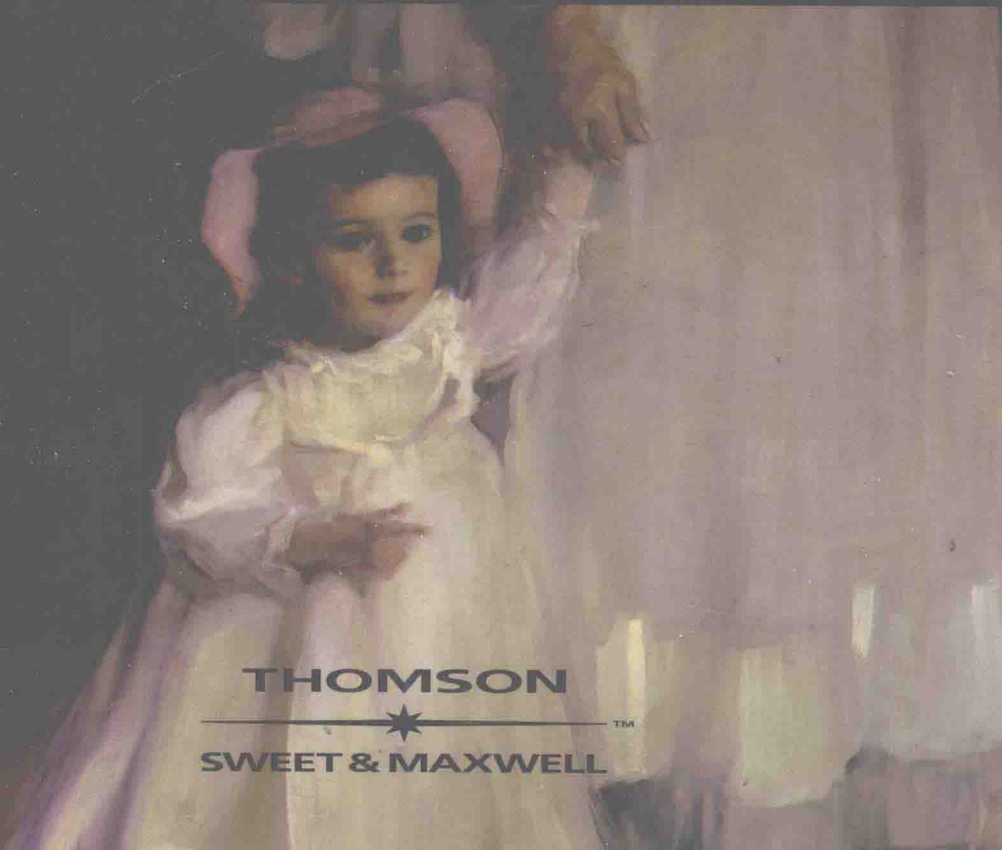


CRETNEY

PRINCIPLES OF FAMILY LAW

EIGHTH EDITION

JUDITH MASSON
REBECCA BAILEY-HARRIS
REBECCA PROBERT



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SWEET & MAXWELL

CRETNEY
**PRINCIPLES
OF
FAMILY LAW**

EIGHTH EDITION

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PREFACE

The aim of this book continues to be not only to explain the law as it is, but to give an account of its historical background, to analyse the factors underlying its development and to stimulate discussion of its effectiveness as an instrument of social policy in the context of the social realities confronting the legal system early in the twenty-first century.

Providing an account of current family law is a challenge exacerbated by the fast pace of change in family practices and the continued desire by the Government, even after 11 years in power, to leave its mark throughout the statute book. Legislation does not necessarily lead to implementation, as the *volte face* on divorce reform and the abandonment of parts of the Family Law Act 1996 showed. This debacle appears unlikely to be repeated, and the size of the Government's majority suggests that Bills currently before Parliament are likely to be enacted, largely in their current form. There is far more doubt about the future of the Law Commission's proposals for the financial consequences of cohabitation breakdown (Law Com. No. 307). On March 7, 2008, the Justice Minister announced that the Government wanted to examine the cost and efficacy of the Scottish scheme before taking further steps.

