

DETAILED TABLE OF CONTENTS

PREFACE *iii*

ACKNOWLEDGMENTS *vii*

CHAPTER 1:
FAMILY STRUCTURES AND CANADIAN FAMILY LAW *1*

- A. Definitions of “Family” *1*
- B. Functional Significance of Definitions *2*
- C. Sources of Family Law *8*
- D. Evolution of Family Law *8*
- E. Fragmentation of Legislative Powers *16*
- F. Fragmentation of Judicial Jurisdiction *17*

CHAPTER 2:
MARRIAGE *21*

- A. Engagemnets *21*
- B. Property Disputes on Termination of Engagement *21*
- C. Change of Name *23*
- D. Marriage: Status or Contract? *23*
- E. Definigion of Marriage: Monogamous and Polygamous Marriages *24*

1) Definition of "Marriage"	24
2) Monogamous and Polygamous Marriages	27
F. Formal and Essential Validity	29
1) Validity of Marriage; Applicable Laws	29
2) Formal Validity	29
3) Essential Validity	30
G. Jurisdiction	30
H. Void and Voidable Marriages	31
I. Absence of Consent	32
1) Unsoundness of Mind; Alcohol and Drug Intoxication	32
2) Duress	33
3) Fraud	33
4) Mistake	34
5) Intention and Motive; Marriages of Convenience	35
J. Legal Capacity	37
1) Same Sex Marriages	37
2) Age	37
3) Prior Marriage	37
4) Prohibited Degrees	38
K. Non-consummation of Marriage	39
L. Bars to Annulment	41
1) Collusion	41
2) Estoppel	41
3) Insincerity	42
M. Religious Annulments and Divorce	44
CHAPTER 3:	
COHABITATIONAL RELATIONSHIPS	45
A. Introduction	45
B. Legal Consequences of Unmarried Cohabitation as compared to Marriage	48
C. Cohabitation Agreements	50
D. Support Rights and Obligations between Unmarried Cohabitants	53
E. Property Rights	56
F. Debts and Liabilities; Financial Planning	61
G. Custody and Access	62

CHAPTER 4:
DOMESTIC CONTRACTS 64

- A. Types of Domestic Contracts** 64
- B. Domestic Contracts under the Ontario *Family Law Act*** 70
- 1) General Observations 70
 - 2) Marriage Contracts 71
 - 3) Cohabitation Agreements 73
 - 4) Separation Agreements 74
 - 5) Formal Requirements of Domestic Contracts 75
 - 6) Capacity to Enter into Domestic Contracts 76
 - 7) Contracts Subject to Best Interests of Child 77
 - 8) *Dum Casta* Clauses 77
 - 9) Setting Aside Domestic Contracts 78
 - 10) Rights of Donors of Gifts 81
 - 11) Contracts Made outside Ontario 81
 - 12) Paternity Agreements 82
 - 13) Application of Act to Pre-existing Contracts 83
 - 14) Setting Aside Provision of Domestic Contract Respecting Spousal and Child Support 84
 - 15) Incorporation of Provisions of Domestic Contract in Order under *Family Law Act* 85
 - 16) Incorporation of Provisions of Domestic Contract in Divorce Judgment 86
 - 17) Filing, Enforcement, and Variation of Support Provisions of Domestic Contract 86
 - 18) Remedies For Breach of Domestic Contract 88
 - 19) Termination of Domestic Contracts 88

CHAPTER 5:
FAMILY VIOLENCE 90

- A. Introduction** 90
- B. Abuse of the Elderly** 91
- C. Nature of Spousal Abuse** 93
- D. Social and Legal Responses to Spousal Abuse** 95
- 1) Shelters and Transition Houses 96
 - 2) Counselling Services 96
 - 3) Legal Responses to Spousal Abuse 97
 - 4) Criminal Law 99
 - a) *Criminal Code* Offences 99

