

from ***Every Canadian's Guide to the Law*** (HarperCollins 2005)

HOW FAMILY LAW HAS CHANGED

by Linda Silver Dranoff

There have been extraordinary changes in family law over the past 30 years, and these seismic shifts in legislation reflect similar upheavals in social values.

Before 1968, for example, divorce was not available unless adultery, cruelty, desertion or another form of matrimonial misconduct could be proven in court. In 1968, divorce became available on the basis of three years' separation. Since 1986, however, a couple has been able to divorce after one year's separation, on the strength of a sworn affidavit attesting to the fact of separation.

Custody is another area of change. Forty years ago, the mother was assumed to be the natural custodial parent; 30 years ago, the father was more accepted as the custodial parent; today, the right is the child's—the child's best interests govern the custody decision. Access is no longer the right of the parent, but the right of the child. And the courts continue to grapple with the problem of custody and access when the custodial parent wants to move, and in high conflict cases.

The law governing the division of marital assets has also shifted dramatically. In the early 1970s, the Murdoch case went through the courts and demonstrated how few rights to property a married woman had when her marriage broke down, unless her name was on the title to the property. Irene Murdoch, a farm wife who had been an equal working partner with her husband in running the farm, was told by the Supreme Court of Canada that she did not make a compensable contribution to the accumulation of marital assets, and was not entitled to share in the property she and her husband had accumulated.

It was only in 1978 that the first laws were finally passed requiring husband and wife to share some assets when a marriage broke down. Three or four years after that, however, in the case of *Leatherdale v. Leatherdale*, the courts showed once again that a married woman's contribution as wife, mother and homemaker was not acknowledged even as an indirect contribution to the accumulation of the family's assets. Since that time, all provinces and territories have passed laws that require an almost equal sharing of all the family's assets, including investments, pensions and businesses, whether a spouse made a contribution in the home or out at work or both. The specific rules vary to some degree in each province and territory.

Thirty-five years ago, when a marriage broke down, a married woman was limited to getting support. When property-sharing laws came into effect in the 1970s and 1980s, however, and women began receiving a share of property, the courts started expecting women to become self-sufficient soon after the marriage ended—even when they had never worked outside the home, and even when the property share was inadequate to support them. It took until 1992 to redress the unfairness of these expectations, when the Supreme Court of Canada ruled that they were unreasonable. Since then, court decisions have resulted in higher awards of spousal support and for indefinite periods.

As society's ideas about child support have evolved, so too has the legislation. Historically, child support has been low and difficult to enforce. In the 1980s, the provinces one by one established enforcement agencies to help collect both child and spousal support. Only in 1994, however, did the courts begin to recognize how inordinately low the payments usually were, and started to raise them. Since 1997, there have been legislated Child Support Guidelines, which has resulted in more generous child support awards for children.

At the same time as the spousal and child support awards have been increasing, governments have been cutting back social assistance, although the two are not officially connected as a matter of social policy and, of course, not all mothers on social assistance have a payor spouse or father to approach for support payments.

Even with the trend of a rise in support payments, Statistics Canada reported in 1997 that women and children who received support experienced a dramatic 33 percent median decline in their standards of living one year after separation. This contrasts with the situation of men paying support, whose lifestyle improves 20 to 25 percent. Statistics Canada had studied the tax files of Canadians with children who separated between 1987 and 1993 to obtain these statistics. In 2005, the federal government released for discussion a set of advisory guidelines on spousal support, for the assistance of the courts and lawyers advising family law clients. It is not intended to bear the weight of law.

Remarriage has become a newer area of legal concern. When divorce was uncommon, rules on remarriage were even more uncommon. Today, however, second and subsequent marriages occur so often that these issues arise in the courts.

And in 2004, the first same-sex divorce in Canada was granted by an Ontario court, soon after the Ontario Court of Appeal approved same-sex marriage.

C Linda Silver Dranoff 2005