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BOOK REVIEW

Mary Jane Mossman, *Families and the Law: Cases and Commentary* (Concord, ON: Captus Press, 2012)

Susan Boyd

In 2012, Professor Mary Jane Mossman of Osgoode Hall Law School moved her family law casebook *Families and the Law: Cases and Commentary* from Emond-Montgomery Press to Captus Press.¹ As with the earlier edition, which has been a prominent feature of my family law reference shelf, this textbook is an enormously impressive and comprehensive treatment of family law in all of its complexity. In addition to providing key statutory references, edited case law, and case summaries and notes, Professor Mossman places the law within its social and economic context and offers important law reform and policy discussions. Reflecting her deep and broad knowledge of the field, this text is an incredible compendium of national and international studies related to family law as well as significant legal documents. As such, it is an indispensable resource for those who are teaching and learning family law, especially from a critical or feminist perspective. The book would also be useful, I would think, for family law practitioners. I will not attempt to duplicate the excellent and insightful review of the Emond-Montgomery edition authored by Professor Gillian Calder in this journal,² which identified all

¹ Mary Jane Mossman, *Families and the Law: Cases and Commentary*, 1st Captus ed (Concord, ON: Captus Press, 2012). Professor Mossman thanks Emond Montgomery Press for their kind cooperation in the transition to the First Captus Edition in her Acknowledgments, at xxxix.

² Gillian Calder, Book Review of *Families and the Law in Canada: Cases and Commentary* by Mary Jane Mossman (2005) 22 Can J

the strengths that I would note. Instead, I will highlight the approach and structure of the text and its treatment of diversity in families. I will then address the vexed question of creating a pan-Canadian textbook on family law.

APPROACH AND STRUCTURE OF THE TEXT

This textbook takes the view, which I would think all modern family law professors would share, that family law must be viewed as going far beyond marriage, divorce, and their corollary issues. Chapter 1 offers materials that prompt students to critically assess what and who they, and the law, consider to be “family”. Key themes are then identified as follows, shifting only slightly from the earlier edition:

1. Principles of Equality and the *Charter*
2. Autonomy versus Protection: Individuals, Families and the State and their Responsibilities for Economic Dependency
3. Family Law and Its Processes: The Constitution, Legislators and Judges, and Clients (including access to justice and dispute resolution).³

The brief Epilogue identifies additional significant themes that emerge throughout the text.⁴ First, concerning family formation, there is a contradiction: family law does not always recognize units that their members regard as families, yet it may extend family law obligations (e.g. child support) to persons who do not think of themselves as “family”. Second, although law historically regarded intact family units as “private” and insulated them from state intervention, modern

Fam L 101. Thanks also to Professor Calder for her helpful comments on an earlier version of this review.

³ Mossman, *supra* note 1 at 36-47.

⁴ *Ibid* at 917.

family law increasingly permits intervention, even in intact families, to protect vulnerable family members, such as children, spouses (especially women), and elderly persons. Third, while decisions by spouses to divorce or separate are now treated more or less as “private”, and requirements for divorce have been relaxed, legal intervention has accelerated on issues such as post-separation parenting and financial obligations such as property division, spousal support, and child support. Moreover, these new areas of regulation and financial obligations for the “private” sphere (family members) have been enhanced at the same time as resources from the state, for instance legal aid, have been diminished.⁵

Although it is clear from these themes that this text is attentive to the complex social realities of family law and to the ongoing debates about the balance between demands on “public” and “private” resources to support families and individuals, Professor Mossman does not compromise the legal detail in favour of the policy focus. The organization of the book proceeds in a logical manner, similar to the organizational framework that I use for my course. Part 1, “Legal Regulation of Family Formation”, deals with parent-child relationships (including adoption and assisted reproduction) and spousal relationships articulated through marriage and cohabitation. Part 2 addresses “Legal Regulation of ‘Intact’ Families”, including child-care, child protection, intimate abuse, and elder abuse. Part 3, which takes up two thirds of the text, moves to what some still feel is the heart of family law: “Legal Regulation of Family Dissolution”, specifically divorce and separation. This part helpfully includes questions about family bargaining and contracts as well as a chapter on the economic consequences of family dissolution and dispute resolution. A lengthy treatment of family property comes next, including the fraught question of whether unmarried cohabitants should be

