

Summary

Families in the Eyes of the Law:
Contemporary Challenges and the Grip of the Past
Robert Leckey

News stories about legal cases involving polygamy, how many parents a child can have, what unmarried partners owe one another and other family law issues have frequently made headlines in recent years. Based on these stories one might be tempted to conclude that contemporary family life and family law are often at odds.

Indeed, in this study, McGill University law professor Robert Leckey shows that while Canadian family law has evolved considerably over the past few decades, social practices and family relationships have changed even more dramatically and have outpaced the legal framework for families. He argues that these laws regarding family relationships interact crucially with public programs, especially in terms of gender equality, income security and children's well-being. Therefore, he says, a discussion of the appropriate role of government in relation to families requires a clear sense of the state of the law.

The study describes the changes to family law in Canada in the second half of the twentieth century and its broad outlines today (including federal, provincial, civil and common law regimes). The author first sets out the conceptual framework for the rest of the analysis, presenting four oppositions that are the source of tensions in family law: 1) public versus private law; 2) instrumental versus symbolic recognition of a given relationship; 3) formal versus functional recognition of a relationship; and 4) formal versus substantive equality.

Leckey reviews the changes to marriage and divorce law in the last 50 years, notably those to equalize spousal rights and duties. Looking at data on the economic roles of spouses, he finds that legislative equality in marriage and divorce has not produced economic gender equality to the extent expected. At the same time, marriage rates have declined, so fewer couples benefit from the current regimes.

While marriage remains the most common family form in Canada, the landscape of Canadian families reflects increasing pluralism. Indeed, the increased social acceptability of relationships outside marriage has diminished marriage's claim to the position of sole legitimate family form, while increased access and recourse to divorce have made marriage less permanent.

Paradoxically, the legal response to greater pluralism in family forms has been to treat more couples like married spouses. Leckey explores the legal recognition of same-sex and unmarried couples and shows that legisla-

tors have tended to base their treatment of these non-traditional forms of union on the traditional marriage model. He argues that this focus on marriage can impede recognition of other forms of nonconjugal relationships. Quebec stands out in this regard, since the Civil Code is silent regarding the duties of unmarried spouses toward one another.

Finally, the author turns to parents and children and shows that in today's legal regimes for recognizing parentage, there are contradictory concerns about genetic linkages, intention to parent and family stability. Having described how legal parental status is established and outlined parents' legal rights and obligations when the family breaks down, the author then examines the implications of recognizing the parental rights and obligations of individuals who do not have full parental status.

Overall, the author argues that a coherent and sound family policy must strike a balance between the tensions within family law. These tensions, he says, are an inevitable feature of family law in a plural society. The key mission for policy-makers, in his view, should be to ensure that asymmetry or irregularity of recognition is an intended part of a larger policy plan, and not happenstance.

He also cautions that formal equality does not necessarily result in substantive equality. Indeed, despite significant law reforms to provide equality, economic disadvantage in certain types of families persists (for example, in female single-parent households). This reflects the limits of private law and the fact that, in many cases, the family resources are insufficient to support two households after unions break down, hence the need for robust social programs.

In concluding, Leckey discusses avenues for further legal changes, and he sets out guidelines for the design of public programs that support families. He makes several recommendations in relation to private family law.

Quebec, for instance, should enact a reciprocal obligation of support on the part of de facto spouses who have had a child together. In addition, all the provinces should

- provide for a possible right of temporary occupancy of a family residence on the part of a former unmarried partner who has custody of children;
- look at creating a status between those of parent and legal stranger; and
- consider creating or expanding registration options for family relationships other than conjugal couples.