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BOOK REVIEW

THE DIVORCE REVOLUTION. By Lenore J. Weitzman. The Free Press, 1985.

*Stanley Elliot Tobin**

In 1985, the Free Press published *The Divorce Revolution*, by Lenore J. Weitzman, Ph.D. (Sociology), a culmination of the author's writing on the subject. The title is a misnomer; "The Divorce Convolution" would better describe Weitzman's thesis. Basically, the book iterates and reiterates that "no-fault" divorce legislation, led by California in 1970, is a noble experiment which like the eighteenth amendment is fatally flawed.¹ Its unintended consequences are so financially damaging to women, Weitzman asserts, that major and drastic legislation must be enacted to bring about or bring back "equity."

Not surprisingly, *The Divorce Revolution* was greeted with delight and kudos by countless commentators. Feminist Betty Friedan proclaimed it an "extremely important book that reveals how the illusion of equality under current divorce laws is imposing devastating and unfair hardships on women and children."² Less lyrical and somewhat more critical treatment came from other quarters. James Cook, president of the Joint Custody Association, asserts that what Weitzman really seeks is a redistribution of wealth from one sex to the other, without waiting for death, the historical leveler. "The implication is that toleration of a spouse isn't necessary. You can have it now, rather than later. Divorce is the procedure. The legal profession is the transfer agent."³

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1. The author does not take issue with Ms. Weitzman's views on child support and child custody.

2. L. WEITZMAN, *THE DIVORCE REVOLUTION* (1985) (quote from book jacket). In another quote from the book jacket, Diane Richmond, Chair, California State Bar, Family Law Section, tabs the book "[p]rovocative and thoughtful . . . It is must reading for anyone concerned with the future of marriage and divorce in this country." Barbara Williamson, an English teacher, called the book "rigorously documented and gracefully written"; that Weitzman has proven with her "wide knowledge and sensitive understanding of her topic" that no-fault, no consent divorce has "weakened marriage" and "worsened women's condition." Williamson, *Victims of Reform* (Book Review), N.Y. Times, Oct. 13, 1985, (book review section) at 39, col. 1.

3. Cook, *The Divorce Revolution* (Book Review), L.A. Times, Nov. 17, 1985, (book review section) at 2, col. 3. Recognizing that Weitzman has probably inflamed the ever-lasting embers of the war between the sexes, Cook asserts that Weitzman "seeks government sanction for a greater future economic security for the divorcing public, largely by one party at the expense of the other, than our social system has been able to assure for those who remain married." *Id.* at 11, col. 4. He calls for something other than an "early polemic," something

This much about divorce both "sides" agree: women (as a general rule) and children (almost invariably) suffer in many ways as a result of divorce, not the least of which is financially. And more often than not, men suffer less financially than women. All that is a "given." To this recognized problem, Weitzman has a ready, easy solution: redefine the term "property" to permit divorce settlements that overwhelmingly favor women.

The Divorce Revolution is Ph.D. poppycock. But can Weitzman be dismissed on the assumption that her camouflaged persiflage is of no major import and that her grand following is to be expected? Can her proposals be considered a nightmare, that with a new dawn will go away? Unfortunately, that dream road is a dead end for almost everyone. Weitzman cannot be ignored. Because her writing is not openly shrill, seldom strident and has the patina of scholarship, she can well grab the brass ring. Her book, therefore, is as dangerous as it is disingenuous.

It is dangerous because from such drivel come laws. Already, women have been told that *The Divorce Revolution* is a "good handbook" to learn about their rights.⁴ More significantly, a bill is now pending before the California Legislature that would make some of her less "off the wall" ideas the law in California.⁵ Already afforded an opening wedge, her claims and aims, therefore, require further analysis.

First, what does she want? Just about the most radical change in both divorce and property law in Anglo-Saxon annals. She proposes that spouses be able to obtain divorces without having to prove fault—as is the present law.

other than Weitzman's "gotcha" book: "there have to be better ways to ensure the economic security of women than the way that turns divorce into extortion." *Id.*, col. 5.

