Simon Fodden

CANADIAN FAMILY LAW

cases and materials

BUTTERWORTHS
canadian legal casebook series

CANADIAN FAMILY LAW

CASES AND MATERIALS

Editor

SIMON FODDEN

Contributors

Christine Boyle
Alan Grant
Ross Irwin
Heino Lillies
Edward Veitch
Ian Bushnell
Winifred Holland
Jay McLeod
Graham Parker
Frederic Zemans

TORONTO

BUTTERWORTHS

1977

CANADA:
BUTTERWORTH & CO. (CANADA) LTD.
TORONTO: 2265 MIDLAND AVENUE, SCARBOROUGH, M1P 4S1

UNITED KINGDOM:
BUTTERWORTH & CO. (PUBLISHERS) LTD.
LONDON: 88 KINGSWAY, WC2B 6AB

AUSTRALIA:
BUTTERWORTH PTY. LTD.
SYDNEY: 586 PACIFIC HIGHWAY, CHATSWOOD, NSW 2067
MELBOURNE: 343 LITTLE COLLINS STREET, 3000
BRISBANE: 240 QUEEN STREET, 4000

NEW ZEALAND:
BUTTERWORTHS OF NEW ZEALAND LTD.
WELLINGTON: 26/28 WARING TAYLOR STREET, 1

SOUTH AFRICA:
BUTTERWORTH & CO. (SOUTH AFRICA) (PTY.) LTD.
DURBAN: 152/154 GALE STREET

ISBN 409-83050-X (Hard Cover)
409-83051-8 (Paperback)

CANADIAN FAMILY LAW

CASES AND MATERIALS

Canadian Legal Casebook Series

CASTEL: *CONFLICT OF LAWS, Cases, Notes and Materials*

PALMER AND PRENTICE: *CASES AND MATERIALS ON COMPANY LAW*

WRIGHT AND LINDEN: *THE LAW OF TORTS, Cases, Notes and Materials*

SCHMEISER: *CRIMINAL LAW, Cases and Comments*

WATSON, BORINS AND WILLIAMS: *CANADIAN CIVIL PROCEDURE, Cases and Materials*

WHYTE AND LEDERMAN: *CANADIAN CONSTITUTIONAL LAW, Cases, Notes and Materials*

CASTEL: *INTERNATIONAL LAW*

FODDEN: *CANADIAN FAMILY LAW, Cases and Materials*

GLASBEEK: *EVIDENCE, Cases and Materials*

This book is dedicated to Carolyn Barber
and her children Kimberly, David, and Kyle.

PREFACE

This book is the result of collaboration among the teachers of family law at four Ontario Law Schools. Our aim was to provide a teaching tool for a basic course in family law. We have tried to offer each instructor who uses the book freedom to tailor a particular course of instruction to his or her own interests, while at the same time offering sufficient structure in the materials to assist those who do not have strong predispositions about family law. To this end we have included more material than would likely be dealt with in one course, expecting that instructors will omit certain topics or encourage students to explore them on their own. The material is arranged into three Parts: Part A includes material on marriage and nullity, and as well on the problems of informal families, where there is no legally valid marriage. Part B begins with a short chapter on those tort and criminal laws which shelter the family from outside interference either by individuals or the state. Then follows material on children, specifically with respect to child protection, juvenile delinquency, sterilization, abortion, and adoption. Part C, dealing with family breakdown, covers divorce, custody, financial support obligations between family members, and matrimonial property.

Chapter 1 lies outside this scheme. Its purpose is to act as a locus for material which is pervasively relevant, but which can conveniently be dealt with en bloc. There is a brief introductory section adumbrating some of the major social issues in family law. As well, there is a section on the court structure within which family problems may be treated. There is a lengthy note on constitutional law as it affects family law. This may be discussed intensively at the beginning of a course, or may be referred to throughout the course as constitutional law issues arise. Finally, there is a section introducing conflict of laws. As is made more clear in that section, our expectation is that this important topic will typically be dealt with in a separate course in most Law Schools. In this book we offer, in addition to this introductory note, periodic essays designed to give students a basic grounding in this subject.