- b) Specialized Criminal Courts 104
- c) Provincial Statutory Developments 104
- 5) Matrimonial Proceedings 104
 - a) *Divorce Act* 105
 - b) Spousal and Child Support 106
 - c) Custody and Access 106
 - d) Orders for Exclusive Possession of Matrimonial Home 107
 - e) Non-molestation or Restraining Orders 108
- 6) Actions for Damages 109
- E. The Victim's Response to Spousal Abuse 110**
- F. Proposals for Reform 112**
- G. Nature of Child Abuse 115**
- H. Social and Legal Responses to Child Abuse 116**
 - 1) Criminal Sanctions 117
 - 2) Child Protection Proceedings 119
 - 3) Family Law Proceedings 124
 - 4) Damages for Child Abuse 125
 - 5) Institutional Child Abuse 129

CHAPTER 6:

THE CRISES OF MARRIAGE BREAKDOWN AND PROCESSES FOR DEALING WITH THEM 131

- A. The Crises of Marriage Breakdown 131**
- B. The Emotional Divorce 132**
- C. Recent Trends in Family Dispute Resolution 135**
- D. Duty of Legal Profession to Promote Reconciliation, Negotiation, and Mediation 136**
 - 1) Duty of Legal Adviser 136
 - 2) Duty of Court: Reconciliation 138
 - 3) Confidentiality 138
- E. Marriage and Family Counselling 141**
- F. Negotiation 143**
 - 1) The Importance of Negotiation 143
 - 2) Negotiation Techniques 143
 - 3) Aspects of Successful Negotiation on Family Breakdown 145
- G. Mediation 147**
 - 1) Nature of Mediation 147

- 2) Approaches to Mediation 148
- 3) Reasons for Mediation 149
- 4) Goals of Mediation 149
- 5) Arriving at a Fair Settlement 150
- 6) Circumstances in which Mediation is Inappropriate 151
- 7) Full Disclosure and Confidentiality 151
- 8) Involvement of Third Parties 151
- 9) Involvement of Children 152
- 10) Involvement of Lawyers 152
- 11) Issues to be Mediated 153
- 12) Neutrality of Mediators 153
- 13) Common Impediments to Settlement 154
 - a) Emotional Barriers 154
 - b) “Stuck Spots” 154
 - c) Imbalances of Power 154
 - d) War Games 154
- 14) Mediation Strategies to Circumvent or Remove Impediments to Settlement 155
 - a) Dealing with Anger and Hostility 155
 - b) Circumventing “Stuck Spots” 156
 - c) Private Caucusing 157
 - d) Restoring Trust and Respect 157
 - e) Redressing Power Imbalances 157
- 15) Steps in Mediation Process 158
 - a) Setting the Stage 158
 - b) Defining the Issues 158
 - c) Processing the Issues 159
 - d) Resolving the Issues 159
- 16) Court-Connected Mediation 160
- 17) Pros and Cons of Mediation 161
- 18) Professional and Community Responses to Mediation 161
- 19) The Future of Family Mediation 162

H. Arbitration 164

- 1) Advantages of Arbitration 164
 - a) Selection of Arbitrator(s) 164
 - b) Type of Hearing 165
 - c) Flexibility and Speed 165
 - d) Definition of Issues 166
 - e) Privacy 166
 - f) Expense 166
- 2) Disadvantages of Arbitration 167
 - a) Absence of “Due Process” 167

- b) Income Tax 167
 - 3) Court-Annexed Arbitration 168
 - 4) Judicial and Legislative Responses to Arbitration 168
 - 5) Arbitration Appeals 170
 - 6) Evaluation of Arbitration 171
- I. Med-Arb 171
- J. Concluding Observations 173

CHAPTER 7:

**DIVORCE: JURISDICTION; FOREIGN DIVORCES;
GROUND; BARS 174**

- A. Judicial Separation; Separation Agreements;
Divorce Settlements 174
- B. Jurisdiction over Divorce 176
- 1) Introduction 176
 - 2) Definition of “Court” 176
 - 3) Exercise of Jurisdiction by Judge Alone 176
 - 4) Jurisdiction in Divorce Proceedings 176
 - a) Basic Statutory Criteria 176
 - b) Transfer of Divorce Proceeding to Another Province 177
 - c) Competing Foreign Proceeding 178
 - 5) Jurisdiction in Corollary Relief Proceedings 179
 - a) Basic Statutory Criteria 179
 - b) Transfer of Corollary Relief Proceeding to Another Province 180
 - 6) Jurisdiction in Variation Proceedings 180
 - a) Basic Statutory Criteria 180
 - b) Transfer of Variation Proceeding to Another Province 181
 - c) Variation of Foreign Orders 181
 - 7) Ordinarily Resident 181
- C. Recognition of Foreign Divorces 184
- 1) General Criteria 184
 - 2) Extra-Judicial Divorce 185
 - 3) Substantive and Procedural Defects 185
 - 4) Doctrine of Preclusion 186
- D. Marriage Breakdown as Sole Ground for Divorce 186
- 1) Spousal Separation as Proof of Marriage Breakdown 189
 - 2) Adultery and Cruelty as Proof of Marriage Breakdown: No Waiting Period 192

- 3) Marriage Breakdown: Adultery 192
- 4) Marriage Breakdown: Cruelty 193
- E. Bars to Divorce 200**
 - 1) Collusion 201
 - 2) Connivance and Condonation 202
 - 3) Absence of Reasonable Arrangements for Child Support 206
 - 4) Barriers to Religious Remarriage 208

- CHAPTER 8:**
- SPOUSAL SUPPORT ON OR AFTER DIVORCE 209**

- A. Definition of “Spouse” and “Spousal Support” 209**
- B. Formal Legal Equality between Spouses 210**
- C. Types of Order 210**
 - 1) Diverse Types of Order 210
 - 2) Nominal Orders; Final Orders 211
 - 3) Interim Support Orders 211
 - 4) Lump Sum Support Orders 213
 - 5) Security 217
 - 6) Fixed Term Spousal Support Orders; Review Orders 218
- D. Terms, Conditions, and Restrictions 222**
- E. Relevant Factors 222**
 - 1) Definition of “Condition” of the Spouses 224
 - 2) Definition of “Means” 225
 - 3) Needs and Capacity to Pay; Economic Self-Sufficiency; Relevance of Cohabitation Standard of Living 225
 - 4) Definition of “Other Circumstances” 226
- F. Spousal Conduct 226**
- G. Four Objectives of Spousal Support 227**
- H. Broad Judicial Direction 238**
- I. Overarching Principle of Equitable Sharing 240**
- J. Needs and Capacity to Pay Not Excluded by Compensatory Model 242**
- K. Implications of Child Care during Marriage and after Divorce 244**
- L. Alleviation of Feminization of Poverty 245**
- M. No Pat Formula 245**

- N. Effect of Separation Agreement or Consent Order on Subsequent Application for Spousal Support** 246
 - 1) The Impact of the Majority Judgment 251
 - 2) Future Ramifications of *Miglin* 252
 - a) Finality of Spousal Agreement 252
 - b) Applicability of *Miglin* to Payors and Payees 253
 - c) Retrospective Implications of *Miglin* 253
 - d) Non-Cohabitation Covenants 254
 - e) Effect of Separation Agreement on Interim Orders 257
 - f) Effect of Marriage Contract or Cohabitation Agreement 259
 - g) Variation Orders 260
 - h) Effect of Spousal Agreement on Child Support 263
 - i) Applications under Provincial Statute 263
- O. Effect of Sponsorship Agreement** 264
- P. Double Recovery or Double Dipping** 265
- Q. Income Tax and Retroactive Orders** 268
- R. Variation and Termination of Support Orders** 269
 - 1) General 269
 - 2) Variation of Fixed Term Orders 275
- S. Cost-of-Living Indexation** 277
- T. Retroactive Spousal Support Orders** 277
- U. Spousal Support Guidelines** 278

CHAPTER 9:

CHILD SUPPORT ON OR AFTER DIVORCE 281

- A. General Observations** 281
- B. Income Tax — Child Support** 281
- C. Presumptive Rule; Table Amount of Child Support; Section 7 Expenses** 282
- D. Exeptions to Presumptive Rule** 282
- E. Obligation of *de facto* Parent** 283
 - 1) Relevant Statutory Provisions 283
 - 2) Termination of Parent/Child Relationship: Impact on Child Support 287
 - 3) Respective Obligations of Biological and Adoptive Parents and of Persons who Stand in the Place of Parents 289
- F. Children over Provincial Age of Majority** 293

