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Review essay

Law's Families
By Alison Diduck. 241 pages. London: LexisNexis Butterworths, 2003; Cambridge: Cambridge University Press 2003
ISBN 100406967334. £19.99

Divorcing Responsibly
By Helen Reece. 272 pages. Oxford: Hart Publishing 2003
ISBN 1841132152. £35.00

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Being responsible in the new family law

Family law has experienced a transformation over the past two decades in many western countries such as England, Canada, the United States, and Australia, which has produced trends that sometimes appear to be at odds with one another. My own country, Canada, has witnessed a steady expansion of those who are legally defined as 'spouses' or 'parents'; an increase in legislated guidelines to direct decision-making in certain fields; a shift in focus towards parental responsibility and (to some degree) away from spousal responsibilities; a reinforcement of privatised economic responsibilities; an emphasis on extra-judicial dispute resolution processes such as mediation and collaborative family law; and a recent re-affirmation of freedom of contract (Boyd and Young, 2004). Some of these trends reinforce the responsibilities of family members towards one another, while others affirm the ability of adults to contract out of responsibilities. Various family law scholars have attempted to capture the contradictory nature of such trends. For instance, John Dewar identified four themes: the decline in significance of marriage as the central concept linking law to families and increased significance of cohabitation and parenthood; a shift from reliance on discretionary decision-making to statutory rules limiting discretion; a diversification in the sources of legal norms, with private contracting providing one such source and human rights another; and finally, a fragmentation of the family law system (Dewar, 2000). Dewar had earlier pointed to the 'chaotic, contradictory or incoherent' developments in family law and suggested that the chaos of family law was normal, rather than constituting a crisis (1998).

Two significant new books by Alison Diduck and Helen Reece offer both refinements of Dewar's themes and further explorations of the antimonies of modern family law, particularly in the context of law reform in England. The analysis of both authors rests impressively on diverse literatures from a range of perspectives and jurisdictions outside their own (and this review barely scratches the surface of the rich analysis offered by both authors). The two books emphasise somewhat different intellectual roots: Reece focuses more on theories of post-liberalism, whereas Diduck derives insight from a variety of socio-legal, extra-legal, historical and feminist approaches. Yet the authors share important commonalities, for instance, both drawing (as do many other English scholars of late) on the sociological work of Anthony Giddens (1992) on the new self, and Ulrich Beck and Elisabeth

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Beck-Gernsheim (1995) on individualisation and the 'normal chaos of love'. Both authors highlight the influence of post-liberalism on family law. These commonalities are not surprising, since both books were published in 2003 and presumably were written more or less parallel to one another in time.[1]

Reece's book can be read as an exploration of a subset of the themes within Diduck's, especially dejuridification and individualisation, with formal law being de-emphasised to some degree. Reece's overarching concern lies with post-liberalism, with divorce providing her case study of the post-liberal self and its relationship with community. *Divorcing Responsibly* provides both a sustained journey through theory (liberal, feminist, lesbian, communitarian, post liberal) and a journey through the new divorce law. In contrast, Diduck's concern in *Law's Families* rests more squarely, and more broadly, with the politics, history, and sociology of families and family law. Also, Reece focuses primarily on the *process* of divorce, whereas Diduck addresses more expansively both procedural and substantive topics within modern family law, including divorce (Chapter 3), children (Chapter 4), mediation (Chapter 5), alimony and property (Chapter 6), and child support (Chapter 7). The clearest points of connection between the two books are in Diduck's chapters on divorce and mediation. That said, as I hope to show, these two books complement each other and point to significant shifts in dispute resolution in family law – shifts that transcend national boundaries and can be detected in North America as well.