The five years since the last edition has been a very productive period for legislators, and has produced some very radical changes to family law and for society. The Civil Partnership Act 2004, together with a much celebrated occasion at the Windsor Guildhall when Elton John and David Furnish formalised their relationship, marked the acceptance in law and broad sections of society of same-sex relationships. The Gender Recognition Act 2004 has allowed transsexual people to change their legal identity and enter into new relationships in their acquired gender. The Domestic Violence Crimes and Victims Act 2004 has criminalised the breach of non-molestation injunctions in an attempt to show the seriousness of such behaviour and provide better protection for victims. Economic changes and government policies promoting employment as a means of tackling child poverty have increased the proportion of parents of young children in employment. Rights to maternity, paternity and parental leave, introduced through EC law, are changing family life radically for many parents. So far as case law is concerned, the courts are still working out the implications of fairness for post-divorce financial arrangements and examining trusts and the family home. The opinions of the House of Lords in *Miller; McFarlane* [2006] UKHL 24 have explored approaches to fairness in big-money cases but have not provided the degree of clarity that could promote settlement; *Stack v Dowden* [2007] UKHL 17 has similarly not had the desired effect of increasing certainty for cohabitants over shares in the family home.

Nor has child law stood still. The Adoption and Children Act 2002 was finally implemented on December 31, 2005; the courts are now beginning to use their powers to make special guardianship orders, providing security for children without the severance entailed by adoption. Almost 20 years after the signing of the United Nations Convention on the Rights of the Child, recognition is being given to children's rights; the Children Act 2004 established the office of Children's Commissioner for England—a similar post but with a broader remit having been established by the Children's Commissioner for Wales Act 2001. The courts are also indicating a greater willingness to allow children to participate in proceedings that are regarding them. In the area of private law, campaigns by men's organisations, such as Fathers4Justice and concern from the judiciary has focused government attention on the limited ability of the courts to enforce orders for contact in the face of obdurate resistance by the parent with care. The government's response, the Children and Adoption Act 2006 (currently scheduled for implementation in the autumn of 2008), glosses the Children Act 1989 with a sheaf of new provisions, which on close examination involve changes to the law that scarcely justify the paper on which they are printed. In the area of public law, the effects of the Human Rights Act 1998 are continuing to be felt, with the courts giving far more attention to ensuring that local authorities have followed proper procedures in consulting parents. The problem of costs and delay in childcare proceedings remains, but in April 2008, a new system was introduced (the Public Law Outline), which seeks to divert cases from the courts and improve the quality of the applications that are made. However, massive increases in the costs of bringing proceedings from May 1, 2008, ostensibly as part of a policy to make the civil courts self-supporting, are likely to have a much greater effect on the number of proceedings and the protection provided for children in the most adverse circumstances. Further aspects of child law are currently before Parliament, particularly the Child Maintenance and other Payments Bill, which makes further reforms to the child support system, the Children and Young Persons Bill, which seeks to raise the quality of provision for looked-after children, and the Human Fertilisation and Embryology Bill, which amends the law of parentage where children are conceived using assisted reproductive technology, allowing recognition of the second parent in lesbian couples and applying a system of dual consent where donor gametes are used for clinical procedures. These reforms are referred to throughout, although their enactment and date of implementation remain uncertain.

The first edition of this book, published in 1974 and used by the first author as an undergraduate text, was 369 pages long. By the fourth edition it had grown to 1,018 pages. I was pleased to be invited by Stephen Cretney to write the chapters on children for the fifth edition and have continued to do so, also taking over Chapter 6 on State Support for the Family for this eighth edition. Rebecca Bailey-Harris joined Stephen and myself for the seventh edition and has authored Chapters 7, 12 and 13 for this edition. Following Stephen's decision not to continue writing this book after his retirement, I was delighted that my former

colleague Rebecca Probert agreed to join the team. She is responsible for the rest of the text. Happily, Stephen Cretney agreed to continue with his important work of identifying a picture for the cover that would capture an aspect of family life in art.

The authors hope that they have done justice to Stephen Cretney's work in completing this edition. The law is stated on the basis of the materials available to them on April 30, 2008.

Judith Masson
May Day, 2008

Valedictory Note by Stephen Cretney

I am deeply grateful to Judith Masson, Rebecca Bailey-Harris and Rebecca Probert. The text of the present edition of this book is entirely theirs, and I am glad that this should be so: family law must keep pace with the social realities that it governs and may influence, and there comes a time when the author of the first edition (published nearly 35 years ago) rightly makes way for new generations.

I have always greatly enjoyed choosing the picture decorating the cover, and the present authors have kindly allowed me to suggest the beautiful image painted by the American artist Cecilia Beaux that appears on this new edition. I believe that many great works of art tell a story, or at least convey messages and different views—whether about the apparent subservience of the nurse (perhaps brutally excluded from the painting as, no doubt, from so much else) or the need of a two-year-old (the artist's niece Ernesta) for what may be a helping but could equally be a restraining hand—will no doubt be held about such issues, as indeed about many of the topics dealt with in the book.

Stephen Cretney
Whit Sunday, 2008

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