⁵ *Ibid* at 918.

included in property regimes.⁶ A chapter on spousal support deals also with the definition of “spouse” and returns to the question of family agreements, covering the key Supreme Court of Canada decisions. The Spousal Support Advisory Guidelines are also reviewed. The final chapter, Chapter 8, deals with “Children and Family Dissolution”, including “custody and care”, processes for decision-making, and child support.

The textbook suffers from a perhaps inevitable length problem, running at 926 pages, but that is the penalty one pays for comprehensiveness. Moreover, Professor Mossman has edited major Supreme Court of Canada cases very effectively, by summarizing certain parts of the judgments and excerpting others. Most family law instructors, and particularly those who teach a three hour as opposed to four hour per week one-term course, would want to provide a detailed outline to their students as to which parts of the text to read and which to omit, and then remind students that the rest of the text remains a valuable resource for essay projects and further reading. I would, for example, likely have to omit child-care and elder abuse in large part, despite their obvious importance.

DIVERSITY, FAMILIES, AND FAMILY LAW

As Professor Calder pointed out in her review of the first edition, a strength of this textbook is its upfront acknowledgement that there is no one “family” in family law,⁷ raising questions such as whether family is based on biological and marital ties or whether it is about functioning as a family. In addition, the textbook makes an extraordinary effort to

⁶ British Columbia recently included cohabitants in its family property regime (*Family Law Act*, SBC 2011, c 25), whereas Ontario still does not (*Family Law Act*, RSO 1990, c F.3).

⁷ Calder, *supra* note 2 at 104-105.

reflect the fact that “family law encompasses every area of human diversity requiring sensitive discussion of issues of gender, race, class, religion, sexual orientation, disability, and the intersections of all of these areas.”⁸ For instance, the challenges that transgender persons have brought to the legal institution of marriage, at least in jurisdictions such as Australia where marriage is still premised on a male/female binary, are identified.⁹ A family law student in British Columbia might benefit from somewhat greater foregrounding of issues confronting Aboriginal families, but the text covers important questions, such as aboriginal children and the child protection regime,¹⁰ adoption of Aboriginal children,¹¹ and family property on reserve land.¹²

THE CHALLENGES OF A PAN-CANADIAN TEXT ON FAMILY LAW

I have commented previously that “[d]escriptions of Canadian family law trends are disproportionately influenced by developments in Ontario, simply because that province produces a large amount of both family law and commentary on family law.”¹³ This tendency is aggravated of course by Canada’s complicated interaction of federal and provincial

⁸ *Ibid* at 101.

⁹ Mossman, *supra* note 1 at 126-132. Canada has, of course, rendered this binary irrelevant in legalizing same sex marriage (*Civil Marriage Act*, SC 2005, c 33).

¹⁰ Mossman, *ibid* at 260.

¹¹ *Ibid* at 169.

¹² *Ibid* at 43.

¹³ Susan B Boyd, “No Presumptions! Joint Custody in the British Columbia Court of Appeal” in Sanjeev Anand, ed, *Children and the Law: Essays in Honour of Professor Nicholas Bala* (Toronto, ON: Irwin Law, 2011) 267 at 267.

laws on family law, which means that each province has different statutes on multiple issues such as parenthood, cohabitation, property, and support, not to mention legal process. More than any other family law textbook, Professor Mossman's makes a heroic effort to go beyond her home jurisdiction, Ontario, and incorporate legal developments from various provinces and territories. The text also refers widely to and excerpts secondary literature from a variety of lawyers and scholars, national and international, on multiple topics. To take only one example, her materials on "custody" incorporate many references to the author of this review, which is very generous.¹⁴

