Families, Inc.

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Allison Anna Tait, *Corporate Family Law*, 112 **Nw. U. L. Rev.** 1 (2019).

From *Dallas* and Dynasty to *Hobby Lobby*, NewsCorp, and the First Family, American culture is replete with the successes (and failures) of family businesses. But interestingly, even as family businesses are touted as the "backbone" of the American economy (P. 5.), they fall outside of the logic of corporate law. Corporate law posits that firms, whether publicly traded or privately held, seek to maximize shareholder profits. That is, corporate law "presupposes rational actors making rational choices" aimed at maximizing shareholder value. (P. 4.) On this theory, it is the individual's responsibility to make decisions that will protect her interests, economic or otherwise, in the business.

But as Allison Anna Tait makes clear in *Corporate Family Law*, the assumptions that undergird most businesses do not always hold true for family businesses. As an initial matter, corporate family members do not acquire their interests in the business in the same way that others do. Rather than purchasing shares through bargaining in a market, most family members acquire their interest in the family business through entrepreneurship, or more likely, as bequests and gifts. As importantly, corporate family members do not bargain in the same way as traditional corporate shareholders. Corporate family members are, in the terms of behavioral economics, "bounded" rational actors, whose decisions are not shaped exclusively by a desire to maximize profits. (P. 4.) Their interests, by contrast, "are enmeshed in a complex set of interlocking relationships that intertwine the personal with the professional." (P. 4.) As such, their decisions may be impacted by "personal tensions, desires, and loyalties." (P. 5.)

As Tait explains, corporate law's underlying assumptions, which prioritize rational actors and efficiency, miss essential aspects of the intimate relationships that shape family businesses. Unlike the neutral efficiency that typically characterizes the behavior of firms, corporate family members' actions may be fueled by or are subject to affective ties, deep-rooted history, and in some cases, even childhood slights, and petty jealousies. In stark contrast to their traditional corporate counterparts, corporate family members "operate from a position of bounded self-interest; they are idiosyncratic bargainers who may prioritize values over profits and family legacy over maximal efficiency." (P. 5.) The problem, of course, is that corporate law has failed to appreciate the degree to which family businesses confound the traditional tropes about corporate governance.

Tait aims to rectify the oversight. In *Corporate Family Law*, she carefully details the various ways that family businesses depart from the traditional corporate law model. And as importantly, she contrasts corporate law's approach to protecting minority shareholders with family law's approach to protecting economically vulnerable spouses during dissolution. In the corporate context, majority shareholders frequently have opportunities to exploit the position of minority shareholders. And while some jurisdictions may enforce a heightened fiduciary duty, or impose other obligations on majority shareholders, in order to protect minority interests, the standard for enforcing these protections is often impossibly high. Put simply, corporate law places the onus on individuals to bargain in ways that maximize their interests.

Analogizing the position of majority and minority shareholders in a corporation to spouses in a marriage, Tait draws important comparisons between family law and corporate law. If corporate law emphasizes individual responsibility, then family law takes a far different approach—one that acknowledges the uniquely intimate circumstances in which spouses bargain and the particular vulnerabilities that spouses may assume over the course of the marriage. As she notes, family law makes multiple provisions for protecting the interests of the minority shareholder in a

marriage—usually the wife. In divorce, family law protects the economically vulnerable spouse who may have foregone educational and other opportunities to raise a family, support a spouse, or contribute to the family business by valuing his or her contributions to the marriage as part of the equitable distribution of marital property. Likewise, in probate law, elective share provisions ensure that a spouse will not be left destitute after her partner's death.

While these protections seem unremarkable to those well-versed in family law, as Tait goes on to explain, family law extends these protections to the corporate setting by making them applicable in circumstances where spouses own and operate a business together. On this account, it is not just that family law values the indirect contributions of the more vulnerable spouse in distributing marital property; it is that family law will consider the family business as marital property and allow the more vulnerable spouse to share in the proceeds upon divorce. Likewise, if one spouse dies intestate and the couple had no children, the surviving spouse may receive the decedent's shares in the company. If they did have children, many jurisdictions still allow the surviving spouse to take a share, albeit a smaller share.

