Book Review

The Illusion of Equality: The Rhetoric and Reality of Divorce Reform, by Martha Albertson Fineman, University of Chicago Press, Chicago and London, 1991, 252pp $70.00.

Reviewed by GW Austin*

Family law is peculiarly immune to critique. In some areas, this is due to the diminution of its traditional, "legal" content. In the child placement context, formalistic rules have been replaced by a broad and largely unfettered judicial discretion. The key statutory provision in this area is section 23 of the Guardianship Act 1968, the "paramountcy principle," which lists things that courts are *not* permitted to take into account: parental conduct may be considered "only to the extent that such conduct is relevant to the welfare of the child" and judicial presumptions based on gender are prohibited. The wishes of the child need be considered only "to such extent as the Court thinks fit, having regard to the age and maturity of the child."[1] Although some judicial comments might suggest otherwise, the Children Young Persons and Their Families Act 1989 has further immunised child decisions about children from public scrutiny by leaving most care and protection decisions to families themselves.[2] As mainstream law has little role, traditional legal analysis has little purchase. A further immunising factor is the confidentiality which surrounds most family litigation. Family law is one of the areas where the "publicity principle" - that court proceedings should be conducted in public - does not apply.[3] Family litigation is considered deeply personal and private. Few details from family law cases now reach the public gaze.

Perhaps the most important, and most elusive, reason why family law resists criticism is to be found in the powerful and attractive stories it tells about itself. Even a cursory glance through family law decisions and literature reveals a number of persistent themes. The Family Court, for instance, is said to deal "with human feelings, not any arid question of fact or law" and "will respond to the human situation in any case which comes before it."[4] Results in child placement decisions are "personalised" to meet the

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1 See *Butterworths Family Law Guide* (4ed, Butterworths, Wellington, 1991) para 6.121 for discussion of the difficulties associated with ascertaining the wishes of children and with according them the appropriate weight.

2 Compare, *Director-General of Social Welfare* v *HS* [1991] NZFLR 373, 375 where Judge von Dadelszen commented that "officers of the Department of Social Welfare and others concerned in the administration of this legislation must never lose sight of the fact that, in the final analysis, it is for the Court to decide what is to be done in the best interests and welfare of the child."

3 See, C Baylis "Justice Done and Justice Seen to be Done - the public administration of justice" (1991) 21 VUWLR 177, 191.

4 *Tiller* v *Esera* 26April 1989 Unreported, Family Court, Wellington, FP 085.016.89 p9 (per Judge Inglis QC).

circumstances of the particular cases.[5] Children are "victims"[6] needing judicial protection. Judicial deliberations are based on "an enormous increase in our knowledge and understanding of human nature and behaviour and the forces that shape it."[7] Judges are aided in the "highly specialised task" of "understanding the family" by human science experts "trained and experienced in the wide range of human behaviour, arguably from a clinical point of view."[8] Much is made of the special responsibility parents have for their children - guardianship rights are therefore "entrenched" and equal.[9] Matrimonial property law is said to recognise "that in the general run each spouse contributes in different but equally important ways to the common enterprise which constitutes the marriage partnership."[10] To criticize family law is thus to criticize sensitivity to human feelings, concern for the vulnerability of children and even the notion of equality itself. It is to criticize some of the fundamental tenets of a decent world. It is little wonder, then, that family law is so resistant.

Some writers, however, have questioned the dominant perceptions upon which much of family law is based. Olsen, for example, has examined the costs of not doing this and argues that many family law scholars, by advocating only minor reforms, "convey the message that family law is basically fair" and "discourage us from considering more radical change."[11] Minow questions whether the "progression" towards individualism which characterises much modern family law is necessarily an accurate characterisation or necessarily good.[12] Broadly, these scholars do not buy the idea that family law promotes fairness or decency for everyone. They hold the stories family law tells about itself up to the strictest scrutiny to assess whose interests they serve and whose interests they neglect. Martha Fineman, in her book, *The Illusion of Equality: the Rhetoric and Reality of Divorce Reform*[13] does likewise.

