

FAMILY LAW
IN THE
REPUBLIC OF IRELAND
(Second Edition)

ALAN JOSEPH SHATTER

B.A. Mod., Dip. E.I. Solr.

WOLFHOUND PRESS

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PREFACE TO SECOND EDITION

Since publication of the first edition of this work in 1977 there have been very few new statutory provisions of importance enacted by the Oireachtas in the area of Family Law. There has been, however, a sharp increase in the number of written judgements delivered by the courts in dealing with family matters and over one hundred and fifty additional cases are referred to and discussed in this edition. Consequently, whilst some of the new material derives from new legislative provisions, the major portion of it is concerned with case law developments. Virtually every chapter contains some changes from the last edition but the major changes are to be found in the chapters dealing with the Constitution, Separation Agreements, Adoption, Guardianship and Custody of Children, Maintenance and Matrimonial Property. New sections have also been inserted to deal with the law relating to Family Planning, Passports and Child Kidnapping.

At the time of writing the Courts Bill, 1980, is still being discussed by the Oireachtas. This Bill, if enacted as initiated before Dáil Éireann, will introduce a number of important changes in the family law jurisdiction exercised by the lower courts. Thus, the contents of the Bill, as initiated, are referred to in those chapters to which they are relevant. The Family Law Bill, 1981, is also presently before the Oireachtas, and is also referred to where relevant. The Bill as initiated can be found in Appendix D.

A major disappointment in the last four years has been the minimal impact of the Law Reform Commission on this area of the law. Working Papers produced by the Commission have, in the main, concentrated on those areas of family law of least practical importance. Not a single Working Paper has yet dealt with areas of major concern such as the law as to nullity, judicial separation, domicile and recognition of foreign divorces, maintenance and matrimonial property. A further disappointment has been the failure of the Task Force on Children's Services, established in 1974, to produce the necessary recommendations for reforming children's law and children's services. Both of these bodies, rather than providing a stimulant to legislative action have, by their very existence, provided an excuse for legislative paralysis. The proposals to date made by the Law Reform Commission for reforming family law are examined and discussed in the chapters to which they are relevant.

A continual difficulty in the area of family law is the number of unreported judgements. A majority of the new cases discussed in this edition are unreported and most of the unreported cases discussed in the first edition remain unreported. There is an urgent need to change the present law reporting system so as to ensure that a proper public record is maintained of all written family law judgements. The absence of such a record renders it almost impossible for legal practitioners to keep up to date with case law developments. Unreported cases in both the footnotes and the table of cases are dealt with and cited exactly as in the first edition.

I must again thank my partner, Brian Gallagher for reading this edition at the proof stage and for his helpful comments. My thanks also go to all of those working in the High Court and Supreme Court offices for their help in tracing

unreported judgements and to the Incorporated Law Society of Ireland for assistance towards some of the costs of publication.

My greatest thanks go to my wife, Carol, for her support, encouragement and assistance and for never once complaining when I worked late into the night and at weekends to complete this new edition. I must also thank our son, Dylan, who is just one year old, for not tearing up the proofs despite ambushing me on at least three occasions with a clear intent to do so.

The original manuscript for this edition went to my publishers in September of 1980 but it has been possible to update the manuscript at the proof stage to include legislative and case law developments up to the 1st April, 1981.

A. J. SHATTER

3rd April, 1981

PREFACE TO THE FIRST EDITION (1977)

This book is written not only with the legal practitioner and law student in mind, but also having regard to all those without legal training who in their professional or voluntary work may look to this area of the law for assistance. The absence of any other book on Irish Family Law has, of course, influenced the manner in which this book is written. I have tried to deal with the areas of family law that are of particular importance, and that arise most often in practice. It was also my intention when I started my research, to produce a work at a price which would not put it out of the reach of many of those who may wish to acquire it. Thus, in certain areas I have had to be deliberately selective and omit some material, that if not for cost factors, would have been otherwise included. For example, many problems of private international law that are of direct relevance to family law have been excluded or only briefly referred to. I have confined detailed discussion in this area to those matters that in practice arise most frequently, such as recognition of foreign divorces, enforcement of maintenance orders, etc. I have also taken into account the existence of other books in areas of Irish Law. Thus, the chapter on matrimonial property contains many references to topics dealt with in J. C. W. Wylie's recently published and excellent work on Irish Land Law. Certain matters have also been deleted that were in the original draft. Thus the chapter on the courts has been considerably shortened and much material of an historical nature, and some relating to matters of practice and procedure has either been omitted or reduced to footnote form. The chapter on the Constitution is also reduced. It may be possible to include some of this material in a future edition.

The book attempts not only to describe what the law is, but also to examine its deficiencies and stimulate discussion as to what it ought to be. However, so that the practitioner will easily discover what the law is when he needs to do so, without finding himself lost in a morass of critical comment, I have generally confined comment on the need for law reform to the end of the chapter to which it is relevant. The statement in January, 1977 by the recently established Law Reform Commission that it regards family law as a priority area for its deliberations¹ will, I hope, give at least some of the reforms suggested a real chance of implementation.

¹ See The Law Reform Commission, *First Programme for Examination of Certain Branches of the Law with a View to their Reform* (Dublin, January 1977) p. 4. See further pp. 6, 7 and 9 of the programme.

A particular difficulty in the area of family law is the number of unreported judgments. It is my hope that I have managed to trace all those of importance or of interest. Where a case is referred to in a footnote as unreported and the date of delivery of the judgment is stated, unless otherwise indicated, a written judgment is obtainable. The record number of each such judgment can be found in the table of cases. There are no written judgments available, however, in certain cases of interest, and where this is the position, I have had to rely on newspaper reports. Generally speaking where a named case is accompanied by a newspaper citation it means that no written judgement is obtainable.

The emphasis in the book is on Irish authorities. There is of course, considerable reference to pre-1922 English authorities and also to cases determined after that date, where relevant. Indeed, as shall be seen, in certain areas due to the absence of Irish authority, it has been necessary to examine English case law in some detail. Where this is done, however, reference is also made to the relevant English books or articles in which a more extensive discussion of the particular topic can be found. Reference is also made to many Northern Ireland authorities.

Whilst I am of course solely responsible for the law as set out in the book, I wish to thank all those who have given me assistance. I owe a particular debt to Mr. Brian Gallagher, Solicitor, and to Mr. Ercus Stewart, B.L., who have read drafts of the book at various stages and whose critical comments and helpful suggestions have been of great assistance. I am also indebted to Judge Conroy who read the final draft and the proofs, for the many helpful comments he made. Similarly, my thanks go to Mr. Donal O'Hagan and Mr. Gay McGann, whose assistance on the indexation and checking of case citations was invaluable. Others who call for mention are Mr. George Gill who read the section on the Children's Act, 1908, and made comments thereon, and those working in the High Court and Supreme Court Offices, for their tremendous assistance in helping me find unreported judgments. My thanks are also due to the Incorporated Law Society of Ireland for their generous financial assistance, which has helped to make the publication of this book possible.

My greatest debt is however owed to my wife Carol, who has spent most of the last year typing various drafts of this manuscript and without whose continuous support, inspiration and encouragement this book would never have been completed. Her enthusiasm for this project was infectious and often helped to allay doubts as to whether this book would ever be completed. I should also mention my late father whose respect for scholarship and whose critical mind has been an indelible influence.

I have tried to state the law as accurately as possible on the sources available to me on February 1st 1977. The final draft of the manuscript went to the printers in September 1976, but it has been possible to update the text to the latter date, at the proof stage.

A. J. SHATTER

February 10th, Dublin, 1977.

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