with elaborate entrance and circular driveway, they held firm to 50:50 shares and thought division would be quick and easy. In 2006 and 2008, participants also first agreed that dividing a valuable commercial property was less problematic than an old *sifang* or *gongfang*, but they were quicker to think of all sorts of financial complications. Typical was a middle-aged professional

man who noted that unless the couple had purchased the apartment many years earlier, such an expensive condo would likely have a big mortgage. Thus, if forced to sell and pay off the mortgage, neither party would have enough money to get a comparable apartment. On the other hand, this man also said that given the financial issues, the side who initiated the divorce probably “had already prepared” (ID #2113) for this challenge and therefore was likely to have made plans for buying the next home. Both the young and the middle aged also introduced the complication of parental down payments or even parental ownership. In 2004, the commercial flats were still within the budgets of young salaried professionals. By 2006, and even more so by 2008, many young couples could not afford to even make a down payment. On the other hand, most urban couples in their twenties had no siblings and therefore could turn to two sets of parents for help. In much of the discussion about problems of only-children, the focus has been on the future burdens of a 4:2:1 family of four elderly grandparents, two young parents, and one grandchild. But in 2006 and 2008, the 4:2:1 ratio also referred to four middle-aged parents helping two young adults buy one apartment as illustrated by a story recounted by a working class participant in her late forties:

I have this friend whose daughter recently had this experience. The man’s side had put down 300,000 on the apartment, and took out a five-year mortgage for the balance. Then as they were preparing for the wedding, the parents of the bride (my colleague and her husband) asked that their daughter’s name be put on the papers for the apartment and mortgage, but the man’s side wouldn’t agree. The bride’s mother and father then objected. Their view was if you want to marry our girl, then you must add the daughter’s name. Then, his parents decided to add their names. So now they have stopped preparing for the wedding and the daughter is not going to marry this guy. When the man’s side made the down payment, the house was worth 750,000 yuan. Now it is worth 1.5 million. Her parents had thought they liked the guy, but when he wouldn’t even add their daughter’s name, they worried that if there were a divorce, their daughter would get nothing.

In response to a comment that the bride and her family must be from outside Shanghai to have these insecurities, the woman continued,

No, they are all Shanghainese. The man’s parents actually agreed to add the daughter’s name, but they also insisted that their names be added. Then if later there was a divorce, the wife would get one quarter



of the value. However, the man's parents required that after the marriage the daughter pay the mortgage while his parents wouldn't contribute to the mortgage. Relations between the young couple were just fine; it was the two sets of parents that was the problem. (ID #2202)

## **Conjugal Property Rights under Capitalism, Socialism, and Post-Socialist Capitalism**

In the extensive scholarship on property rights within Chinese marriages (Bernhardt, 1999; Buxbaum, 1978; Tai, 1976; Watson, 1991), the work of Jonathan Ocko (1991) is of particular relevance for understanding changing assumptions about fair division of the conjugal home after divorce. Ocko understands marriage as an institution that is defined, and in turn is created, by property rights, and an institution that during the high Qing treated women as "something that husbands and households possess" (Ocko, 1991: 358). After 1907, legal reforms did increase spousal claims, but overall these initial reforms strengthened the personal property rights of young husbands more than those of their brides. Moreover, as Margaret Kuo (2003) has shown in her study of the reception and impact of the family law provisions in the Civil Code of 1929–1931, Republican legal reforms had a fundamental contradiction. On one hand, the new Civil Code advanced the civil rights of "private individuals" (Kuo, 2003: 29), but it did not grant the same rights to individuals in their capacity as family members. As a result, while women gained new civil rights as citizens in the public realm, they did not gain equality with their husbands as wives or daughters-in-law within the institution of marriage. Moreover, Kuo even argues that because of the primary need for citizens to support a strong state, judges turned down most petitions from women for divorce on the grounds of the prior demand that citizens uphold the country's need for social stability.