In particular, the themes of responsibility and 'the responsible divorce' emerge from both books. These themes are particularly significant, given that modern family law systems have been developing during a period that has witnessed the rise of neo-liberalism and privatisation, accompanied by a renewed emphasis on the rational liberal individual, choice, contract, and individual or personal responsibility (Boyd, 2004; Boyd and Young, 2004; Cossman and Fudge, 2002). However, Reece suggests that the story is more complicated and that the atomistic individual of liberal theory has been replaced by a post-liberal subject who is embedded in, and constituted by, a particular context. This move to the embedded subject has resulted in part due to the critiques of liberalism by feminists and lesbian philosophers, although more conservative critiques also play their role, and possibly have more influence.[2] Both Reece and Diduck write about the ambivalence of modern family law that emerges from this shift. Paradoxically, during a time when formal legal rules in relation to family have ostensibly diminished and family matters have been de-juridified, regulatory measures providing context nevertheless induce individuals to take responsibility for resolving their disputes in particular socially and politically acceptable ways (Diduck, 2003, p. 2).

Neo-liberalism is not, then, the only philosophical element at work in the current period. Rather, a new post-liberal emphasis on process, self-help, self-reflection and discovery has emerged. Divorce need not signal the end of a period in one's life; instead, it provides the perfect opportunity to remake one's life. As a Canadian newspaper article recently stated: 'Post-divorce remodelling is where it's at.'[3] Diduck and Reece offer insights as to the role of the legal system in this post-divorce remodelling. However, Reece grounds her work most clearly in an exploration of the post-liberal subject, while Diduck draws on literature from a broader range of theoretical perspectives. Diduck also takes a more clearly critical feminist stance in relation to gender-based power dynamics and the implications of the new family law philosophy for vulnerable groups such as women.

Reece argues that in the process of moving from a fault-based system of divorce to a no-fault system,[4] new ways of understanding what is right and wrong in family law had to be found. She

1 Diduck's book specifically refers to Reece's work, including *Divorcing Responsibly*.

2 In this review, I will not delve into Reece's careful and useful exploration of post-liberal theories, which are worthy of a review all to themselves.

3 Sarah Hampson 'My Divorce Makeover' *The Globe and Mail* 28 May 2005, L1-2.

4 In both England and Canada, the ground for divorce is breakdown of a marriage, but breakdown can be proved by fault-based behaviour such as adultery as well as by living separate and apart. Fault thus remains a factor even in these modern versions of divorce law, even though we tend to think we moved to a no-fault system some time ago.

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suggests that divorcing parties are now held accountable not for *what* they do, but rather for *how* they approach their decisions. For the first time, then, individuals can divorce responsibly – or, indeed, non-responsibly. The dichotomy is now drawn not between marriage and divorce, but rather between good and bad marriages; and, in particular, those who divorce well and those who divorce badly (Reece, 2003, p. 271). There may still be a bias in the system in favour of saving marriages, but individuals' choices concerning their relationships, including divorce, are also affirmed (see also Diduck, 2003, p. 61).

According to Reece, post-liberalism has an ambivalent attitude to divorce: 'we should remain married only if the marriage is consistent with our primary duty to live authentically' (Reece, 2003, p. 127). What defines a good or bad divorce now is thus not whether or not a spouse is at fault, but rather the process through which he or she divorces. Importantly, there is a shift in emphasis not only away from fault, but also away from substance and towards process. The content of substantive outcomes – for instance, achieving fair outcomes in relation to economic issues by taking account of the economic advantages and disadvantages to the spouses arising from the marriage or its breakdown, something that is emphasised in spousal support law in Canada[5] – has given way to procedural outcomes. Those who divorce well – using the right process and taking the time to reflect and be educated by the process through the appropriate information[6] – may leave their marriage without a 'civilised' post-divorce financial settlement (Diduck, 2003, p. 134), but they can still leave it with positively enhanced moral standing even if the substantive result is unfair.

