

J. Herbie DiFonzo and Ruth C. Stern,
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Culture of American Families,* Ann
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by

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In the very first sentence of their acknowledgments, law professor J. Herbie DiFonzo and attorney/social worker Ruth C. Stern note that they wrote this book on the law and culture of American families “to appeal to a broad range of readers.” They seek to do this through a blend of legal and social science that they believe “reflects the capacious dimensions of the issues involving American families.” Indeed, this is a valuable book that should be on every attorney’s book shelf, as well as be read by judges who deal with family law matters, court administrators who manage and keep family courts running, as well as family court social workers and guardians ad litem who need to understand the demographic and legal trends affecting their respective clientele. Academics who study history, sociology, family systems, and family law will also find much to value in this book.

It is a short book, with text of only 150 pages, but it covers vast swathes of family history and legal change all leading up to the current challenges facing American families and the courts that deal with families and address their legal issues. Non-academic readers who tend to skip the endnotes in academic writing will find value in these endnotes, as they not only provide citations to important cases that lawyers will want to include in their briefs and judges in their decisions, but the rich and detailed

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endnotes also provide helpful and hard to find statistical data on all types of cultural, sociological, and demographic trends affecting American families in the early twenty-first century. All of this raw data provides the underpinnings of the insightful observations and conclusions that are presented in this book.

While the title of the book suggests a broad canvassing of law and culture affecting American families, the primary focus of the book is on how families are legally recognized and treated by family courts when issues of custody and parenting arise and require legal resolution. Financial aspects of family law and divorce are certainly touched upon, but the primary focus is on family structure and how legal categorization and treatment have not kept up with the demographic changes in society and culture. The authors do not just present problems facing the family and family courts, but they offer opinions on the causes of the problems and suggested solutions, some of which will be surprising to readers. While the authors are direct and succinct as to the problems and their suggested solutions, they are not overtly political and unnecessarily provocative as so much writing these days on family culture tends to be. That is no small feat given the polarization and politicization that family law issues seem to take on in our current culture. This accomplishment is on display in their introduction where the authors set out the objective of the book as follows:

One of our principal objectives is to reframe family law so that it properly addresses the way 21st-century American families constitute themselves and live out their lives. Our current system reflects an outdated set of rules privileging marriage and biological connection to children. The trends toward cohabitation and de facto parenthood are strong and getting stronger, and we propose that the formal legal system be adjusted to reflect the actual shape of today's families. At the same time, it is critical to point out that the looser and less-established forms of American families are not conducive to family stability or children's welfare. The social science research on these points is overwhelming: nonmarital unions are not as healthy and long-lasting as marital ones, and children do not benefit from the parade of partners that often characterizes cohabitating relationships. (p. 3).

This insightful look at the American family and family law is broad in its coverage. The first chapter discusses the history of marriage and how it has changed as an institution both culturally and demographically over the decades. Included in the discussion are not just changing views and perceptions of marriage, but

data on trends as to average ages when individuals marry and the impact this has on family formation and structure. The book also discusses the relevant data on the economic background of those getting married (the wealthy and educated) and those not getting married (the poor and uneducated), as well as the dramatic negative impact the declining marriage rate and rise of single or unwed parenting has had on childrearing. These observations are important; while many practitioners are experiencing these trends firsthand in their practices, the discussion of how America has reached this stage of family structure and legal status is both sobering and helpful in coming to grips with the changes in our family law practices that we are all seeing—more cases with unwed parents, non-traditional family arrangements, third party custody, and complex cohabitation arrangements often with subsequent marriages occurring after long periods of cohabitation.

The second chapter continues on with this discussion, looking at why couples began turning away from the standard approach to finding happiness and fulfillment through a widely accepted family structure—a heterosexual marriage early in adulthood with a small number of children born to the couple early in their marriage. In this chapter, the rising prevalence of cohabitation outside of marriage and single parentage is discussed in great detail, as are the demands for gay marriage and changing gender roles, all of which have had an enormous impact on the structure of families and how the law treats them. The third chapter makes a compelling case for the significant legal advantages that arise from marriage and incisively describes the substantial economic benefits that flow from marriage and the important positive impact it has on raising healthy and happy children.