Like Kuo, Ocko (1991) also concluded that Republican legal reforms did little to protect women's property claims at divorce. Only in the new PRC Marriage Law of 1950 does he see a fundamental advance. However, although the 1950 law permitted *ex parte* divorce and initially allowed millions of women to successfully sue for divorce, the realities of everyday life limited women's ownership claims to conjugal property. In the countryside, where village exogamy and patrilocal residence systematically placed wives in the communities of their husbands' kin, statutes governing equal division of property at divorce were difficult to enforce. In the cities, equal property rights within marriage faced fewer obstacles, but in the context of low levels of home ownership, it is hard to know how much impact the 1950 law had on

the allocation of property claims between husbands and wives.<sup>19</sup> Moreover, some statutory provisions (e.g., Article 23 of the 1950 law) directly undercut the claims of individuals by explicitly giving preference to the economic interests of the collective. Thus for Ocko (1991: 331), while the 1950 law strengthened individual and conjugal property rights within marriage, in practice and by statute it also marked a turn toward increased support for what Ocko terms the priority of “social property” relations that persisted for the next three decades. Only after the Chinese leadership moved decisively away from collective ownership to endorse marketization of city real estate did the legal provisions for individual property rights within marriage gain traction. Other elements of the economic reforms, however, simultaneously created substantial departures from the (relatively) gender-blind workplace of the Mao years. As a result, while the reform era legislation strengthened individual rights over property, urban men and women were not equally well positioned to claim those rights.

In the socialist era, men’s average wages were higher than those of women, and because women usually retired at 50 and men at 60, women’s lifetime earnings (and personal savings) were lower. However, compressed salary gaps and absence of property markets and investment opportunities meant that at divorce, men and women had a rough economic parity. After the acceleration of marketization in the mid-1990s, the situation changed. Women, particularly middle-aged women, became economically and financially more vulnerable than their male peers. Still required to retire ten years earlier than men, women were also more likely to be laid off or forced into early retirement in the first wave of privatization. Overall, the impact of economic reform therefore was to create a more gender-distinct economic profile and one where the wage gap between husbands and wives in absolute terms increased (Gilmartin et al., 1994; Shu and Bian, 2003).<sup>20</sup>

I would therefore hypothesize that because of their disadvantaged position in the workplace, women more than men approach marriage as the primary institutional location to acquire property. And as a corollary, divorce becomes a moment when it is imperative for women to maximize their legal rights as co-owners of property acquired during marriage. In their evaluation of the likelihood that the 2001 revised marriage law would strengthen women’s property claims, jurists Charles Ogletree and Rangita de Silva-de Alwis (2004) are not sanguine. While they find the revised law “facially-neutral,” they conclude that because the law fails to “account for the experience and values of women . . . the law may actually disadvantage women” (254). In support of their conclusion, Ogletree and Alwis explain how the procedural weaknesses of the law, the wide discretion given to a poorly educated male

judiciary, and the difficulty in meeting the requirements of proof undercut the ostensible gains women secured with the 2001 Revisions. They also recognize that even when wives gain title to property, they lack the financial resources to realize their legal rights. In sum, Ogletree and Alwis find that “equitable property distribution in the context of inequality between two parties does not produce equal results” (281). Their recommendations for improvement stress the need for “rational, but potentially unequal, division of economic assets of husbands and wives at divorce,” and they conclude that “unless gender bias in the courts is addressed clearly” (282), legal reforms will not benefit men and women equally.

Legal scholar Margaret Woo (2003) is similarly pessimistic, concluding that because women have fewer economic resources than men “to make their stories heard” (132) in the more evidentiary based judicial decisions, the new emphasis on contractual arguments and burden of proof disadvantages most women. On the other hand, Woo thinks that the 2001 Revisions redressed some of the disadvantages by clarifying grounds for divorce, defining what constitutes conjugal property, and elaborating custody and visitation rights. Overall, she finds that the revisions of 2001 “swing the pendulum back” (133) toward more collectivist arguments that ultimately may protect women’s interests.

By contrast, I would argue that the changes since 2001, both as incorporated in statutes and regulations and as articulated by focus group participants, highlight the increasing emphasis on individual contractual obligations within the institution of marriage, and in particular, they highlight greater concern with personal property within marriage. One finds evidence of this interpretation both in legal documents and the language and logic of participants in the focus groups. For example, Article 13 of the 1980 Marriage Law allowed spouses to make side arrangements to exclude even property acquired after marriage from joint ownership. Article 19 of the 2001 revisions enlarged and elaborated these rights so that within the institution of marriage the weight of the law noticeably shifted toward individual contractual initiatives. Confirming this interpretation was the argument by Jia Mingjun, partner in one of the largest legal firms in Shanghai specializing in divorce, who wrote in his 2008 handbook for family lawyers that the key contemporary issue is to clarify premarital individual property rights (Jia, 2008: 1).