In fact, the only substantive morality in the new responsible divorce is arguably that whatever the divorcing couple agrees to is right. In this process, attitude is key, as is emphasised by preferred dispute resolution choices such as mediation, which 'requires the adoption of an attitude rather than any particular decision' (Reece, 2003, p. 217). John Dewar also notes the emphasis on attitude or approach: adults who divorce well 'should be reasonable, self-denying, conciliatory, and fully conscious of the implications of their actions for themselves and others' (Dewar, 1998, p. 483). As both Diduck and Reece, as well as authors such as Shelley Day Sclater (1999) have pointed out, the emphasis on cooperation and altruism in the Family Law Act 1996 (U.K.) pathologised many experiences of divorce that otherwise might be seen as normal, such as anger, conflict, and the need to assert one's rights (Diduck, 2003, p. 61). Yet it may be important for individuals to be able to experience these emotions in their divorce process.

The requirement that divorcing parties assume the correct attitude has particular implications in relation to decisions and dispute resolution concerning children. Reece actually refers to the notion of 'therapeutic correctness' as the new standard of good behaviour, noting that it is especially strong in relation to decisions regarding children (2003, p. 217). For instance, there has been a shift away from a focus on preserving marriage for the sake of the children and towards instructing parents about how best to tell children about the impending divorce and how best to organise post-separation parenting. Moreover, the operative language in this model increasingly is drawn not from morality but from psychology or medicine (Reece, 2003, p. 225). Diduck notes that even after they separate, 'parents are expected to subsume their own interests, needs, and rights to the welfare of their children and to be "reasonable" . . . in negotiating the details of the co-parenting arrangements that law has already decided is in their children's welfare' (2003, pp. 90-91). Even mothers and

5 Divorce Act, RSC 1985, c. 3 (2nd Supp.), s. 15.2(6)(a). *Moge v. Moge* [1992] 3 SCR 813. Diduck (2003) suggests in Chapter 6 that this goal is less clear in the U.K.

6 Part II of the Family Law Act 1996 is offered by both Diduck and Reece as an example of a (partially failed) effort to introduce reflective delay and education explicitly into England's divorce process. Reece's chapters are cleverly organised to elaborate on each part of this process and their relevance to the post-liberal subject: Chapter 2 'Reflecting on Divorce'; Chapter 3 'Delaying Divorce'; Chapter 4 'Learning from Divorce; Chapter 5 'Informing Divorce'.

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fathers who did not desire or experience co-parenting before separation are expected to move towards that ideal after separation. Contact with non-resident parents becomes essential in order that this ideal be realised, and contact is conceptualised as the individual right of the child, reflecting the trend towards individualisation of children in the divorce process. Moreover, children as well as parents must be educated and internalise the normative message that contact is desirable and that they are responsible for operationalising this goal (Diduck, 2003, pp. 94, 95).

As with many concepts that appear benign on their face, the new normative model of responsible divorce has far from neutral (and possibly less than savoury) underpinnings. The new emphasis on process does not, say Reece and Diduck, necessarily mean that the legal system is agnostic towards the process, or, arguably, its results. Education is therefore key to inculcating virtue under this post-liberal model of divorce (Reece, 2003, Chapter 4). Even law has a role to play in *pushing* divorcing parties towards settling matters themselves. These processes appear on the surface to give parties more autonomy than litigation and to give priority to their own solutions, but at the same time they temper party control with behaviour modification. It is now acceptable to divorce, so long as one exercises a collaborative attitude in so doing, and takes responsibility for the breakdown of the marriage and its end. Reece and Diduck thus argue that there is a coercive element within this new responsible divorce model, even as it supposedly empowers parties to come up with their own solutions (Diduck, 2003, p. 61). A more benign way of putting this is that there is an expressive function of modern family law as it radiates messages and influences behaviour (Dewar, 1998, p. 483), and the key message at the moment is taking responsibility.

It is not at all clear to me that the shifting of moral responsibility for ensuring the proper process and outcome of divorce away from legal norms and on to individuals and process will result in better behaviour on the part of divorcing partners. Moreover, I fear that the consequences of imposing a norm of individual responsibility upon the still highly gendered terrain of family law can be problematic, especially for disadvantaged or vulnerable parties. Women's experiences of family relations do not necessarily fit well either with the primacy accorded under the responsibility model to the rational liberal subject or its emphasis on therapeutic correctness.