According to Professor Fineman, family law scholarship should "evaluate critically not only outcomes but the fundamental concepts, values, and assumptions embedded in

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5 *Spence* v *Spence* (1984) 3 NZFLR 347, 350; *Kidd* v *Kidd* 3 May 1991 unreported, Family Court, Hastings, FP 021.128.89 p3.

6 An important early source for this characterisation was Goldstein J, Freud A and Solnit AJ *Beyond the Best Interests of the Child* (Free Press, New York, 1973).

7 *Hall* v *Hall* 22 August 1977 Unreported, Supreme Court, Auckland Registry 614.77, p7 (per Jeffries J).

8 GP Davidson "Counsel for the Child and Psychological Expert Witnesses in Custody and Access Cases" [1980] NZLJ 177, 177.

9 *Makiri* v *Roxburgh* (1984) 4 FRNZ 78.

10 *Haslam* v *Haslam* (1985) 3 NZFLR 545, 552.

11 F Olsen "The Politics of Family Law" (1984) 2 Law and Inequality 1, 4.

12 M Minow "Forming Under Everything that Grows: Towards a History of Family Law" [1985] Wisconsin LR 819. In New Zealand context, the emphasis on family decision-making in the Children Young Persons and Their Families Act 1989 might present an ideological move in the opposite direction - in that it downplays the relationship between the child and the state and empowers the family as a mediating body between state agencies and the child.

13 MA Fineman *The Illusion of Equality: the Rhetoric and Reality of Divorce Reform* (University of Chicago Press, Chicago and London, 1991) 9-10.

legal thought."[14] As her title suggests, the principal subject of her critique is the notion of equality,[15] particularly as it applies to property distribution at divorce. Fineman locates the drive from hierarchical to equality-based family law within the broader equality revolution which occurred in the middle decades of the century. The rise of the notion of equality in family law followed more general claims for racial, and particularly gender, equality. The equality rhetoric of these social movements provided the template by which divorce reforms were to be measured. But Fineman sees the appropriation of equality rhetoric in divorce reform as "antirevolutionary"[16] - promoting a view of marriage which denies the reality of many women's lives. In United States divorce law, she claims, the equality model is imposed on circumstances and situations that are far from equal.[17] Women are apparently treated "equally" by matrimonial property regimes which encourage a 50:50 split of assets yet women are then required to function in an unequal world of lower wages, reduced career opportunities and greater child-care burdens.[18] However attractive the rhetoric of equality might be, it is illusory.[19]

Such is the power of egalitarian rhetoric, it all but drowns out alternative stories. In her book, Fineman resuscitates one alternative family law story - a story which concentrates on the material needs of women and children in post-divorce families. One aim of *The Illusion of Equality* is to explain why the "needs" story is seldom heard; another is to explore ways of telling it. Examining post-divorce material needs provides a focus for critique of the symbolically attractive ideal of marriage as a partnership - an ideal reflected in equal distribution of property. For instance, a view of marriage as an equal partnership between spouses means that "[t]here are no 'junior partners' (children) legally recognised with enforceable rights to share in partnership assets."[20] Because focussing on material needs would, under the egalitarian view of marriage, be contrary to the ideal of partnership, the material needs of children, and by implication those of their post-divorce care-givers, do not easily find voice within the dominant rhetoric. Fineman argues that matrimonial property law should "inquire into and specifically define" factors to be taken into account when property is split - but not the usual factors which sometimes support deviation from the equality norm. Rather, she advocates a matrimonial property regime which would address squarely inherent inequalities between

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14 Above n 13, 9-10.

15 Fineman's approach may be located within the "sameness/difference" debate which permeates much feminist scholarship, particularly of law. One side of the debate sees the path to a better social order in terms of "sameness" of treatment between sexes despite their differences; the other side takes the view that difference should not be ignored or eradicated - rather, society should accommodate difference by "special treatment." See, CA Littleton "Reconstructing Sexual Equality" (1987) 75 California LR 1279, 1286-1304 for a survey and critique of these strands of feminist thought. Littleton characterises these approaches as "symmetrical" and "asymmetrical" responses to issues of inequality.

16 Above n 13, 33.

17 Above n 13, 30.

18 Above n 13, 29.

19 Fineman builds upon, but does not accept totally, the work of L Weitzman in *The Divorce Revolution* (Free Press, New York, 1985).