In the focus groups, we saw that although the younger participants more often invoked a positive role for prenuptial agreements, older men and women also spoke in a language of individual investment and entitlements and stressed the need for evidentiary proof or formally notarized contracts

to establish a claim to contested property. Advice columns and hortatory articles in the popular and professional journals similarly stressed the positive value of extending the use of contracts (*yueding*) and notarized documents (*gongzheng*). In the January 2004 issue of *Zhongguo funü* (p. 8) editors reported that 56 percent of respondents in a recent survey endorsed the use of prenuptial property contracts, and overall women respondents were more emphatic about the need for documentation (*caichan gongzheng*) than men. On the other hand, participants in the focus groups regardless of gender, generation, or class made distinctions according to the pathways to ownership and the specific history of the conjugal home. They refused to simply apply the letter of the law and instead wanted to weigh past contributions and future needs of the two parties. They were conversant with prenuptials and particularly in 2008 invoked the vocabulary of contracts, deeds, and notarized *yueding* and *xieyi*, but they protested when anyone tried to use the technicalities of law to trump all other logics.

In her study of the young brides in the fishing villages of Huidong, Sara Friedman (2006) describes changing marriage practices as the outcome of a “complex struggle” between an outsider state and local values, where the state is defined as a “set of normalizing practices” (9). Although contemporary disputes over marital property in China’s global cities may seem a world away from the political, economic, and cultural matrix of rural Huidong, the analytic frame that Friedman used to clarify state–society interactions applies to understanding “who gets the house” in Shanghai or Beijing. For couples who divorce in these cities, statutes and legal procedures establish a “set of normalizing practices” to guide state actors as they rule on intimate relations in line with party-state priorities. But when ordinary people finalize the *xieyi* that actually divides conjugal property, they draw simultaneously on the statutory provisions and on their personal experiences and moral reasoning. As in the case of inheritance disputes, there is a co-mingling of official and unofficial norms that allows people to look both backward and forward in time and to assess property claims according to the unique conditions by which the couple established initial tenancy.

In contemporary China, the newest statutes consistently support equal division of property acquired after marriage. In contrast, the ordinary men and women who participated in my focus groups triangulated among competing claims. On one hand, they cited and endorsed the importance of impartial courts and statutes that recognize individual property rights. At the same time, however, they want to diverge from the legal requirement for equal division and punish the guilty partner or provide for the weaker party. As result, even as they demonstrated fluency with the legal rules for establishing

ownership to property, ordinary citizens continue to use their own experience and draw on context-specific moral reasoning. And because divorce settlements after 2003 have most often been finalized by *xieyi* drawn up without legal advice and outside the courts, the contextual and personal logics of ordinary citizens play a central role in the maturation of a post-socialist property regime as it incorporates expectations and practices rooted in pre-socialist, socialist, and market experiences.

## Appendix A

### *ID Numbers and Profile of Focus Group Participants*

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#### *2004, Shanghai*

101	male, 55, worker in state machinery factory
102	male, 55, clerk in food shop
103	male, 48, worker in state plastics factory
104	male, 47, staff in city transport company
105	male, 55, retired staff of city drama troupe
106	male, 34, driver for city transportation company
107	male, 29, waiter in private restaurant
108	male, 26, worker in JV electric appliance factory
109	male, 26, worker in state freezer plant
110	male, 34, clerk in JV real-estate firm
111	male, 47, manager in city construction company
112	male, 50, district manager in city fire equipment company
113	male, 50, sales manager in city water works
114	male, 45, sales manager in JV sports equipment company
116	male, 35, office director in financial investment company
117	male, 28, owner of company
118	male, 25, software engineer in state factory
119	male, 29, sales manager in city trading company
201	female, 53, retired worker in state electric appliance factory
202	female, 51, retired worker in state plastics factory
203	female, 51, retired worker in state textile factory
204	female, 45, worker in jewelry factory
206	female, 35, staff in trading company
207	female, 31, staff in machine tool company
208	female, 28, staff in amusement park
209	female, 27, staff in battery company
210	female, 35, sales clerk in mall

*(continued)*

## Appendix A (continued)

211	female, 52, retired cadre in state factory
212	female, 55, manager of taxi fleet
213	female, 49, general manager of real-estate company
214	female, 45, manager in restaurant
215	female, 47, office management of city utility
216	female, 31, managerial staff of trading company
217	female, 28, managerial staff of clothing company
218	female, 30, accountant in city auditing department
219	female, 32, manager in JV electronics firm
220	female, 25, kindergarten teacher