The book is meant to be used in company with a separate compilation of relevant statutes. Thus, there are few excerpts from legislation reproduced in this book. Rather, citations are given to particular statutory provisions as the occasion demands. This permits the materials to be used in any of the common-law provinces of Canada. In order to avoid a plethora of citations, and to provide some structure, reference is commonly made to the legislation of Ontario.

The concentration on the legislation of a single provincial jurisdiction makes it easier to examine the extensive reform of family law which is now underway throughout Canada. At the time of writing, Ontario was on the verge of adopting a number of pieces of legislation which will substantially alter the law. We refer to these in Bill form, and in the 1977 version of these Bills, with the understanding that any particular provision may be changed before adoption.

This is a teaching tool, not a research tool. Consequently, cases have been edited as the particular pedagogical aim requires. Usually, elipses reveal such editing. As well, footnotes have on many occasions been eliminated from cases and articles. Those interested in pursuing any matter can, of course, consult the original to find the necessary citations.

TABLE OF CONTENTS

PART C: FAMILY BREAKDOWN

CHAPTER 1

THE SETTING

SECTION ONE: AN INTRODUCTION TO THE ISSUES IN FAMILY LAW

The family has always been a basic institution of human society. This makes the study and practice of family law different from and perhaps more difficult than the study and practice of any other branches of law. Families exist to serve the needs of their members and, through them, the needs of society. They do not depend upon positive law for their genesis, form or demise, although law speaks with respect to all of these. Families serve the most intimate of human needs, presenting a forum for the expression of emotions, sexual desires and individual identity. The law concerns itself with all of these powerful matters to a greater or lesser degree. Families carry with them traditions inherited through successive generations of teaching children about the nature of themselves and the world. The laws we have today embody centuries of tradition in layers that lie imperfectly beneath our current gloss. Families are closely interwoven into the economic life of our society, serving as important incentives to work and as important mechanisms to distribute wealth. Our laws reflect this as a social fact but are only now coming to deal with the modern economic importance of this linkage and with current views of justice.

Until recently family law was an exceedingly ill-fitting garment for our society. Gradually, we are tailoring the law to current needs and ridding ourselves of these sources of discomfort. The first of these is the great age of much of our family law. The second is the borrowing of that law from England and its continuation here long after its reformation in that country. Third, this old, foreign law was not spelled out clearly in local statutes but was simply borrowed by reference to English common law as it stood at a certain date. As we do our own modern law making, all is now in flux; and we face the uncertainty which always accompanies novelty in law.

Compounding this uncertainty is the fact that Canadians hold a wide variety of views on the powerful matters raised at the beginning: personal expression in society, the raising of children, and economic justice. This heterogeneity did not always exist or, at least, was not so forcefully apparent as it is today. It is difficult to tell whether in those respects which most affect family life we are moving toward some new generally accepted sense of what is permitted, proper and fair. This sense is important to law-makers in all branches of the profession, for it is upon such grounding that our family laws develop. In times of diversity and rapid change, legislators may be unable to speak authoritatively with clear and defined rules, preferring instead to sketch broad guidelines and to devolve discretion upon the courts. Yet, this only presents the same problems of what is permitted, proper, or fair to the courts and their officers – family lawyers.

Two focuses seem to be developing within this diversity and change. One has to do with the changing roles of women in our society. In family law, women are emerging from positions of subordination to men and complete identification with "home life". The differential treatment of men and women informs every major issue in family law. The other focus has to do with children, traditionally classed along with women and lunatics as requiring benevolent protection in law. One aspect of this focus has commentators and others pressing for "children's rights", in large measure an appeal that law should respect the child as a person entitled to fair procedures and not treat the child as the object of a paternalistic exercise. Allied with this is the growing sense that children may be given more responsibility in our society than we now permit. Another aspect concerns the increasing community intervention in the raising of children and the correspondingly diminishing respect for the "natural rights" of parents. This last development involves public agencies, courts, and lawyers in the consideration of what is in the best interests of the child. At its widest, this question can become what is in the best interest of any person in our society.

As new legislation is passed, such difficult questions proliferate: courts must decide, upon the breakdown of a marriage, what financial support one spouse should pay the other, using criteria such as "need" or what is "fit and just". Property may be divided between spouses on the basis of what is "equitable". One may be granted a divorce on the ground of "mental cruelty"; or because of a spouse's wrongful act even though forgiven, if a divorce would be "in the public interest". Children may be removed from their parents by the courts if they do not receive "proper care". Children may be found to be juvenile delinquents for having indulged in "sexual immorality or any similar form of vice".