Hugh McIsaac, Director Family Court Services/Conciliation Court, Los Angeles County Superior Court, wrote that Weitzman's "point of view fails to deal with the new realities we face and attempts to return to a simpler time" and that Weitzman's proposals would result in a "return to a dubious, romanticized past." McIsaac, *The Divorce Revolution: A Critique*, 10 CAL. FAM. L. REP. 3069, 3069-70 (1986). "Weitzman's approach would return us to the polarized, adversary relationship between men and women; she fails to explore divorce within a context that includes all members of the family or to consider a range of solutions that transcends sexual politics." *Id.* at 3072. Weitzman "identifies the right problem, but proposes some solutions that would merely trade one evil for another." *Id.* "We need thoughtful, careful research, not narrow advocacy that plays parents against each other like scorpions in a bottle." *Id.*

4. Blair, *Women Who Divorce: Are They Getting a Fair Deal?*, WOMAN'S DAY, May 27, 1986, at 44-45.

5. S.B. 1750, 1985-86 Reg. Sess. (as amended May 5, 1986) (Legislative Counsel's Digest). California Senate Bill 1750 proposes amending section 4800.7 of the California Civil Code to require the court, in certain cases, to defer the sale of the family home to achieve equal division of the community property. Under the bill, the court must defer such a sale when the economic, emotional, and social impact on the children is not outweighed by the economic detriment to the noncustodial parent. As originally written, the bill would have allowed the court to assign the family home to a spouse if, among other things, the parties had been married at least 20 years, the spouse receiving the home is at least 50 years old, and that spouse has "minimal" earning capacity. *Id.* Fortunately, this last provision was stricken from the bill.

However, her plan *requires* the courts to treat the husband *as though he were at fault* so that the "property" can be divided unequally between the parties, allowing more than half of the community property to be awarded to the wife. This, she claims, will help achieve "equity." If that sounds strange, Orwell would understand.

But Weitzman's script has an additive feat. Taking "more" (or even *everything*) from the husband may not give the wife "equity." The concept of "property" must, therefore, be expanded, and once expanded, expropriated in favor of the wife to help produce "just compensation." The husband need "only" pay, in addition to alimony, the value of his future worth—his future earnings—reduced to its present value, which will be treated as though it were community property. The husband must, at the time of the divorce, turn over whatever part of that "property" a judge, aided (or compelled) by Weitzman's criteria, finds appropriate. Mr. Orwell meet Mr. Kafka.

Weitzman's reviewers who write that her book is "gracefully written" and that it reflects "sensitive understanding" must have read a different book. There is no question that for almost 500 pages she shows compassion and empathy for women. From the beginning (her dedication of the book to her mother) to the peroration in her conclusion, she portrays the plight of women, quoting their trials in vivid terms. One has the feeling of reading a modern-day version of a Victorian melodrama where one is supposed to hiss the villain and cheer on the heroine.⁶

But nary a single sentence or a sympathetic word about men—any of them. Why not? For the most part they hardly exist except as a source of income. When Weitzman does bring them from some inanimate state to life, men are usually depicted in the role of *bete noir*. She appears to divide society into saints and sinners; and men, quite simply, are not saints. Weitzman does not engage in an open diatribe against men; they do not seem to be worthy of any such sustained emotion. So much for her graciousness and sensitivity.

The foremost assumptions in Weitzman's thesis are unstated. Men, she avers, when married, made two promises and it must be assumed in a divorce situation they have broken the first promise and so they must at least be made to comply with the second promise. On the other hand, women only make one promise; and it must be assumed they have fulfilled it. What are these mutual covenants?

