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## BOOK REVIEW: The Divorce Revolution -- The Unexpected Social and Economic Consequences for Women and Children in America. By Lenore J. Weitzman

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## BOOK REVIEW

THE DIVORCE REVOLUTION—THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA. By Lenore J. Weitzman, New York. The Free Press: 1985. Pp. 504. \$19.95.

*Reviewed by Philip Eden\**

This book is must reading for all attorneys and judges in family law because it describes how what was originally intended to be a reform of divorce law has become instead an engine for the victimization and impoverishment of women and children on a vast scale.

### I. THE DIVORCE REVOLUTION

California pioneered the movement to eliminate fault as the basis of divorce in 1970; within a decade, all but two states followed suit. Before this, the traditional role of the courts was to award alimony to the "innocent party." This changed and the no-fault law provides two major bases for alimony awards: the wife's employability and the duration of the marriage. Instead of the presumption that the wife was dependent, the new law assumes that she is independent and employable. The new focus is on helping the divorcee to acquire new skills or to update old ones so that she can become self-sufficient. The only exception is in the case of a long marriage where a woman might be incapable of self-support or too old to be retrained.<sup>1</sup>

Weitzman stresses the fact that most of the leaders of this reform movement had the best of intentions. They believed they were ending traumatic and acrimonious litigation over fault and the award of alimony as a moral reward or punishment for past conduct. They believed they were recognizing the growing equality of the sexes.

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1. L. WEITZMAN, THE DIVORCE REVOLUTION 145-50 (1985).

## II. THE UNEXPECTED CONSEQUENCES

The bulk of this book is devoted to a description of the unexpected consequences of this change in the divorce laws. The research underlying the book is supported by a variety of agencies spread over a ten-year period in California. This research includes systematic random samples of court records, interviews with members of the matrimonial bar, interviews with superior court judges and commissioners who hear family law cases and interviews with divorced men and women. Here are some examples of what Weitzman found:

About five out of six divorced women were not awarded any alimony in 1978, and over half of the women in longer marriages received none.<sup>2</sup> Only thirteen percent of the women with preschool children received spousal support in 1978.<sup>3</sup> Typically, the husband retained two-thirds of his income after divorce for himself, while the wife and children (usually a total of three people) received only one-third.<sup>4</sup> A similar unequal division occurred when the community property was "equally divided:" The husband, one person, received one-half, and the wife and children, usually three persons, received one-half.<sup>5</sup> However, the main form of community property in most marriages, the earning capacity of the husband, was and is not deemed to be property and thus kept entirely by the husband alone. This, notes Weitzman trenchantly, "is like promising to divide the family jewels equally, but allowing the husband to keep the diamonds."<sup>6</sup> Child support awards were typically less than half of the costs of raising children<sup>7</sup> and were less than the welfare levels as provided by Aid to Families with Dependent Children.<sup>8</sup> About one year after divorce, the men had increased their standard of living by forty-two percent, while the divorced women suffered a seventy-three percent decline in their standard of living.<sup>9</sup> Some of the most heart-rending declines occurred among middle-class housewives with longer marriages.<sup>10</sup>

All of this is bad enough, but the picture is even more scandalous because "less than half of the non custodial fathers comply with court orders."<sup>11</sup> "Current estimates of noncompliance with

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2. *Id.* at 33, 187.

3. *Id.* at 34, 185.

4. *Id.* at 34, 266.

5. *Id.* at 350.

6. *Id.* at 388.

7. *Id.* at 186.

8. *Id.* at 271.

9. *Id.* at 338-39.

10. *Id.* at 339.

11. *Id.* at 192.

child support orders range from sixty to eighty percent."<sup>12</sup> So, we have a picture of adequate awards made to only a small fraction of these women and children, and for this small fraction, the courts often do not enforce payment. The result is a major tragedy. More than half of the poor families in the United States are headed by a single mother.<sup>13</sup> Almost fourteen percent of the divorced women had to go on welfare within the first year of their divorces.<sup>14</sup> All of us, as taxpayers, are therefore subsidizing the new divorce system, irresponsible and delinquent husbands and the gross failure of the courts to enforce their own orders.

What can we say to dispute Margaret Heckler, Secretary of the Department of Health and Community Services, when she states:

I . . . feel very strongly the destitution, the desperation, and the simple human suffering of women and children who were not receiving child support payments legally owed them. Frankly it offends my conscience because I believe that a parent's first responsibility is to reasonably provide for the upbringing and welfare of his or her children. To deny that responsibility is a cowardly act.

Fifteen million children live in homes without their fathers. Only 35 percent of these households receive child support and nearly one-third live in poverty. Children deserve to be supported by both of their parents. For the sake of America's children, we must put an end to what has become a national disgrace.<sup>15</sup>

It might be noted parenthetically that total enforcement of payments would hardly solve the problem since few wives receive awards and most awards are inadequate. Enforcement is therefore only a small part of the problem.

We have created a two-tier society, with an underclass of impoverished women and children at the bottom of the economic ladder.<sup>16</sup> Weitzman attributes this primarily to the Divorce Revolution.