Faced with such vague rules one ought to question whether such matters are proper concerns of the law. If it is necessary for there to be statutes to fix such standards, what role do courts and lawyers have in their application? A great variety of responses are emerging to these questions: at times courts and lawyers behave traditionally and "borrow" expertise from the medical or social sciences in the form of reports and testimony concerning parties to disputes. Some courts are re-forming their structure to incorporate the other "helping" professions into the very process of dispute resolution. Some lawyers are exploring co-operation up to the point of partnership with individuals possessing the necessary skills they lack. Still others are themselves acquiring such skills.

Only rarely is the legal profession in this country turning family disputes over to non-lawyers for resolution, as is sometimes done in Europe. This is, however, a real possibility here: British Columbia Family Courts are experimenting in child protection cases with panels composed of one judge and two lay people. Indeed, the resolution of some disputes may be turned over largely to the most important non-lawyers involved – the parties themselves: The Law Reform Commission of Canada has recommended that divorce become a "non-justiciable" issue; that is, if one spouse wishes it, a divorce ought to be given.

While to focus on such difficulties as diversity, uncertainty, discretion and change may be to go to the heart of the matter, it is also to oversimplify greatly. As with all areas of law, family laws can be ranged along a continuum from the vague standards referred to, through a body of doctrine, to rules as precise as any in law. In all, family law displays challenging complexity, making good lawyering essential if the needs of troubled clients are to be well met.

Some aspects of this complexity will be addressed in the following sections of this Chapter. Two sections will speak to legal factors which affect our freedom

to choose whatever substantive family laws we wish in our province or the country as a whole: constitutional law and conflict of laws. The other section will address the very structure and approach of the legal institutions which administer our substantive laws. All of these factors cut across substantive divisions within family law and, therefore, are treated here, where they can be broached conveniently. As has been stated before, it will be desireable to refer to these aspects again in particular contexts throughout the remainder of the materials.

SECTION TWO: FAMILY LAW AND THE CONSTITUTION

A. The Division of Powers

Since Canada is a federal state with a constitution which divides legislative power between the legislatures of the provinces and the Dominion Parliament, we consequently encounter constitutional problems in our study of family law.

By the *British North America Act, 1867 (B.N.A. Act)*, s. 91(26), the Dominion Parliament is given legislative authority over "marriage and divorce", while by s. 92(12) the provinces have legislative power in relation to "solemnization of marriage". A brief survey of the historical background to these provisions shows that in the 1864 draft resolutions from Quebec the only provision suggested was that of "marriage and divorce", which was placed within Dominion legislative competence. In the debate of 1865 this jurisdiction was questioned, and it was explained, during the debates, that the power over "marriage" was intended to invest the Dominion with the right of declaring what marriages shall be held and deemed valid throughout Canada, and with respect to the power over "divorce" it was considered that by vesting the Dominion with such power it would be more difficult to obtain laws enabling divorce. In Upper Canada at this time divorce was obtained by parliamentary bill. The draft resolutions of 1864 were adopted, but by the London resolutions of 1866-67 the power over "the solemnization of marriage" was added to the legislative power of the provinces and became s. 92(12). By s. 129 of the *B.N.A. Act* the law dealing with matrimonial matters which was in existence in the colonies in 1867 was to continue until altered by the appropriate legislature. The first century of Confederation was characterized by very little Dominion legislation with respect to matrimonial matters.