In entering into *historical* marriage, the "rules of the game" required each spouse to fulfill the promises each made to the other (and implicitly to society). The husband promised to love, honor, respect *and support* the wife. The wife

6. Indeed, in a review of Phyllis Gillis' book, *Days Like This*, Barbara Ehrenreich, in a familiar vein, extols Gillis' personal account and tale of her divorce. Ehrenreich states that Gillis' tragic situation follows the "general pattern" of divorce that Weitzman so poignantly depicts in *The Divorce Revolution*. Ehrenreich, *No-Fault, No Fair* (Book Review), N.Y. Times, July 27, 1986, (book review section) at 8, col. 3.

promised to love, honor and respect the husband.⁷ If either failed to fulfill his/her promise, he/she was at fault and could be punished. If he was the one at fault, alimony and other financial penalties were his lot. If she wronged him, she would not be stoned (under our system), but she would forfeit her future dowry.⁸ Then along came “no-fault,” which essentially prohibited society (at least theoretically) from concerning itself with right or wrong and divided up the community pot as nearly in half as possible, taking care of the dependent spouse to the extent of need.

Weitzman initially accepts that analysis but then turns history on its head. Finding fault with “no-fault” because, so she claims, women are now worse off financially,⁹ she argues that we should junk “fault”—*but only for the purpose of proving it*.¹⁰ Simply assume that the man has breached the contract, that he has failed to love, honor, and support his spouse and, therefore, should pay for his breach. In other words, it’s a conclusive, irrefutable presumption that he is at fault. Of course, in order to make this modern myth viable, it is also necessary to assume—as a matter of law—that the wife is an innocent victim. She, too, has earned her ticket aboard the Gravy Express, Unlimited.

In reality, that is not much different than the state of the law today—except Weitzman would give the wife not merely an “E” ticket aboard the “railroad” but insist the trip be expanded and be first class. Ironically, Weitzman frets that with the arrival of “no-fault” women have allegedly been detrimentally affected. She claims that the “rules” have been changed “in the middle of the game.”¹¹ But it is hardly the middle of the game. And even if one makes all the far-fetched assumptions Weitzman does, surely Weitzman is changing far more than “no-fault.” Indeed, when it comes to gamesmanship, she has no peer.

But, according to Weitzman, the husband has made an additional promise from which he ought not be allowed to escape. He promised that when he got married he would stay married and if he did not he would pay his love as though he still were married. He made this promise even if his love was to be the one who sought and fought to be divorced. Whoa, now. When did he ever make such a promise? Patently, he did not make such a promise if he was in fact innocent in the ensuing fracas. Moreover, even if he felt that should they “split,” he still never promised to do anything more than help to the extent of demonstrable need within the confines of what society considered fair *at the time of marriage*—and that certainly was not Weitzman’s expansive concept of “property.” He made no promise—certainly absent fault—to give his “significant other” a gilded, guaranteed, payable-on-demand insurance policy. That platinum American Express card is Weitzman’s invention.

7. WEITZMAN, *supra* note 2, at 2.

8. *Id.* at 12.

9. *Id.* at x, 73-76, 323-24.

10. *Id.* at 382-83.

11. *Id.* at xiii. Weitzman later states, “it is simply not fair to change the rules . . . in the last quarter of the game.” *Id.* at 390.

As amazing and radical as some of her proposals are, the fact is Weitzman, to a far larger extent than she clearly admits, is seeking much in the way of "reforms" on behalf of her sex that are already "on the books." Thus, in her unique quest for equity, she would include "new" and expansive forms of property. What are these "new forms" of property? She lists them as "career assets" which include: "the major wage earner's salary, pension, medical insurance, education, license, the goodwill value of a business or profession, entitlements to company goods and services, and future earning power."¹² In fact, with the exception of the last item—the real zinger, "future earning power" (which is Weitzman's unique contribution to her brave new world of property)—virtually all these items now *are* part of the "pot" to be divided. This is certainly true in California,¹³ and by the author's own tables is likely true for well over half the population nationwide (and growing).¹⁴