Some of the best writing of the book emerges in the handling of assisted reproduction in chapter four. Not only is the law underpinning this complex legal sub-specialty of family law well presented, including hard to find demographic statistics as to the pervasiveness of the processes, but assisted reproduction practices are contrasted with adoption practices. Further, the roles of all of the participants in the assisted reproduction cases are carefully analyzed—including the intended parents, the surrogates, and even the children born of the processes. As an ex-

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perienced assisted reproduction practitioner, this writer found these sections to be utterly fascinating and extremely useful. When the complication of same sex couples was added to the mix, along with the challenges flowing from the pervasive and ongoing debate surrounding same sex marriage and parenting, the level of analysis is enriched still further. Helpful case studies were included in this chapter, most of which were based on the prominent cases that have emerged in assisted reproduction in recent decades. This discussion will be of assistance to a family law professional who has never handled an assisted reproduction matter, as well as to those who are very experienced in the area.

Chapter 5 discusses in some detail how parenthood has changed in the twenty-first century across the broad spectrum of families that now exist in this country's ever-changing legal landscape. The discussion includes unwed heterosexual and same sex couples, persons having children without a partner, step families and other blended family arrangements, as well as third party custody and parenting time arrangements. Chapter 6 looks at the fluidity of American living arrangements, considering the rise of cohabitation outside of marriage, the dramatic increase in the numbers of stepfamilies, the spread of assisted reproduction and gestational surrogacy, and the increase in same sex couples raising children and pushing for the right to marry. It is important to again observe that these authors do not view this growing diversity in family structure and function as entirely positive; many of their concerns flow from the economic and social realities of society and the growing body of studies suggesting that children are not doing well in these less stable family structures occurring outside of marriage, as well as their significant concern for these impacts on future generations of children.

Chapter 7 explores the separate spheres of courts and legislatures in their development of family law, examining how the current legal system helps, hurts, or ignores nontraditional families. According to DiFonzo and Stern, legislatures are "slow-moving, contemplative bodies that concern themselves with broad issues of social policy" whereas "courts, by contrast, are preoccupied with gritty, day-to-day realities and are more in touch with actual living families." (p. 8). The authors view the courts, more so than legislatures, as the places where solutions will be found to the current problems facing families. Judges,

who have the practical experience and insight to develop and apply legal remedies to emerging legal forms, appear to be the best hope to address these dramatic changes to family structure and legal process in ways that protect and advance the interests of children and their families. It seems that most family law professionals would agree with that prognosis based on experiences in trying to change the law legislatively in these polarized and politically charged times. Family courts certainly have their challenges, but the incremental approach of the common law seems to be the best venue to address this upheaval.

In their introduction, DiFonzo and Stern succinctly summarize the current legal and cultural status of the American family when they state that:

nontraditional families, whether born of technology or nonmarital partnerships, present new complexities in apportioning rights and responsibilities. Old presumptions of paternity and even maternity no longer apply, and biological ties are no longer strictly determinative. . . . To keep pace with cultural change, family law is shifting its focus from biological to functional norms. (p. 2).

After deep and insightful analysis fully supported by quantifiable data and cogent reasoning, they conclude that a family law system that is based on presumptions that are no longer the reality is going to struggle in managing the complex issues that come before it for resolution. Vast numbers of families are no longer built on heterosexual marriages and children with biological connections to their caregivers. While the authors are clearly and unequivocally proponents of the importance of marriage and stable, committed parental relationships as providing the best outcomes for children, they are also realistic in observing that American culture and society, for better or for worse and for both good and bad reasons, has moved beyond that paradigm. They appropriately advocate for a legal system and culture that recognizes and enforces legal parentage based on the function of parenting and the nature of the relationship of the parent figure with the child—whether that parent figure is a married spouse or a *de facto* parent. That is a conclusion that if vigorously applied in family courts and by the professionals engaged with families would go a long way towards bringing much needed clarity to family law and stability to the American family.