20 Above n 13, 43.

spouses and which would aid in predicting future problems which are generated by the material circumstances of raising children in a world where workplaces best accommodate the childless.[21]

The equality story not only permeates the law of property distribution. In chapters 5-9 of *The Illusion of Equality*, Fineman addresses problems with the appropriation of equality rhetoric in child placement decisions. She argues that reforms in United States child placement law, like those in its matrimonial property law - "have also been fashioned according to the ideal of equality to the disadvantage of women and children."[22] One symbol which comes under sustained attack in Fineman's book is the "sensitive father"[23] whose child-rearing abilities, "equal" to those of the mother, are reflected in joint custody presumptions in a number of States. In an illuminating passage, Fineman takes a paragraph from a "father-custody" study and alters the statements about fathers to refer to mothers:[24]

> [The single mother] is a highly educated, capable, self-confident person whose marriage has broken up because of [her husband's] change in lifestyle or increasing incompatibility. [She] seeks custody of [her] children because of [her] love for them and [her] confidence in [her] ability to perform [maternal] parenting functions, inasmuch as [she] had been fairly involved in caring and rearing [her] children prior to the disruption of the marriage. Many of these [mothers] have completed the adjustment process quite well...[P]rofessionals (involved in the determination of custody) should take into consideration this and other reports of seemingly positive and successful adjustment of custodial [mothers].

That the passage reads so oddly when in this form indicates something of the differences in the ways that mothers and fathers are treated in United States family law and in supporting social science literature. A policy change privileging mothers would require much more than merely mothers' "confidence" in their abilities to perform parenting functions. Mothers would have to show more than that they had been "fairly involved" in caring and rearing. Yet for fathers, this is seemingly enough. As Fineman says, "[c]ongratulating and suggesting rewards for a mother for showing love for her children and involvement in their care would seem ridiculous." On the other hand, "fathers doing much less than a typical mother were thus deemed worthy of praise and

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21 Above n 13, 179.

22 Above n 13, 79.

23 Smart critiques the iconography of the "new father" presented in "art" photographs depicting naked or part-naked men with "their" children. While acknowledging that "new fathers" no doubt exist, she also cites evidence suggesting that discussion about them far outweighs evidence suggesting that they are on the vanguard of a real trend. C Smart "Power and the Politics of Custody" in Smart and Sevenhuijsen (eds) *Child Custody and the Politics of Gender* (Routledge, London and New York, 1989) 1, 10-16.

24 Above n 13, 129-130. The original is in Chang and Deinard "Single Father Caretakers: Demographic, Characteristics and Adjustment Processes" (1982) 52 Am J Orthopsychiatry 236, 242. The square brackets indicate changes made by Fineman.

their efforts deemed to be due 'consideration.'"[25] That men are judged by a much less demanding standard than women[26] is predictable enough given that the results of this process - joint custody determinations and policies - correspond so neatly with the egalitarian ideal. Chip away at the dominant symbols, however, and the gendered basis of their production is revealed.

Fineman sees similar problems with recourse to alternative dispute resolution in child placement cases. As in New Zealand,[27] the vast majority of child placement problems are dealt with informally in the United States and involve members of the helping and social science professions. Most visible at the early stages of the New Zealand process are counsellors and social workers. In her book, Fineman maps the transformation in the United States from adversarial to "therapeutic" family law. The therapeutic model portrays itself as caring and sensitive; it is antagonistic towards the win/lose philosophy of the adversarial model and thus promotes sharing of the children's custody at the termination of their parents' relationship. Single parent custody is an anathema according to this model. By presenting divorce as an emotional process - rather than a legal one - to be managed by the careful input of the helping and social science professions, the therapeutic model changed the dominant child custody story. The dominant story now concentrates on how best the continued joint parenting regime can be managed and perpetuated.