### 2006, Shanghai

2101	male, 47, warehouse guard
2102	male, 47, clerk in biscuit company
2103	male, 50, worker in escalator factory
2104	male, 50, electrician in tunnel
2105	male, 56, clerk in computer company
2106	male, 30, worker in electronics firm
2107	male, 32, worker in the city exhibition center
2108	male, 34, worker in steel factory
2109	male, 49, manager in technology firm
2110	male, 53, vice head of electronics factory
2111	male, 53, section manager, state trading company
2112	male, 55, manager in import-export company
2113	male, 57, engineer in transport company
2114	male, 29, personnel manager in stock company
2115	male, 31, accountant in engraving company
2116	male, 33, vice manager in machine tool company
2117	male, 34, vice manager in Xinhua bookstore
2118	male, 29, sales manager in city trading company
2201	female, 54, retired worker in state watch factory
2202	female, 47, worker in factory
2203	female, 48, store clerk
2204	female, 45, clerk at City Temple
2205	female, 49, proofreader in printing company
2206	female, 31, clerk in trading company
2207	female, 28, clerk in food company
2208	female, 29, clerk in department store
2209	female, 27, worker in paint factory

(continued)

## Appendix A (continued)

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2210	female, 33, janitor in import-export company
2211	female, 50, manager in trading company
2212	female, 55, office head of trading company
2213	female, 49, manager of airline reservations at travel agency
2214	female, 50, section chief in research center for medical instruments
2215	female, 30, staff in trading company
2216	female, 31, manager of garment company
2217	female, 35, statistician for GM
2218	female, 30, accountant in lighting company
2219	female, 32, staff in silk import-export company

### 2008, Beijing

3101	male, 45, guard in state warehouse
3102	male, 51, foreman in trucking company
3103	male, 45, driver
3104	male, 45, staff in city transport company
3105	male, 54, bike repairman
3106	male, 28, salesman
3107	male, 30, worker in message company
3108	male, 34, supermarket clerk
3109	male, 54, general manager in state agency
3110	male, 55, manager in city construction company
3111	male, 48, marketing director in private company
3112	male, 51, manager in city construction company
3113	male, 47, engineer for railroad
3114	male, 31, city official
3115	male, 29, manager in real-estate management company
3116	male, 31, researcher in government agency
3117	male, 34, manager in headquarters of supermarket chain
3118	male, 35, surgeon
3201	female, 47, store clerk
3202	female, 48, retired ticket seller on city bus line
3203	female, 46, retired worker, now reemployed for state travel agency
3204	female, 55, retired worker, now runs small stand selling snacks
3206	female, 29, clerk in city bus company
3207	female, 33, clerk in city bus repair station
3208	female, 29, hairdresser
3209	female, 33, clerk in city metro

(continued)

## Appendix A (continued)

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3210	female, 28, clerk in real-estate office
3211	female, 46, accountant in stock company
3212	female, 52, researcher in finance company
3213	female, 54, manager of bank
3214	female, 50, branch manager in post office
3215	female, 30, accountant in IT company
3216	female, 29, managerial staff in trading company
3217	female, 26, head manager in real-estate company
3218	female, 30, section head in cultural exchange center
3219	female, 35, accountant in a record company

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## Appendix B

### *Photos Used in Focus Groups*

#### *Sifang*



*(continued)*



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**Appendix B (continued)**

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**Gongfang****Shangpinfang**

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## Notes

1. Urban families who owned their homes in 1949 kept ownership throughout the socialist era, but by the late 1970s, most of the privately owned homes were one-story cottages in poor condition. The percentage of owners varied among cities, but rarely exceeded 20 percent. In 1981, it stood at 17.7 percent for the nation as a whole (Wilhelm, 2004: 16).
2. After an upsurge immediately after passage of the 1950 Marriage Law, the divorce rate plunged, reaching a nadir during the Cultural Revolution (Diamant, 2000; Glosser, 2003; He, 2009; Huang, 2005).
3. Article 11 of the Regulations for Registering Marriage lists only four documents to file for divorce: *hukou* (household registration) book, identity card, marriage certificate, *xieyi* signed by both parties (reprinted in Jia, 2006: 284–88).
4. In 1998 the CDR, the number of divorces per 1,000 people, was 0.18 percent; in 2008 it was 1.71 percent (Zhongguo linian lihun, 1978–2007; Zhongguo linian shehui zuzhi, 2004–2008).
5. Through January 2010, couples could file their *xieyi* at the Civil Affairs office nearest the residence of one party or nearest the conjugal home. Proof of residence could be as simple as an electric bill, and one colleague in Beijing told me that in some cases friends had used another friend's address. At the Civil Affairs office the functionary asks for a copy of the original marriage certificate, identity cards, and verbal assurance that the terms of the *xieyi* are mutually agreeable.