The comparison between corporate law and family law makes an important point—the family is a unique setting, and, even where it is overlaid with corporate interests, the idiosyncratic nature of family life does not necessarily map on well to the contours and expectations of corporate law. For these reasons, Tait offers a bold prescription. She seeks to build "a new corporate family law that will benefit all corporate family members." (P. 48.)

There is much to recommend this article. Tait's observations about the mismatch about corporate law and family businesses recall earlier scholarly conversations about bargaining in the context of intimate relationships. As alternative dispute resolution and private settlement have become increasingly common in divorce practice, many have noted that the approach of "getting to yes" may be ill-suited to the familial context, where parties are neither dispassionate nor neutral about outcomes.[1] After all, in circumstances where the family home or custody of a child is at stake, the parties are unlikely to bargain in ways that maximize efficiency over other values. In this way, Tait extends the insights of Lewis Kornhauser and Robert Mnookin to show that the assumptions built into private ordering may break down in circumstances where the intimacies of family life shape the scope and nature of bargaining.[2]

The article also makes clear the dangers of doctrinal siloing. By this I mean the tendency of particular doctrinal areas to view themselves as self-contained and insular, rarely acknowledging the degree to which boundaries between doctrinal areas frequently—and uncomfortably—overlap. This caveat is especially pertinent in family law. Although family law often understands itself to be a self-contained domain dealing exclusively with marriage, divorce, and children, Tait makes clear that what may be considered family law is actually quite broad and diffuse. In this circumstance, the law governing corporate entities is a form of family law insofar as it is applied to family-owned businesses. Likewise, Tait shows that corporate law is also unnecessarily siloed. More than a third of Fortune 500 companies are family-owned and controlled. (P. 6.) Yet, the question of families rarely makes its way into corporate law, just as corporations rarely make their way into family law.

It would be interesting to extend Tait's critique of family law exceptionalism further to examine the marriage exceptionalism that undergirds family law. For example, just as Tait painstakingly dissects the many ways that family law protects economically vulnerable spouses (family law's equivalent of the minority shareholder), it would be worthwhile to interrogate (or challenge) family law's prioritization of marriage at the expense of other familial relationships. What would it mean for family law—and family businesses and corporate law—to prioritize the parent-child relationship, or more intriguingly, the sibling relationship? The possibilities are as intriguingly disruptive and thought-provoking as Tait's article.

In all, *Corporate Family Law* is a rich and nuanced exploration of two doctrinal areas that are rarely in conversation. In Tait's capable hands, the connections between corporate law and family law are clearly articulated, such that we may begin to imagine what would be required to make the law responsive to family businesses and the business of family life.

1. *See* Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 **Buff. L. Rev.** 44 (1992) ("explor[ing] power disparities between husbands and wives and the impact these disparities have on the spouses' relative negotiating abilities."); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 **Yale L. J.** 1545, 1610 (1991) (discussing the way in which mediation "fails to fulfill its promise as gentler alternative to the adversarial system" and can in fact be "destructive to women."); Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 **U. Mich. J. L. Reform** 1015, 1017 (1985) (discussing, among other things, the capacity of "divorcing spouses [] to make deliberate and informed judgments necessary to decide whether a particular agreement is in their interests."); Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 **Ind. L. J**. 453, 473 (1998) ("[B]argaining at divorce occurs in the shadow of background rights to alimony, children, and so forth….Background rights accorded women by current law provide women with little protection."); Jana B. Singer, *The Privatization of Family Law*, 1992 **Wis. L. Rev.** 1443, 1540 ("There is substantial reason to suspect that mediation is significantly more likely than adjudication (and lawyer-conducted negotiation) both to reflect and to reproduce power imbalances between the sexes.").
2. Lewis Kornhauser & Robert Mnookin, *Bargaining in the Shadow of Law: The Case of Divorce*, 88 **Yale L. J.** 950 (1979).

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