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The Household: Informal Order Around the Hearth

By Robert C. Ellickson, Princeton and Oxford: Princeton University Press, 2010. 272 pp. ISBN 978-0691147994 £13.95 paperback

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Domestic relationships in a variety of household formations are a topic of great interest to many legal academics working in areas as diverse as property law, contract law, family law and trusts law. The focus of academic enquiries has been predominantly on the domestic arrangements of spouses and latterly, with the rise in cohabitation in western societies,¹ cohabiting relationships as well, specifically on issues arising when these relationships are terminated, in what Ellickson calls the endgame. Recently, some legal academics have begun to expand these intellectual enquiries by, for example, questioning the normative conceptualisation of the dwelling place as a home (Fox, 2007). What have been less theorised however are the phenomenon of the household as an institution in its own right, whether or not the participants are related as a family,² and the domestic practices of household participants during the currency of the relationships, gaps Ellickson seeks to plug in this book. A novel aspect of Ellickson's book is his concern over the ways in which household formation and governance are shaped during the existence of the household relationship – i.e. in what he describes as midgame – since the preoccupation of much of existing legal scholarship has been with the endgame resolution.

Households are multi-stranded and tend to be more transitory than families, especially where the household occupants are socially distant. They comprise multilateral relationships involving three

¹ In the UK, for instance, cohabitation rates have been on the rise. Based on the 2001 Census conducted by the Office of National Statistics, there are just over 2 million cohabiting couples in the UK, a rise of 67% from the numbers in 1991.

² Ellickson in fact reminds us that a distinction should be drawn between family and marriage and the household, in that entry into and exit from household relationships can be achieved with relative informality, and those relationships also tend to be more fragile.

possible groups: co-occupants, co-owners, and both co-occupants and co-owners. In the book, Ellickson explores how and why individuals make the choices they do in forming household relationships and in shaping their domestic arrangements. The book comprises nine chapters in which Ellickson develops several themes. Firstly, he considers the impact of less recognised variables such as legal principles and transaction costs on household formation. Ellickson adopts a liberal discourse in the book, with one of his key arguments being that liberal principles of private property applied to inputs into household production such as land, capital and labour, freedom of contract and freedom of exit provide ambient conditions for the development of a dynamic market in household forms. For Ellickson, these three-fold liberal entitlements are crucial to the governance of household relationships as they provide participants with the potential to be independent agents. For instance, in chapter 2, Ellickson alludes to the way in which freedom of exit is a particularly useful entitlement: the threat of exit empowers household occupants to negotiate the terms of their occupancy. Other developments such as women's increased work opportunities and laws providing for easier exit from the household relationship, e.g. no-fault divorce and the more straightforward partitioning or sale of property, place household occupants in a better position to negotiate a greater allocation of household surplus (p. 26). Moreover, the acknowledgement of the rule of law in a liberal society further facilitates contract formation between household occupants and outsiders, thereby reducing the need for larger household membership in order to produce sufficient outputs to meet the household's consumption needs.

The second theme is, relatedly, the strong influence of transaction costs on the coordination of households. Ellickson argues in chapter 3 that transaction costs motivate people to form households with a small number of intimates in preference to strangers due to the higher levels of trust and homogeneity in interests among intimates. This engenders greater cooperation between household participants which in turn reduces the costs of decision making and monitoring the household. Given the trust in relationships between intimates, he asserts that household coordination between

intimate householders is predominantly based on a process of gift exchange³ which is less costly and more satisfying than formal contracting. Ellickson further argues in chapter 6 that transaction costs also cause household members to prefer conferring ownership on those occupants who contribute the at-risk capital for the acquisition of the property. As capital providers are most vulnerable to exploitation, Ellickson submits that the conferral of ownership is effective compensation to owner-occupants for undertaking that risk. Ownership gives rise to two further intra-household relationships: between co-owners and between co-owners and co-occupants. Drawing on the theory of the firm, Ellickson demonstrates how transaction costs influence the way in which the household enterprise is then coordinated by both groups' members in their intra- as well as inter-relationships.

There are clearly certain advantages to renting rather than owning the dwelling unit. These include greater ease with which to exit the household relationship and greater residential mobility. Nonetheless, Ellickson asserts that transaction cost considerations can influence co-occupants to become co-owners in order to, for instance, pool capital in the acquisition of the property and/or spread the risks of adverse circumstances like illness, injury and unemployment. External legal measures such as regulatory, welfare or fiscal measures can also affect the dynamics of household formation. Rent control, for example, may affect people's choices of where and with whom to set up a household. To further demonstrate the effect of transaction costs on the optimality of household co-occupancy, Ellickson from time to time draws comparisons between conventional intimate households and larger household communities such as secular (e.g. condominiums and co-housing) and religion-based (e.g. Benedictines and Hutterian Brethren) intentional communities. He illustrates how the complexities of governing larger households and the issue of transaction costs have led to most such communities, aside from the religion-based intentional communities, keeping their household membership low, i.e. to no more than two to three dozen.