Inevitably, however, given the differences between provincial statutes on issues such as adoption, child protection, post-separation parenting and, especially, family property, it is impossible for a textbook to avoid a focus on one province. As with so many textbooks in Canada, that province is often Ontario, and this textbook is no exception. For example, the chart on federal and provincial statutes in family law matters offers only Ontario statutes.¹⁵ A teacher in another province could of course create her own version, but students using the text might naturally be confused. In another instance, and reflecting a rare example of an error in the otherwise amazingly impeccable text, the note on when provinces abolished the concept of illegitimacy is wrong, because its date ("the 1970s, before the *Charter*")¹⁶ is based on Ontario, which was the first and by far the earliest province to repeal its distinctions between children born within and outside marriage. These are minor and quibbling issues, but the overarching point is that there remain challenges in using an Ontario focused text, even

¹⁴ Calder too noted how gracious Mossman's book was, *supra* note 2 at 116.

¹⁵ Mossman, *supra* note 1 at 48.

¹⁶ *Ibid* at 37.

one as wonderful as Mossman's, in another province. For instance, the description of legislation in the child protection chapter is of Ontario's statute and the cases used in the child support chapter are drawn mostly from Ontario.

That said, Professor Mossman has made an energetic, generous, and laudable effort to diversify her materials and her references. In the case of British Columbia, she has incorporated references to the province's brand new *Family Law Act*,¹⁷ which is now the most modern family law statute in the country. As well, many important Supreme Court of Canada cases that are central to all family law courses emanate from British Columbia, and so that province's jurisprudence is of necessity featured to a considerable extent.¹⁸ Inevitably, a family law teacher in a province other than Ontario would have to develop her own materials on several issues, notably family property, given that each province's regime is unique, as are many child protection regimes. Professor Mossman informs me that with advance notice and sufficient time, Captus Press would be willing to produce an edition without the property chapter, at a reduced price for the text. A professor teaching in a province other than Ontario could generate her own supplement, with the text being offered at a reduced price.

As for the always fraught question of a textbook becoming out of date as soon as it is printed, Professor Mossman is providing Reading Guides for students and monthly Bulletins to Captus Press, which are uploaded to the Captus website. These updates will be a huge help to any family law teacher using the text. They will also be a way to update readers on, for instance, the important Supreme Court of Canada decision on unmarried cohabitants in Quebec, which

¹⁷ *Family Law Act*, *supra* note 6.

¹⁸ See e.g. *Van de Perre v Edwards*, 2001 SCC 60, [2001] 2 SCR 1014.

was handed down in 2013.¹⁹ Another part that could be updated is the case law on the best interests of the child and lesbian and gay parents. The classic cases from the 1970 and 1980s are discussed,²⁰ but more recent cases could be added, including those that have dealt with emerging disputes between a birth mother and a non-biological co-mother.²¹

This new edition of *Families and the Law: Cases and Commentary* is, then, an enormous accomplishment and Professor Mossman has done virtually everything she could to facilitate the use of the textbook in another province. I wish her well in her ongoing initiative to create a pan-Canadian text, hopefully with colleagues across the country. Generating this textbook is a monumental task, and a collaborative effort guided by Professor Mossman's extensive experience and knowledge might well be the best way to move the national project forward and give it longevity.

¹⁹ *Quebec (Attorney General) v A*, 2013 SCC 5, 354 DLR (4th) 191. In another development, the British Columbia Court of Appeal overturned the Supreme Court's decision in *Pratten v British Columbia (Attorney General)*, 2011 BCSC 656, 99 RFL (6th) 290 on information about donor identity, and the Supreme Court of Canada has refused leave to appeal. 35191 (May 30, 2013) (Mossman, *supra* note 1 at 224-226).

²⁰ See e.g. *Bezaire v Bezaire* (1980), 20 RFL (2d) 358, (Ont CA).

²¹ *KGT v PD*, 2005 BCSC 1659, 21 RFL (6th) 183.