Enigmatically, Weitzman considers as part of this plethora of new property, as her first item, "the major wage earner's salary," assumably the husband's! Aside from the ambiguity (never resolved) as to whether this is to be treated as property or income (and it makes a great deal of difference), note that it inexplicably does not include the wife's (non-major) salary. Moreover, Weitzman's proposed methods for dividing the husband's pension fail, in many instances at least, to consider tax factors. Thus, the end result will often be that the one-half that the husband *may* be fortunate to get from the property division, can be drastically reduced, even to nothing, while the wife may get her share (half or more) of his pension tax-free. This is particularly true if Individual Retirement Accounts, Keogh, or similar pension plans are involved and are not accorded special treatment. In addition, Weitzman apparently would not consider the fact that an older husband may be on the verge of retiring while a younger wife (i.e., ex-wife) may have many more years before going to pasture. He now may never be able to retire (or just die) and since she gets her share in hand, she is doing just fine, thank you.

Weitzman makes this transfer from one spouse to the other sound relatively simple; courts do it all the time, she insists. To some extent that is true. But in domestic relations, that process alone, engaging experts and accountants, witnesses and specialty lawyers, may be a bonanza for lawyers and other service industries, but is often devastating, in costs alone, to one or both parties. Goodwill of a profession, for instance, as almost every lawyer knows, is a make-weight for according the wife a greater share of her husband's potential wealth. In practice, it is so speculative and arbitrary as to be the source of gallows humor among bench and bar, and even the experts themselves laugh about it all the way to the bank.

12. *Id.* at xiii; *see also id.* at 110-42.

13. *See, e.g.,* CAL. CIV. CODE § 4800.3 (West Supp. 1986) (community property includes contributions to education or training that substantially enhance the earning capacity of a party).

14. *See* WEITZMAN, *supra* note 2, at 424-29.

Still another subject Weitzman treats with legerdemain in the area of "new property" is *when* it (whatever "it" is) becomes part of the wife's divorce dowry. Is all the husband's property subject to the wife's life-long lien? Suppose the husband had his education, license, career, or goodwill prior to the marriage, did they merge at the time of marriage? Does such a thing as separate property go down the drain? Weitzman does recognize separability for pension purposes (i.e., contributions determine division ratio), but in these murky areas such as education, license, career, or goodwill, she leaves her position unclear. So, too, is whether a short marriage is to have the same "rewards" as a long one. Is it because her underlying aim is toward "equalizing the standards of living of the two parties after divorce," as she insists?¹⁵

But the lollapalooza of her proposals is, that as a property right, the ex-wife should share in the future earnings of her ex-husband. Though this is the principal thrust of her Financial Plan, and she refers to it hundreds of times throughout her book, her in-depth analysis of the metes and bounds and mechanics of this startling proposal is contained in less than two pages.¹⁶ That brief discussion lends itself to only one sure thing within the courthouses—the legal community's guaranteed annual wage. Outside the courthouse the results are even less promising.

Weitzman, however, treats these enormous problems with near indifference. That is understandable if you begin with her assumptions and end up with her goals. In between, however, you must accept the proposition that when a man gets married he hands to his wife, literally and figuratively, a chattel mortgage (in the full sense of both words) in virtually everything he owns or ever will own for the rest of his life—even more so divorced than married.

But even Weitzman admits that aside from her radical proposal as to the property right of future earnings, her other main proposals are already the law in California (and elsewhere). Repeatedly, she states:

It is interesting to note that the new law guarantees, in theory, support for three groups of women who are exempted from the new standards of self-sufficiency: women with custody of young children, women in need of transitional support, and older homemakers incapable of self-sufficiency. However, despite the law's guarantees, the new legal norms are being applied to these women as well. Few of them are awarded support.¹⁷

How does she prove her assertion that these women are being denied what the law accords them? Simple, judges are not doing their duty.¹⁸ By implication, the lawyers for these women are selling them short (or engaging in malpractice.) The truth probably lies closer to the fact that Weitzman makes a

15. *Id.* at 390.