An interesting consideration which arises with respect to the constitutional issues in family law is that it has been the lower courts which have governed and not, as one is accustomed to seeing in constitutional matters, decisions of the Privy Council and the Supreme Court of Canada. It was not until 1912 that the Privy Council rendered it first and last judgment on ss. 91(26) and 92(12), and it was not until 1934 that a governing Supreme Court decision was rendered. In 1912 the Privy Counsil held that s. 91(26) does not cover the whole field of validity of marriage; s. 92(12) is an exception to s. 91(26) and enables the province to enact conditions as to solemnization which affect the validity of the contract of marriage. The whole of what solemnization ordinarily meant at the time of Confederation was intended, in the opinion of the Privy Council, to come within s. 92(12), including conditions which affect validity: *In Re Marriage Legislation in Canada,* [1912] A.C. 880, 7 D.L.R. 629. In 1934 the Supreme Court of Canada in *Kerr v. Kerr and A.G. Ont.*, [1934] S.C.R. 72,

[1934] 2 D.L.R. 369, held that "solemnization of marriage" within the meaning of s. 92 includes not only the essential ceremony by which the marriage is affected, but also parental consent as such consent is required by law. The provincial legislatures were held to be competent to make preliminaries, leading to the marriage ceremony, conditions precedent to the solemnization of marriage. As a result of these cases we can conclude that s. 91(26) concerns the capacity to marry and the married status, while s. 92(12) deals with the formalities of marriage. The province can legislate with respect to the consent of a parent for children under a certain age being a condition of the validity of marriage: *Clause v. Clause,* [1956] O.W.N. 449; *Graham v. Graham,* [1938] 1 D.L.R. 778 (Sask. C.A.); also the issuance of a licence: *Alspector v. Alspector,* [1957] O.R. 454 (C.A.); and the registration of the officiating clergyman: *Gilham v. Steele,* [1953] 2 D.L.R. 87 (B.C.C.A.). Section 91(26) is concerned with personal capacity to marry such as age, impotence, mental capacity, and consanguinity: *Re Schepull and Bekeschus and Prov. Sec.,* [1954] O.R. 67, [1954] 2 D.L.R. 5. A determination of whether a law deals with formalities or with capacity is not without difficulty. In *Ross v. MacQueen,* [1948] 2 D.L.R. 536 (Alta.), it was held that a provision of the *Solemnization of Marriage Act* of Alberta, R.S.A. 1942, c. 303, s. 24, which prohibited the issuing of a marriage licence and the publication of banns, and the solemnization of a marriage when either of the parties is under the age of 16 years was *intra vires.* The prohibition did not apply to a female who is pregnant and produces a certificate of a duly qualified doctor and has the necessary consents. It was held that the restrictions did not go to the matter of capacity but to the question of the solemnization of marriage. It was said that the fact that a girl of 12 years could be married because of the exception showed that the provision did not deal with capacity. A provision in the *Marriage Act* of Saskatchewan, 1933, c. 59, s. 60, which validated marriages solemnized in the province prior to the date of the Act, notwithstanding non-observance of any formalities (with certain provisos) was *intra vires* since it went to the matter of the form of the ceremony, and only incidentally created a legal married status: *Re Howe Louis* (1970), 14 D.L.R. (3d) 49 (B.C.C.A.) *per* Tysoe J.A.

It has been said that it is the marriage relationship which is within Dominion legislative competence, and as long as provincial legislation does not disturb that relationship it will be valid: *Rousseau v. Rousseau,* [1920] 3 W.W.R. 384 (B.C.C.A.); *Langford v. Langford* (1933), 50 B.C.R. 303; *Holmes v. Holmes,* [1923] 1 D.L.R. 294 (Sask. C.A.). Provincial jurisdiction covers the rights and duties of married persons: *Kazakewich v. Kazakewich and A.G. Alta.,* [1937] 1 D.L.R. 548, 67 C.C.C. 346 (Alta. A.D.), *per* Clarke J.A.

There seems never to have been any question but that the law with respect to on-going family matters fell under the legislative jurisdiction of the provinces. In *Reference Re Adoption Act,* [1938] S.C.R. 398, [1938] 3 D.L.R. 497, 71 C.C.C. 110, the constitutionality of *The Adoption Act*, R.S.O. 1937, c. 218, *The Children's Protection Act,* R.S.O. 1937, c. 312, *The Children of Unmarried Parent's Act,* R.S.O. 1937, c. 217 and *The Deserted Wives' and Children's Maintenance Act,* R.S.O. 1937, c. 211 of Ontario was in question, and as Chief Justice Duff said for the Supreme Court of Canada, "in point of substantive law it is not disputed that the matters which are the subjects of this legislation are entirely within the control of the legislatures of the province". Later in his judgment Duff C.J.C. fortified this point by saying that "the jurisdiction of the