At this point, Diduck's book becomes particularly useful, for she identifies more explicitly than does Reece the difference between the families we live by versus those that we live with. The critical insights opened by this discrepancy between the normative family of law and the often gendered realities of the families we live with are carefully identified by Diduck (2003, p. 43), for instance in her chapter on 'Family Finances'. Diduck's notion of 'Two families', developed in Chapter 2, gives us a fresh way to consider the notion that the familial ideology that is often embedded in family law does not always correspond to the realities of familial lives. Diduck suggests that the traditional familial mythology of true, enduring love winning out against structural conditions has given way, but only in part, to a modern family myth, one that is equally idealised. This modern family myth is based more on modern values of individualisation and reflective choice in relation to both partnering and parenting (Diduck, 2003, p. 25). Family law can be seen as expressing a series of ambivalences in an (imperfect) effort to sustain both of these value sets (Diduck, 2003, p. 211). 'They instill in individuals an ethic of personal responsibility for maintaining political and social values of family stability, tradition and obligation, *and* free will and individual choice' (Diduck, 2003, p. 43). As Diduck makes clear, individuals will always have difficulty living up to this ideal of law.

Significantly, Diduck suggests that injustices can arise for the families we live with when their experiences clash with those of the families we are supposed to live by. Diduck is reluctant to concede that the rational liberal individual has completely given way to the post-liberal individual (2003, pp. 40-41). She suggests that 'the rational course of action in divorce is to be self-sacrificing rather than self-serving' (2003, p. 65), but she clarifies that this norm has gendered consequences. Diduck takes more care than does Reece to identify the ways in which this normatively masculine rational individual poses problems for women in family law (e.g. Diduck, 2003, pp. 64-66). For

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instance, the trend to speak of the legal subject of family law as gender neutral obscures the gendering processes that still exist in society, including within law itself:

> 'Law "speaks" of parents and spouses rather than of mothers, fathers, husbands and wives, and relies upon that subject exercising a form of free will in determining his or her course of familial action. At the same time, however, law plays an important part in constructing or reflecting clearly gendered familial subjects, through whom, for example, "spouse" *is* gendered and mothering is expressed differently from fathering.' (Diduck, 2003, pp. 41-42)

Post-separation parenting law provides one example of the flaws of gender neutral discourse. Ostensibly, the language of parental responsibility (now used extensively in Canada even though our legislation does not use this term), is invoked to encourage parents to act selflessly in their children's best interests and to avoid the parental rights discourse that often dominates this field. Whether this objective of acting selflessly in relation to children can be achieved is, however, another question, and negative impacts on women and children have been identified (e.g. Rhoades, 2002). As Diduck and numerous other authors such as Rhoades suggest, there is a heavier onus on mothers than on fathers to act responsibly in relation to children. In particular, it is mothers' responsibility not only to place their children's interests first, but also to ensure that children develop good relationships with fathers after separation or divorce, whether or not they had good relationships before and whether or not this is good or bad for children or their caregivers (e.g. Boyd, 2003). Women's own interests in moving on after divorce, or developing some autonomy in their own lives, must be negated in order that they take on this responsibility for nurturing father-child relationships. Moreover, the presumption in favour of contact is difficult to displace even where there is a history of violence (Diduck, 2003, p. 94).

Further, as Reece points out (2003, p. 230), parental responsibility does not necessarily mean engaging in tangible acts such as physical care or giving financial support to children. Rather, it signifies communication and the quality of the relationship a parent has with the child, as well as the attitude of the parent, thus abstracting it from the day-to-day care of children (see also Diduck, 2003, p. 90). As we have seen recently, even the Fathers 4 Justice Batman and Robin figures can show that they have the right attitude: they *care about* their children, even if they do not *care for* them very much (see Smart, 1991). Parental responsibility is, of course, also gendered in relation to the construction of male responsibility, specifically for child support. The father as distant provider in contrast to mother as caregiver was reinforced – indeed coerced – by the Child Support Act 1991 (Diduck, 2003, p. 180), which led in turn to the construction of fathers as victims and to the genesis of groups such as Fathers 4 Justice.