16. *Id.* at 139-41.

17. *Id.* at 34. Weitzman also observes that "the California wife can be certain that she will receive half of the assets accumulated during the marriage . . ." *Id.* at 91.

18. *See id.* at 395-400.

quantum leap of cause and effect from her questionable statistics to the conclusion that either "no-fault" causes lesser awards for women or that judges are not enforcing the law. And why would judges do that? She does not say so directly, though her followers have no qualms about pronouncing male chauvinism to be the culprit. Thus, in an article explaining the cause for the property awards discrepancy between husband and wife, the author, discussing and relying on Weitzman's studies, states, "[t]he reason may be, in part, that the wife is still often obliged by male judges to prove her entitlement to a share."¹⁹

Weitzman implies the same. She says her findings were initially met with skepticism by judges, "the overwhelming majority of judges who hear family law cases are male."²⁰ But Weitzman supplies absolutely no evidence that the sex of the judge has a significant effect upon the award. That may well be true, but it could just as easily be discrimination against men as against women.

Throughout the study Weitzman frequently speaks of impoverished women suffering from what she considers lopsided divorce awards. She is forced to admit, despite emphasis to the contrary, that the bulk of the cases in the divorce courts involve little available property and quite often little income.²¹ In other words, in most instances a change or enforcement of the law as Weitzman seeks will have no practical effect on the wife's predicament.

Using the real downtrodden as a lever, Weitzman seeks to ameliorate the plight of three particular groups of women: (1) older women with little work experience; (2) mothers with minor children; and (3) women in transition, those in their forties whose children are grown.²² Aside from the fact that these groups encompass almost all wives, Weitzman wants them all to get full relief, from the husband, of course. All of them should, it seems, share the same standard of living as their ex-spouses (or at least the ex-spouse with the greater income).

Not doubting for a moment the sincerity of her concern for all groups of women, it still seems she has a special concern for one group: women in their forties, especially those who are in the highest economic bracket.²³ These are women whose children are grown, who themselves have been in the job market and are able to remain in or return to the job market with relative ease. But they probably cannot make as much as their husbands and, therefore, they will witness a reduction in their standard of living, particularly if their husbands are not required to pay them stiff amounts in alimony and "new property."²⁴

Many in this latter group, she admits, are relatively well-to-do women—upper middle class, \$40,000 or more pre-divorce family income (in the 1970s).

19. Blair, *supra* note 4, at 38.

20. WEITZMAN, *supra* note 2, at 396.

21. *Id.* at 55-69.

22. *Id.* at 184-214.

23. *See id.* at 330-36.

24. *Id.* at 380-82, 388-91.

In fact, this group is heavily represented in Weitzman's data.²⁵ More of these well-to-do families are included than any other group. It seems likely that this top-heavy data has unduly affected and colored the under-represented groups and data results. Weitzman empathizes with these particular women because after they get their divorces they encounter serious social problems. They can no longer enjoy participation in activities that their social friends take for granted. Moreover, their old social circles become narrower; they even lose "status."²⁶ The winters are colder and the nights are longer than they imagined they would be. Weitzman feels that these women must be helped. She rolls out the same formula: make him pay and pay dearly. Her formula as applied to these women might be aptly labeled, "The Beverly Hills Women's Security Program."

The data Weitzman utilizes raises serious questions both as noted above and by others. Moreover, it appears to exclude the tax consequences to the divorced parties, which fall far heavier on the major wage earner. It also appears that the analysis fails to adequately consider non-deductible but business-related expenses (e.g., travel) that the husband primarily must defray, or other debts, including attorney fees incurred in this and perhaps prior marriages. Moreover, the data hardly seems to deal with the heavy inflationary factors involved in the time span between the pre- and post-divorce periods.