Since the no-fault divorce reform was primarily the work of lawyers and judges, we must now confront these unexpected results and ask ourselves "What have we done to our women and children?"

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12. *Id.* at 321.

13. *Id.* at 350.

14. *Id.* at 204.

15. *Id.* at 262-63 (quoting Margaret Heckler, Secretary of U.S. Department of Health and Human Services).

16. *Id.* at 355.

### III. THE SIGNIFICANCE OF HER FINDINGS

There is a growing awareness of Weitzman's findings by other writers in this and associated fields,<sup>17</sup> for example, with regard to Weitzman's basic conclusion that to treat persons as legal equals when they are economically unequal makes a mockery of justice and is a facade for worsening the inequality,<sup>18</sup> as well as the concept that the earning capacity of a person is a form of human capital, and as such is one of the new forms of community property that should be equally divided at divorce. These ideas have arisen sharply as a result of several cases in which the wife financed the husband's professional education and asked for a fair share of the enhanced capital value of this community asset at the time of divorce.<sup>19</sup> Despite this, under California law, human capital is still deemed not to be divisible property, let alone community property, and remains entirely in the hands of the husband.<sup>20</sup>

Weitzman's study also corroborates the conclusion of Robert N. Bellah and a team of sociologists in their celebrated book, *Habits of the Heart*. Bellah and his associates believe that self-interest has become a "cancerous growth."<sup>21</sup> Weitzman feels that the change in our divorce laws and the manner in which they have been implemented are parts of this cancerous growth in self interest, self-gratification and selfishness, and that it represents a further step toward unbridled and irresponsible individualism at the expense of community interest and the family.<sup>22</sup>

### IV. WHAT CAN WE DO NOW TO CORRECT THIS DEPLORABLE SITUATION?

Weitzman's recommendations flow logically and inexorably from her findings. First and foremost is her plea for equality of

17. See *infra* notes 19, 21, and 25.

18. L. WEITZMAN, *supra* note 1, at 361-62.

19. These cases are described in Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379, 399-416 (1980). Krauskopf is particularly clear in placing these two concepts in the forefront of her analysis. For additional citations, see Amicus Brief of Los Angeles Women Lawyers, *In re Sullivan*, 134 Cal. App. 3d 634, 184 Cal. Rptr. 796 (1982). For a description of the history of human capital, see Eden & Herzog, *Marital Investment in Education, What is Equitable?*, 13 COMMUNITY PROP. JOUR. 14 (Apr. 1986); P. EDEN, ESTIMATING HUMAN LIFE VALUES 3-7 (1st ed. 1975). For a more comprehensive account of this history, see Kiker, *The Historical Roots of the Concept of Human Capital*, J. POL. ECON. 48 (Oct. 1966). See also Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 HASTINGS L.J. 771, 854 (1982). To review this situation in a larger context, see S. HEWLETT, *A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA* 51-139 (1986).

20. CAL. CIV. CODE § 4800.3 (West 1985).

21. R. BELLAH, *HABITS OF THE HEART* (1985).

22. L. WEITZMAN, *supra* note 1, at 374-77.

treatment. The children particularly should have more support and there should be effective enforcement of court awards. If there is to be no fault divorce, there should be no punishment or rewards. Post-divorce income should be shared equitably so that both households have the same standard of living. The way of doing this scientifically and objectively has been available since 1977.<sup>23</sup>

To achieve this, all of what Weitzman calls "career assets" (earning capacity, goodwill value of a business or profession, medical and hospital insurance and other benefits and entitlements) should be considered to be community property and divided equitably. Further, the family home should be awarded to the custodial spouse, or at the very least, its sale should be delayed. The forced sale of the home in order to divide the community property immediately after divorce throws an impossible burden on the woman and children.

There must also be special provisions to care for the divorced wives in older marriages. While they are supposed to receive special consideration under the existing law, Weitzman finds that in practice they are not afforded such consideration.

Weitzman illustrates how backward and appalling the condition is in our country by comparing us to Sweden where courts award women and children ninety percent of their pre-divorce standards of living. The state pays delinquent alimony and child support and takes upon itself the problem of collection of the delinquent amounts.<sup>24</sup>

## V. WOMEN AND CHILDREN LAST<sup>25</sup>

When a ship goes down, the rule is "women and children first." A divorce is like a ship going down. The principle underlying Weitzman's work is: How civilized can we claim to be when, in our divorce laws and practices, we change this to "women and children last"? Have we abandoned all moral and religious teaching and traditions?

This book is an outstanding example of fine academic scholarship applied to a problem of profound and immediate importance. It is a credit to Stanford University where Weitzman was an As-

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23. See P. EDEN, *supra* note 19.

24. L. WEITZMAN, *supra* note 1, at 395.

25. R. SIDEL, *WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA* (1986). Since I thought of the same title before I was aware of her book I feel I can use it in this review. It is an example of two people independently arriving at the same conclusion.

sociate Professor of Sociology when she wrote this book.<sup>26</sup> Judges and attorneys in family law have a special responsibility to read it and to weigh her findings very carefully.

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26. Professor Weitzman presently teaches at Harvard University.