The most obvious example of the rise of responsible divorce, given its emphasis on process, is undoubtedly the increased pressure on intimate partners who are separating to use a conciliatory process that avoids conflict, litigation, and possibly using lawyers altogether. Mediation is supposed to encourage separating *parents*, in particular, to reorder rather than sever their relationship, for the sake of the children. As Diduck points out, 'its revolutionary impact is not surprising: mediation represents private, co-operative decision-making by responsible equals concerned to promote the welfare of children and families' (2003, p. 103). Desired processes leading to the 'good divorce' are not agnostic; rather they are geared towards the production of the 'bi-nuclear family' or 'post-divorce family' (Reece, 2003, pp. 159, 160), which emphasises ongoing contact even in the face of circumstances that might dictate otherwise. Moreover, these processes can be viewed as coercive, not only because many jurisdictions try to require an effort at mediation before access to other legal processes is permitted (Reece, 2003, p. 175), but also, Reece suggests, because some couples experience 'exhortations to cooperation as persecution' (2003, p. 159).

The problems that mediation poses for women who have experienced abuse or significant power imbalances in their relationships have been well canvassed (e.g. Bryan, 1992). At a broader level,

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Diduck's chapter 'The mediation revolution' reveals the subversive story beneath the official story of mediation as the 'civiliser' of family disputes. The benefits of a non-adversarial process to children especially are now touted to separating parents, and who among them would want to compromise their children's interests? The pressure to enter mediation and do the responsible thing can thus be significant. As Diduck says, mediation is about 'an individual's personal responsibility' for being reasonable, compromising and maintaining, even strengthening, familial relationships and obligations (2003, p. 103). A clear set of normative guidelines steer individuals' negotiations in the correct direction towards achieving the post-divorce family unit and mediator strategies coerce particular outcomes (Diduck, 2003, pp. 103, 122). In particular, children's needs override those of their parents: 'The good parent denies his or her own interests in favour of the interests of the children, and unless parents express their interests in this, the "right" way, they are assumed to oppose the child's interests' (Diduck, 2003, p. 119).

In contrast to mediation, the more recent phenomenon of 'collaborative family law', now taking off like wildfire in North America, re-introduces lawyers more centrally into the conciliation process, along with mental health professionals and financial advisers. Yet, the very premise of collaborative family law is that *process* is key and so it is a prime example of the responsible divorce model. Settlement out of court is the primary objective of collaborative law. The rhetoric goes as follows: 'It removes the adversarial element embedded in many divorce proceedings, and replaces it with an approach that consists of mutual respect and team problem solving.'[7] If the collaborative negotiations falter and a return to the litigation mode is expected, the parties are contractually obliged to start their dispute resolution process all over again, with new lawyers - and new bills. Needless to say, this scenario, typically agreed by contract between parties and solicitors, provides a clear financial incentive to settle responsibly, again without necessary attention to the fairness of the outcome.[8]

Inherent within the focus on mediation and collaborative settlements is an emphasis on private ordering. Divorcing responsibly involves being fully conscious of the implications of one's actions for oneself and others, which raises the spectre of freedom of contract and again illustrates the increasing emphasis on process over substantive results. It also illustrates the fact that this notion of responsible divorce permeates not only the non-court processes such as collaborative family law, but also court processes themselves, when judges defer to contractual arrangements. The question of the extent to which spouses can contract out of family law norms (such as equitable sharing of the economic advantages and disadvantages of a marriage) without the security of judicial review has been circulating off and on for some time in Canadian law. In cases from the 1980s, the Supreme Court of Canada privileged freedom of contract over the principles of spousal support.[9] The rigidity of this principle of living with one's agreement was tempered during the 1990s, partly due to extensive feminist critique related to inequality of bargaining power and gender-based *in*equality of women within heterosexual families (see Boyd and Young, 2004). However, recent decisions of the Supreme Court of Canada have returned Canadian family law to an expectation that women will stick by their agreements, almost no matter how unfair.[10] The discourses of 'fairness' and 'choice' have re-emerged, based on impoverished understandings of these concepts (Shaffer, 2004). Diduck illustrates the impact of private ordering on financial settlements in English law, and the ways in

7 'A No Court Approach to Divorce: Collaborative Divorce is a Revolutionary New Process', available online at <http://www.collaborativedivorcebc.org/>.

