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MODERN FAMILY LAW
Cases and Materials

*Second
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Cases and Materials

Second Edition

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Preface

The theme of *Modern Family Law* — the conflict between respect for privacy and deference to state authority — provides a lens for examining family law today. Each chapter of this book uses this lens to explore the actual and appropriate role of the state in various aspects of family life.

- Chapter One explores the constitutional underpinnings of a right to family privacy.
- Chapters Two and Three address the state's regulation of marriage before and after celebration.
- Chapter Four identifies the extent to which the legal system treats members of alternative families differently from, or similarly to, members of traditional families.
- Chapters Five and Six examine state regulation of divorce, including its financial consequences, and Chapter Seven examines the state's role in child custody matters.
- Chapter Eight explores the limits of family autonomy, emphasizing cases of child abuse and neglect.
- Chapter Nine considers the tension between privacy and state protection arising in adoption and use of new reproductive technologies.

Modern Family Law offers valuable interdisciplinary perspectives. Family law has been heavily influenced by work in the fields of family history, psychology, sociology, social work, medicine, and philosophy. Many of the excerpts, as well as the notes and questions, incorporate these different perspectives in an attempt to shed new light on the nature of legal regulation of the family.

Modern Family Law reflects an awareness of the impact that legal rules have on persons' lives. The law affects individuals in profound ways that legal abstractions cannot capture. The book attempts to reveal (through presentation of sociological and psychological research as well as narratives) the subjective experiences of family members when confronted with various socio-legal problems. The book emphasizes that family law is not just analyzed and applied — it is experienced.

Changes in the Second Edition

While preserving the basic organization and overall length of the First Edition, this major revision incorporates new material on virtually every topic previously addressed. It updates earlier developments and includes significant new state and federal legislation and case law. Recent opinions from the United States Supreme Court in *Stenberg v. Carhart* and *Troxel v. Granville* appear as principal cases.

The Second Edition covers new provisions of the American Law Institute's *Principles of the Law of Family Dissolution* on premarital agreements, domestic partners, child custody, property division, child support, and separation agreements. It also discusses the Uniform Child Custody Jurisdiction and Enforcement Act, the new Uniform Parentage Act, the Restatement (Third) of the Law Governing Lawyers, new provisions of the ABA Model Rules of Professional Conduct, the federal Deadbeat Parents Punishment Act, the Child Victims' and Child Witnesses' Rights Act, and new laws opening adoption records, among many others.

The Second Edition incorporates important developments affecting same-sex partners, including recent state and international legislation that recognizes these relationships; post-dissolution property rights; inheritance rights; protection against discrimination in housing, employment, health benefits, and tort law; child custody rights; and regulation of adoption and assisted reproduction. It also includes new material on the legal treatment of transgendered persons.

Several new excerpts have been added (focusing on divorce, domestic violence, and antimiscegenation laws). Epilogues to principal cases have been added, updated, and expanded.

The Second Edition continues to emphasize empirical research with sensitivity to the influence of gender on family law issues. It incorporates data on abortion, teen pregnancy, divorce and annulment rates, domes-

tic violence, developmental outcomes for children of gay and lesbian parents, international adoptions, infertility, and much more.

Like the earlier edition, this revision gives instructors considerable flexibility in designing family law courses of varying lengths and emphases. The editors have taught two-, three-, and four-unit courses based on these materials. The book can be adapted easily for shorter or longer courses. (The Teacher's Manual accompanying the book provides further pedagogical suggestions and sample syllabi.) For the problem-oriented instructor, the book includes many questions and problems, often derived from actual cases or current events.

Editorial Matters

Cases and excerpts have all been edited, often quite extensively. Most deletions are indicated by ellipses, with some exceptions: Some concurring and dissenting opinions have been eliminated; citations have been modified or eliminated; some footnotes and references have been omitted; and paragraphs have been modified, and sometimes combined, to save space and to make the selections more coherent. Brackets are used at times to indicate substantial deletions. Original footnotes in cases and excerpts are reprinted nonconsecutively throughout the book. The editors' textual footnotes are numbered consecutively and appear in brackets to differentiate them from original footnotes.

We have relied on the seventeenth edition of *A Uniform System of Citation* (2000), except when that style conflicts with the publisher's style. Statutory citations are to the bound volume and supplement, if possible, rather than to the electronic version.

D. Kelly Weisberg
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Introduction

Family law explores the legal regulation of the family and its members. These members include husband, wife, parent, and child, as well as unrelated “significant others” who now form alternative families with increasing regularity.

Fundamental to family law today is the tension between respect for family privacy and deference to state authority. This conflict forms the overarching theme of this book. Specifically, the book explores the issue: How does the law allocate responsibility for decisionmaking about private family matters? A respect for privacy gives consideration to individual family members’ decisional autonomy on matters that intimately affect them. Conversely, deference to state authority recognizes that the state has important interests, such as child protection and dispute resolution, that may precipitate intervention in the family. Such concerns necessarily raise questions about the actual, as well as the appropriate, relationship of the state to the family.

Because the state accords legal protection to the family and family members, even basic definitions — what constitutes a “family” and who is a “family member” — are contested. Thus, a central issue explored throughout the book is: Which personal relationships qualify for legal protection and for what purposes?

Family law is a field in transition. Change is apparent in the evolving roles and responsibilities of family members, the definitions of a

family, and the nature of legal regulation of the family and its members. The dynamic character of the field results, in part, from societal influences on family law. Over the past several decades, social developments have prompted significant changes in the field, including:

- (1) the women's movement, which has led to changes in gender roles as well as public policy;
- (2) the children's rights movement, which has recognized children's increased role in decisionmaking;
- (3) changing sexual mores, which have resulted in the decreasing influence of morality;
- (4) disillusionment with the traditional family, which has contributed to the growth of alternative family forms;
- (5) dissatisfaction with traditional dispute resolution processes, which has given rise to alternative forms of dispute resolution; and
- (6) developments in reproductive technology, which have altered traditional methods of family formation.

All of these developments are challenging traditional conceptions of the family and parenthood.

Family law also reflects several important legal trends:

- (1) the federalization of family law (that is, the increasing congressional role in family policy);
- (2) the constitutionalization of family law (that is, the growing recognition of the constitutional dimensions of the regulation of intimate relationships); and
- (3) the movement toward uniformity of state law.

These factors partly explain the changing role of the state in the contemporary regulation of the family.

Family law formerly was the exclusive domain of the states. Each state formulated and applied applicable legal rules and procedures. In the past several decades, however, Congress has enacted legislation on many issues of family life — child support, child custody, child abuse and neglect, foster care, adoption, and parental leaves, to name a few. In addition, beginning in the 1960s, the Supreme Court handed down a number of decisions that limit state regulation of the family. One of the most significant developments is the Court's recognition and expansion of the notion of privacy.

Because family law primarily has been a matter of state regulation, considerable variation exists in the legal regulations applicable to the family. In an effort to bring uniformity to the field, the National Conference of Commissioners on Uniform State Laws has promulgated important model statutes (addressing marriage and divorce, premarital

agreements, marital property, paternity establishment, child custody jurisdiction, spousal and child support, adoption, and the parentage of children born of new reproductive technologies). Another unifying influence is the American Law Institute (ALI), which now has completed a decade-long project to reconceptualize family law, clarifying the underlying principles and making policy recommendations to guide the states in regulating the dissolution of marriages and nontraditional family relationships.

Today's family law classes offer the challenge and excitement of exploring this rapidly changing legal landscape.



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