- 1) Relevant Provisions of *Divorce Act* and *Federal Child Support Guidelines* 293
 - 2) Status of Applicant; Payment to Parent or Child 295
 - 3) Statutory Definition of “Child of the Marriage”; Eligibility of Adult Children for Child Support 296
 - a) General 296
 - b) Sick or Disabled Children 296
 - c) Unemployed Adult Children 297
 - 4) Post-Secondary Education or Training 297
 - a) General 297
 - b) Options Available to the Court under Section 3(2) of the *Federal Child Support Guidelines* 301
 - c) Expenses for Post-Secondary Education under Section 7 of the *Federal Child Support Guidelines* 307
- G. Incomes over \$150,000** 308
- H. Split Custody; Section 8 of Guidelines** 310
- I. Shared Custody: 40 per cent Rule** 312
- J. Undue Hardship** 314
- K. Effect of Order or Agreement** 317
- L. Special and Extraordinary Expenses** 322
- 1) General 322
 - 2) Child Care Expenses 324
 - 3) Medical and Dental Insurance; Medical, Dental, or Health-Related Expenses 326
 - 4) Extraordinary Educational Expenses; Private School 328
 - 5) Extraordinary Expenses for Extracurricular Activities 330
- M. Variation of Child Support Orders** 333
- 1) Variation of Amount of Child Support Made under Applicable Table 334
 - 2) Variation Where Amount of Child Support Not under Provincial or Territorial Table 335
 - 3) Variation of Orders Pre-Dating Implementation of Guidelines 337
 - 4) Remission of Arrears 337
- N. Determination and Disclosure of Income** 341
- O. Disability Payments and Child Support** 358
- P. Types of Orders** 359
- 1) Interim Orders 359
 - 2) Periodic and Lump Sum Orders 360

- 3) Orders to Pay and Secure Child Support 361
- Q. Retroactive Child Support Orders under the *Divorce Act*** 361
- R. Priority of Child Support Over Spousal Support; Effect of Child Support Order on Assessment of Spousal Support** 367
 - 1) Relevant Statutory Provisions 367
 - 2) Commentary 368

CHAPTER 10:

PARENTING ARRANGEMENTS AFTER DIVORCE 373

- A. Introduction** 373
- B. Preservation of Family Bonds; Joing Custody; Maximum Contact Principle** 374
- C. Terms and Conditions** 383
 - 1) General 383
 - 2) Intended Change of Residence; Mobility Rights 384
- D. Best Interests of Child** 389
- E. Conduct** 393
 - 1) General 393
 - 2) Child Sexual Abuse Allegations 394
- F. Effect of Agreement** 396
- G. Variation and Rescission of Custody and Access Orders** 399
- H. Parental Conflict Resolution** 402
- I. Voice of the Child** 404
- J. Parenting Plans** 405
- K. Third Parties** 409
- L. Process** 409

CHAPTER 11:

REMEDIES AVAILABLE UNDER PROVINCIAL AND TERRITORIAL LEGISLATION 411

- A. Spousal Support** 411
 - 1) Diversity under Provincial and Territorial Statutes 411
 - 2) Differences between Federal *Divorce Act* and Provincial and Territorial Legislation 413
- B. Child Support under Provincial and Territorial Legislation** 414

- C. Need for Rationalization of Income Support Systems 416
- D. Enforcement of Support 417
- E. Custody of and Access to Children under Provincial and Territorial Legislation 417
 - 1) Welfare or Best Interests of Child 417
 - 2) Types of Order 421
 - 3) Wishes of Child; Judicial Interviews; Legal Representation 422
 - a) Hearsay Evidence 424
 - b) In-Court Testimony of Young Children 425
 - c) Interviewing Child in Chambers 426
 - d) Investigation by the Children's Lawyer 427
 - e) Court-Ordered Independent Assessment 428
 - 4) Mediation and Reconciliation Attempts; Confidentiality of Process 431
 - 5) Court-ordered Investigations, Assessments, and Reports 432
 - 6) Grandparents and Other Third Parties 441
 - 7) Provincial Parenting Programs 442

CHAPTER 12:

MATRIMONIAL PROPERTY RIGHTS 444

- A. Provincial and Territorial Legislative Diversity 444
- B. Family Property Rights in Ontario 446
 - 1) Introduction 446
 - 2) Objectives of *Family Law Act* 447
 - 3) Definition of "Spouse" 447
 - 4) Indian Lands; Foreign Immovable Property 448
 - 5) Domestic Contracts 448
 - 6) Applications Respecting Ownership and Possession of Property 448
 - a) General 448
 - b) Presumptions 449
 - 7) Triggering Events for Equalization of Net Family Properties 450
 - a) Separation as a Triggering Event 451
 - b) Death as a Triggering Event 451
 - c) Improvident Depletion of Net Family Property 452
 - d) Alternative Triggering Events 452
 - 8) Limitation Periods 453
 - 9) Equalization of Net Family Properties 453
 - a) General Observations 453
 - b) Significance of Ownership to Equalization Scheme 457
 - c) Definition of "Property" 458

- d) Pensions 460
- e) University Degrees; Professional Licences; Goodwill 465
- f) Value 466
- g) Valuation of Business; Private Companies 466
- h) Valuation Date 468
- i) Income Tax and Other Prospective Liabilities 469
- j) Expert Evidence: "Splitting the Difference" 470
- k) Deduction of Debts and Liabilities 471
- l) Valuation of Pre-Marital Property 472
- m) Excluded Property 474
- n) Property Acquired by Gift or Inheritance 475
- o) Income from Third Party Post-Marital Gift or Inheritance 476
- p) Damages 477
- q) Life Insurance Policies 478
- r) Traceable Property 478
- s) Property Excluded by Domestic Contract 479
- t) Domestic Contracts: Canada Pension Plan 479
- 10) Unequal Division of Net Family Properties 480
 - a) Judicial Discretion Based on Unconscionability 480
 - b) Undisclosed Pre-Marital Debts or Liabilities 482
 - c) Debts or Other Liabilities Incurred Recklessly or in Bad Faith 483
 - d) Inter-Spousal Gifts 483
 - e) Depletion of Net Family Property 484
 - f) Duration of Cohabitation 484
 - g) Debts and Other Liabilities Incurred for Support of Family 484
 - h) Written Agreement 485
 - i) Any Other Circumstance Relating to the Acquisition, Disposition, or Management of Property 486
- 11) Entitlement on Death 487
 - a) Death as a Triggering Event 487
 - b) Election by Surviving Spouse 487
- 12) Property and Financial Statements 491
- 13) Powers of Court 492
 - a) General Observations 492
 - b) Order for Payment 494
 - c) Order for Security 494
 - d) Deferred or Instalment Payments 494
 - e) Transfers of Property; Partition and Sale 495
 - f) Financial Information and Inspections 496
 - g) Variation of Order for Instalment or Deferred Payments 496
 - h) Operating Business or Farm 496
 - i) Interest 496

- 14) Restraining Orders and Preservation Orders 497
- 15) Variation and Realization of Security 498
- 16) Retrospective Operation 498
- 17) Occupation Rent and Accountancy Claims 498
- 18) Disposition and Possession of the Matrimonial Home 499
 - a) General Observations 499
 - b) Definition and Designation of “Matrimonial Home” 500
 - c) Disposition of Matrimonial Home 500
 - d) Possessory Rights in Matrimonial Home 500
 - e) Penalties for Contravention of Exclusive Possession Order 504
 - f) Variation of Possessory Orders 505
 - g) Severance of Third Party Joint Tenancy in Matrimonial Home 505
- 19) Registration of Orders against Land 506
- 20) Situs of Matrimonial Home; Retrospective Operation of Part II of *Family Law Act* 506

SELECTED BIBLIOGRAPHY 507

APPENDIX 1: *DIVORCE ACT* 515

APPENDIX 2: *FEDERAL CHILD SUPPORT GUIDELINES* 550

APPENDIX 3: AN OVERVIEW OF PROPOSED SPOUSAL SUPPORT
ADVISORY GUIDELINES 575

APPENDIX 4: *ONTARIO FAMILY LAW ACT* 588

TABLE OF CASES 641

INDEX 000