8 Collaborative family law has recently been introduced in England, currently with about 100 family lawyers having trained since 2003 to offer it (LNTV, 2005).

9 *Pelech v. Pelech* [1987] 1 SCR 810; *Richardson v. Richardson* [1987] 1 SCR 857; and *Caron v. Caron* [1987] 1 SCR 892.

10 *Miglin v. Miglin* [2003] 1 SCR 303; *Hartshorne v. Hartshorne* [2004] 1 SCR 550.

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which the emphasis on individual autonomy and responsibility detracts from doctrinal rules that gesture towards promotion of fairness in outcomes (2003, Chapter 6).

Clearly, women might be faulted for agreeing contractual arrangements that are not in their interest in a way that reflects their socialisation into norms of self-sacrifice. Reece offers an insight that might explain this phenomenon in relation to responsible divorce. She suggests that 'it is arguable that even the most radical re-evaluation of one's most fundamental characteristics involves merely finding oneself rather than actually changing oneself' (2003, p. 75). This insight indicates that post-liberal reflection and self-reflection may not enable either men or women to reject their socialised characteristics and change their behaviour, but rather will lead individuals to endorse decisions based on various aspects of their socialisation. If women are socialised to put their own interests behind those of others – children and spouses – then we might expect that divorcing responsibly may have different and heavier consequences for women than for men.

Divorcing responsibly thus produces some consequences that may generate injustices. Another possibly surprising aspect of the new model of responsible divorce is that it may be even more interventionist than the old fault based one, which looked, for example, into whether we were adulterous or not (Reece, 2003, p. 236). Reece concludes that under the responsibility model, since only the individual is even remotely capable of knowing whether she has tried her best to be responsible, a legal investigation is bound to be 'intense, intensive and deeply personal' (p. 236). Second, as discussed above, law needs to inculcate in divorcing individuals the necessary character traits that are a prerequisite to responsible behaviour. Third, responsibility presents itself as mere procedure; so the intervention wears a deeper disguise than if it purported to dictate results. So, arguably, the abolition of fault has led to increased not decreased levels of state intervention.

Returning to the newspaper article I quoted earlier, if the whole point of modern divorce is remodelling oneself – or 'biographical repair' as Reece might say – then we have to ask what influences our remodelling; it rarely occurs in a vacuum. Both Reece and Diduck offer us much food for thought about this new function of divorce and family law, with Diduck bringing a sharper focus to the ways in which the new family law may generate, or perpetuate, injustices, including those based on gender. Reece is not uncritical, however: she shows that we are encouraged to make choices, but that only certain types of choices are valid and we must be educated or persuaded as to how to make authentic choices. The aim of divorce law has shifted 'from prevention or control of divorce to ensuring that divorce is an educative experience' (Reece, 2003, p. 146). In addition, the process of divorce is now directed by an elite that includes not only the state but also the various industries of advice-giving, including therapists, mediators, and conciliators (Reece, 2003, p. 195). Finally, the education (coercive) process may never end, as every divorcing person will always inevitably transgress against the new norms of responsible divorce (Reece, 2003, pp. 228–229).

The brave new world of divorcing responsibly seems to be catching on, but there is much need for critical and feminist analysis of the (often gendered) consequences of this approach to family law. The post-liberal self has only an illusory autonomy in relation to divorce (Reece, 2003, p. 181). Moreover, the regulatory measures that shape its autonomy may actually reinforce conditions such as women's inequality in relation to parenting and family economies, as Diduck is especially effective in pointing out. These two books, when read together, offer an important basis for further family law research in the twenty-first century.

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