³ Ellickson distinguishes between gift exchange and altruistic giving, with the former based on the reciprocal spontaneous exchange of services.

A third theme the book considers is the ways in which the study of the household helps to shed light on the extent to which small-bore private law⁴ affects household coordination. This theme is developed most comprehensively by Ellickson in chapter 8 where he asserts that most people tend to avoid or minimise the involvement of formal legal processes. He states that the preference is to organise household arrangements informally and beyond the shadow of private law. This is particularly the case with intimate households where formalisation is not only more costly and time-consuming but also antithetical to the nature of trust in a relationship between intimates. Household participants tend to favour a form of governance that will enhance their sharing of household surpluses. In so doing, householders generally prefer to adopt a decentralised and informal method of governance. In the case of intimate householders, they are more likely to opt for a consensus approach, rather than a majority vote or unanimity, to decision making (p. 98) and low-level household rules, both substantive and procedural, to govern the household relationship. In such households, these low-level rules tend to arise from 'second-party rules', i.e. rules that are generated by the household participants through their practices over time, contracts (usually informal) made among themselves and also rules formulated by organisations that they establish (p. 101). Crucially, Ellickson asserts that these low-level household rules are based on relationship-specific norms which arise from the reciprocal acts of cooperation between participants and against a backdrop of gift exchange, a process of low-level coordination (p. 103).

In addition to low-level household rules, Ellickson points to two other potential sources of rules that may also influence the household governance structure: ambient social norms and legal rules. Ellickson, however, takes the view that legal rules are more likely to have relevance in endgame disputes rather than in the midgame relationship. The uptake of legal rules is generally low by household participants in midgame since the spirit of 'give-and-take' is still strong among participants: transaction costs are lower when midgame issues are resolved informally. Alternatively,

⁴ Ellickson describes small-bore legal rules as those the scope and effect of which are insufficient to qualify as being 'foundational' rules of a liberal society like the three core liberal principles of private property, freedom of contract and freedom of exit: see p. 50.

Ellickson argues that a household participant may threaten to exercise his or her right of exit to discipline other participants and/or to ensure a sufficient flow of household surplus in his or her direction. Ambient norms, concedes Ellickson, can strongly influence the governance structure of the household in so far as these are internalised by participants. For instance, a strong adherence to gender norms concerning the allocation of household responsibilities may disproportionately disadvantage women in terms of allocation of household tasks which may in turn impair their share of the household surplus.

While Ellickson acknowledges the problem, he seems somewhat overly optimistic about the ability of a liberal discourse to resolve the matter. The same may be said of Ellickson's response to the possible problem of exploitation of a vulnerable participant by the other members of a household.⁵ In these situations, Ellickson places great faith in the ability of a household participant to discipline or control the others through threatening to exercise, or indeed exercising, his or her liberal freedom of exit. Ellickson is mindful of criticisms levelled at liberalism by feminist and non-feminist commentators. For instance, in chapter 2, he notes the concerns raised by Milton Regan (1999) about the use of liberal discourse in relation to intimate relationships. In chapter 5, he likewise acknowledges the concerns of feminist commentators about the limitations of self-determination and of individuals as autonomous decision-makers. These concerns, however, are dealt with somewhat cursorily in the book, with Ellickson coming down in favour of the ability of liberal principles – particularly, the freedom of exit as a disciplining tool – to manage. It is difficult to be fully persuaded by liberal arguments though when these are weighed against the countervailing evidence of economic inequalities within intimate household relationships which may be caused by factors such as adherence to gender norms in determining the allocation of household responsibilities. This can in turn affect matters such as power and control over decision-making and lead to the disempowering of vulnerable household participants from exercising the core liberal entitlement of exit (see e.g. Pahl, 1989; Tichenor, 1999; Vogler, 1998 & 2005; Powell & Van Vugt,

⁵ See chapter 2 of the book.

2003; Kenney, 2006). A liberal discourse may do no more than offer formal equality rather than equity to those who are indeed vulnerable parties within the household.

Notwithstanding the reservations that one might have about Ellickson's liberal arguments, this book is a welcome addition to the literature. It covers an area which has to date attracted limited academic critique but one which certainly merits closer academic study. It provides academics and students with a keen analysis of the wider phenomenon of home-sharing, with an interesting, albeit liberal, perspective on the household. Most importantly, this book raises academic consciousness of the significance of and need for greater interrogation of the household as a legal phenomenon.

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