The Michigan studies she cites are interesting.²⁷ The first major finding showed significant declines in the income of *both* divorced men and women. The gap, when other factors are considered, may hardly be significant. Weitzman, however, finds great support for her theses, she asserts, by the second major finding, showing that the standard of living of divorced men seven years later had risen and that of divorced women had significantly fallen.²⁸ Weitzman's own poll done in Los Angeles in 1978, comparing standard of living information in a one-year period from the time of divorce, shows a differentiation considerably greater than the Michigan study. Unfortunately, and significantly, this "scientific" analysis was in Weitzman's phraseology, "Based on weighted sample of interviews with divorced persons, Los Angeles County, California, 1978."²⁹ Presumably these "sample" interviews were conducted in large part by Weitzman from her already sparse pool of subjects. How many from these Beverly Hills type families were utilized in arriving at living standards based upon the "Lower Standard Budget" devised by the Bureau of Labor Statistics?³⁰

But aside from the accuracy or limited quantity of this questionable data,

25. *Id.* at 333.

26. *Id.* at 335.

27. *See id.* at 337.

28. *Id.*

29. *Id.* at 338.

30. *Id.* at 481 n.19. Weitzman's private study, resting upon such suspicious, scant, and skewed data, has nonetheless been spouted nationwide; adherents of her philosophy and her statistical conclusions have been cited as though they were the Holy Gospel. *See, e.g.,* Cohen & Hillman, *Score 2 for Fairness In Divorce Courts*, N.Y. Times, Aug. 13, 1986, at 23, col. 4

neither the Michigan nor Weitzman's own study leads to the point of her thesis, to wit, that the "no-fault" legislation brought about a significant worsening of women's plight and that the solution lies in the retribution (a.k.a. redistribution) approach to a failed marriage: the non-faulting husband is nonetheless guilty. In addition to this "guilt without fault" judgment, the concept of "property" is to be expanded as far as the elastic will stretch so as to bring about "equity."

Weitzman from the very title of her book to the end of her brief warns of the unintended consequences of even well-intentioned legislation. Indeed, she actually emphasizes "that equality cannot be achieved by legislative fiat" in our society.³¹ One may have thought this was her chief aim. Rather, she proposes that a husband and wife be considered unequal and thereby end up equal. But aside from that hat trick, it is clear that Weitzman seeks legislation to cure a societal defect, a defect that she asserts was aggravated by the unintended consequences of prior legislation which sought the same aim.

I submit Weitzman's proposals not only are totally without merit, plainly illogical and blatantly unfair, but they will inevitably prove to be counterproductive. The unintended consequences are clear and certain.

First, the marriage institution, which I assume Weitzman favors, will lose many future adherents. Why should a man marry when he must mortgage his life to get out? Particularly in our day and age when everyone knows, as Weitzman notes, half of present marriages will fail.³² That, coupled with society's perfect willingness to permit the foregoing of formal, legal marriages, will, given the Weitzman Plan, result in a decline in marriage.

Second, the Weitzman Plan is so Draconian to men—married men—that they will hardly jump at the idea of divorce. Thus, unhappy marriages and unhappy children will multiply with all the social consequences.

Third, Weitzman and others are rightfully concerned about the slim chances afforded women over thirty-five being able to find marriage partners. The Weitzman Plan will reduce these women's marriage prospects from slim to none.

Weitzman, of course, never for a moment concerned herself with the problem that men have now in divorce situations, let alone under the Weitzman Plan. But Ms. Weitzman cannot ignore—and no one can play with—this startling statistic: white men, particularly if they are divorced, have the highest suicide rate, ten times that of women.³³ Speaking of unintended consequences.

(national ed.) ("Property and maintenance agreements should reflect the fact that the largest asset is often the earning ability of the breadwinner spouse.").

31. WEITZMAN, *supra* note 2, at 365.

32. *Id.* at ix.

33. Gottschalk, *Ending It All*, Wall St. J., July 30, 1986, at 1, col. 1.