In Fineman's view, there are at least three problems with this trend. First, it represents an important substantive change from the traditional clean-break principle to an emphasis on on-going relationships - yet it has been disguised as a mere change in process. A second problem, one which is common to judicial joint custody decisions, is that the joint custody preference can lead to increased state and paternal control on mothers' post-divorce lives. Increased paternal "participation" might for many mothers result in increased control over their child rearing practices. Finally, Fineman suggests that the helping model is premised on a largely fictitious horror story of maternal pathology. Functioning units made up of mothers and children are ignored in the divorce discourse which is dominated by images of children as victims of mothers determined to deny the input of loving fathers into their children's lives.[28] Fineman argues that most mothers will accommodate input from fathers, yet this image of maternal pathology is the image with which helping professions in the United States are fixated in their general enthusiasm for the shared custody antidote.

Much in *The Illusion of Equality* is argued powerfully and carefully. Yet the book perhaps suffers from its determination to address family law discourse at the "macro" level. The analysis could have been usefully supported by analysis of what powerful

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25 Above n 13, 130.

26 Above n 13, 129.

27 See GM Maxwell *Family Court Counselling Research Report 1* (Research and Policy Division, Department of Justice, Wellington) 53.

28 Analysis of this point in New Zealand will be different because "guardianship" usually vests in both parents despite any custody order: see Guardianship Act 1968, ss3, 6 and 10 and the discussion in *Makiri* v *Roxburgh* above n 9.

members of the legal community say at the "micro" level about families who come before them. Fineman's book presents a careful analysis of policy discourse, yet little is made of the stories which have currency in individual decisions. Similarly, the solutions she presents are generalised. She dismisses existing statutory provisions which allow deviations from the equality ideal at divorce rather lightly and gives little attention to what the mechanics of a reformed, "needs-based" property distribution regime might be. As a solution to the problems she sees with United States child custody law, she advocates adoption of the "primary caretaker principle": the parent who has been mainly responsible for the raising of the child will be appointed sole custodian unless he or she is found to be an unfit parent.[29] Fineman sees this principle as an appropriate recognition of the role most mothers play in the lives of their children. The suggestion would have had more impact had Fineman also grappled with some of the potential and actual problems that have been perceived with adoption of the primary caretaker principle in some States.[30] But, this is probably to criticize Fineman for failing in what she did not set out to achieve. It is not necessary to question everything all at once.[31] Works which question fundamental tenets of powerful and attractive institutions such as modern, "egalitarian" family law are bound to be somewhat abstract.

Some discussions of New Zealand family law have moved in similar directions. Dissenting voices are to be heard amidst judicial and extra-curial shared custody enthusiasms.[32] Writing on matrimonial property law includes critiques both of New Zealand judges' failure always to live up to the egalitarian ideal behind the Matrimonial Property Act 1976[33] and of the equality principle itself.[34] Fineman's book will be thought provoking in the New Zealand context because it gives scholarly support to the questioning of some of the things institutions such as family law hold dear or take for granted.

Fineman's book also suggests future directions for New Zealand family law scholarship. Family jurisprudence involves analysis of formal rules, policy questions and interdisciplinary processes. Much good work has and will be done in these areas. Yet family law is also cultural and symbolic. It generates attractive stories about itself, such as the "equality" story, whose cultural and symbolic power sometimes disguises the means of their production. *The Illusion of Equality* challenges family law

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29 See, generally, R Neely "The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed" (1984) 3 Yale L & Policy R 168.

30 See G Crippen "Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference" (1990) 75 Minnesota LR 427.

31 See, generally, HR Wishik "To Question Everything: Inquiries of Feminist Jurisprudence" (1985) 1 Berkeley Women's LJ 64.

32 See, for instance, MA Opie *Shared Parenting After Separtation and Divorce* (PhD thesis, VUW, 1989).

33 See, for instance, CA Bridge *Judicial Policy in the Division of Property Under the Matrimonial Property Act 1976* (LLM thesis, VUW, 1987).

34 See, for instance, V Ullrich "Matrimonial Property - Is there Equality Under the Matrimonial Property Act?" New Zealand Law Society Family Law Conference Papers - The Family Court 10 Years On (1991) 97.

scholarship to attend to family law as discourse. Attention to the symbolic and cultural aspects of New Zealand family law might reveal fairness and decency for all. On the other hand, it might reveal that some voices are heard more easily, that some discourses dominate and that some concerns are yet to find a voice.