The staff member then asks if they agree that affection has broken down and that both parties agree to the divorce. If they both agree that the decision is voluntary and that they agree to the terms of the *xieyi*, the clerk processes the paperwork and terminates the marriage. The fee is between 10 and 20 yuan, and the entire procedure takes less than three hours.

6. For example, in 2007, courts accepted 1.02 million divorce petitions, of which they adjudicated 343,039, but only 25,054 inheritance disputes, of which they settled 4,717 (Zhongguo shehui tongji nianjian, 2008; accessed Feb. 28, 2009).
7. In 1953, 1.17 million couples divorced, a total not surpassed until 1996 (Platte, 1988: 432). Divorce rates fell abruptly in 1954 and reached historic lows during the Cultural Revolution (1966–1976) (Diamant, 2000: 290; Woo, 2003: 107–8).
8. Two additional changes from the 1950 law were a requirement that couples practice family planning (Articles 2 and 12) and an increase in the minimum marriage age from 18 to 20 years for women and 20 to 22 years for men (Article 5).
9. Quote from sociologist Xu Anqi during a discussion at the Shanghai Academy of Social Sciences in Sept. 2000. *People's Daily* <http://english.people.com.cn/english/200009/12/> (accessed May 19, 2005).
10. In fact, the 1980 law had not even used the words *guilty* or *innocent*.
11. In 1999 the Women's Federation circulated a 147-article revised law that was reprinted in *Minzu yu fazhi* 2000 no. 1 (issue no. 316): 4–11.
12. In 2004, there were 18 men and 19 women; in 2006, there were 18 men and 19 women; and in 2008, there were 18 men and 18 women. For both genders, two groups had participants born between 1969 and 1979, and two had participants born between 1949 and 1959. In each age group one group held manual or blue-collar service jobs and one group held professional or managerial positions. A full list of participants by ID number is included in Appendix A. For convenience in identifying the gender of quoted participants, all those for whom the last 3 digits start with a 1 are men, for example, 101, 2101, 3101; all those starting with a 2 are women, for example, 201, 2201, 3201.
13. The query and the answer summarized below were taken from *Tianjin wanbao*, August 25, 2004, online edition [www.jwb.com.cn/gb](http://www.jwb.com.cn/gb) (first accessed on Sept. 21, 2004). In 2006 and 2008, we did not state the amount of the purchase price because housing prices in major cities had risen so dramatically that we did not want to divert participants' focus from criteria for division to discussion of real-estate prices and in 2008 we did not include the reference to Hangzhou to make the example universal in a year in which prices fluctuated greatly between locations.
14. ID #104–105, 107, 111, 113, 117, 212, 216–217, 220.
15. In line with this assumption of a mother's advantage, it was noteworthy that when young white-collar participants were directly asked in 2006 if there was a bias to men, all agreed there was such a bias (ID #2114–2118).

16. At the firm's Shanghai office on July 9, 2009
17. In 2004, 16 out of 37 as opposed to 27 out of 37.
18. ID #2101–2109, 2111, 2113, 2115, 2117–2118, 2206–2210, 2215–2219.
19. Fieldwork in Shanghai before urban housing reform suggested that the privileged claims of men before 1949 had atrophied. While I would not argue that as a result of socialist housing policies, women held greater claims, observation of and interviews about the use and decoration of interior space suggested that in the socialist era homes were frequently understood to be “my mother's house” (Davis, 1989).
20. In rigorous statistical analysis where “all else” can be controlled (Shu and Bian, 2003), the gap has not increased. That is, a woman engineer working in a state enterprise has not fallen further behind her male peer, but because women are more likely to be concentrated in the lower-earning sectors, have lower education, and lower party membership, in absolute terms women have either fallen behind or not narrowed the gap.

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## Biography

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