

FAMILY LAW

Cases and Materials—THIRD EDITION

JUDITH AREEN

University Casebook Series

CASES AND MATERIALS
ON
FAMILY LAW

THIRD EDITION

By

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To My Family

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PREFACE

Family law is a bit of a maverick as law school subjects go. For one thing, there is no consensus about the proper scope of the course. In the 1970's when I prepared the first edition of this book, most of the then widely-used casebooks devoted little space to the relationship between parent and child. Indeed, one of the reasons I embarked on a new casebook was to provide coverage of this important relationship. I soon discovered, however, that far from being a new idea, coverage of parent-child issues was common in the late nineteenth and early twentieth centuries when the first casebooks in the field appeared.

Contemporary scholars of American family law would probably agree that two types of law are included in the field: (1) the law concerning the formation or dissolution of family relationships, particularly (a) the relationship of husband and wife; and (b) the relationship of parent and child; and (2) the law governing the rights and obligations that flow from these relationships. This description hardly captures the scope or flavor of most modern family law courses, however, which increasingly focus on nonlegal materials as much as on cases, and are as concerned with alternative methods of dispute resolution as with reading appellate opinions.

The controversy over coverage has exacerbated a more fundamental problem facing students of family law: the general lack of theory to employ in organizing the material. This is not to suggest that American family law has never had a theory of the family or, at least, been shaped by a model of family life. As the material in Chapter 2 illustrates, until very recently most courts and legislatures embraced a very rigid model of family life in which the husband provides economic support and the wife services the needs of both husband and children by laboring in the home without monetary compensation. As late as 1940, for example, a federal court in Michigan refused to enforce a marital contract that deviated from the traditional model because the contract obligated the wife to support her husband (*Graham v. Graham*, p. 78). Even today, a number of states have not approved contracts made prior to (or during) a marriage that govern alimony in the event of divorce.

Professor Lawrence Stone in his landmark history of the family argues that this traditional, patriarchal family was at its apogee in Western Europe between 1550 and 1700 and that it has been in decline ever since.¹ The legal changes emphasized in this casebook thus may well be only the most recent manifestations of a larger economic and cultural change that has roots that reach back centuries. Whatever the

¹ Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800* (Harper and Row 1977).

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origins of the change, it is clear that the traditional model of family has come under increasing challenge in recent decades.

The change can be seen, first, in the demographics of family life in the United States today:

Only twenty-seven percent of all households consist of a married couple with one or more children.

More than two-thirds of married mothers are employed outside the home, as are fifty-eight percent of mothers with at least one child under six years of age.

By 1988, almost one out of four children aged seventeen or younger did not live with both parents. One in five lives in a family with an income below the federal poverty line.

Nearly thirteen million children live in poverty, more than two million more than a decade ago.

Change has also been reflected in increased judicial rejection of gender-based discrimination. In 1979, for example, the United States Supreme Court in *Orr v. Orr* (p. 126) held unconstitutional an Alabama statute that authorized alimony for needy wives, but not for needy husbands. The Court opinion criticized the traditional model, explaining "No longer is the female destined solely for the home and the rearing of the family and only the male for the marketplace and the world of ideas."

With the rejection of the traditional model, the need for rethinking the field of family law is even more apparent. To assist that effort, the materials in this book have been selected to develop several key themes.

The theme most central to the book is the tension between private ordering and state supervision in family law. In recent decades, family law has moved toward private ordering in a number of areas, most notably with the adoption in all fifty states of no-fault grounds for divorce. At the same time, the disadvantages of private ordering have become more apparent, particularly the economic burden created for children. One result has been the passage of federal laws that require states to establish minimum standards for the awarding of child support at divorce.

A second theme of emerging importance to the field is the expanding list of constitutional doctrines that have been invoked to limit state regulation of family life. In 1978, for example, the Supreme Court in *Zablocki v. Redhail* (p. 36) established constitutional protection for access to marriage. In recent decades, a series of Court decisions have granted constitutional protection to the rights of biological fathers even if they are not married to the biological mother.

A third theme is attention to the ethical dilemmas unique to the field. Is it appropriate, for example, to represent both husband and wife

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in a divorce? How can an attorney represent a child who is too young to talk?

A fourth theme emphasized is the larger context in which legal issues are debated. The family is, after all, an institution both older and more universal than the corporation, and at least as fundamental to human life as the law of real property. The fact that attorneys who practice family law have not ranked very high in the social structure of the legal profession reveals more about the priorities of the profession—and the larger society—than it does about the intrinsic significance of the issues in this troublesome, untidy, controversial, but always lively field.

The materials that follow are designed primarily for classroom use, although some chapters may also serve as resources for research. Deletions from excerpted material are marked for your convenience except when the omitted material consists only of citations or footnotes.

I am indebted to the many law students and faculty colleagues whose probing questions and suggestions over the years have helped to shape these materials. Quinn Dodd and Cara Woodson provided invaluable research assistance in the preparation of this edition. Nancy Burton edited and organized the final manuscript. My husband, Richard Cooper, and sons Ben and Jon were understanding of my absences and my inspiration throughout.

JUDITH AREEN

Washington, D.C.
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