Family Law in Canada, Christine Davies, Toronto: Carswell, 1984. Pp. *iii*, 681, $95.00 (softcover).

Although technically a fourth edition of *Power on Divorce and Other Matrimonial Causes*,[1] this book is, as stated by the author,[2] an attempt to present the law as of June 1, 1984. As a result, practically speaking, the bulk of the material can no longer be attributed to Kent Power.

Readers of this volume will quickly discover that it is an exhaustive and concentration study of all facets of family law as they exist in Canada today, with concentration on divorce. While the law pertaining to divorce is closely scrutinized, this edition of Power transcends divorce and considers such varied aspect of family law as provincial support legislation, marriage annulment, tort actions relating to loss of consortium, judicial separation, restitution of conjugal rights, alimony, support, constitutional questions relating to support, custody and an in depth analysis of Bill C-10, a proposed bill to amend the *Divorce Act*.[3] The purpose of this review is to consider those aspects of the book which deal with support provisions under Ontario, Prince Edward Island, New Brunswick and Yukon Territory legislation, and the proposed amendments to the *Divorce Act* as outlined in Bill C-10.

Chapter 10 of the book is entitled "Support in Ontario, Prince Edward Island, New Brunswick and the Yukon Territory other than under the *Divorce Act*." As the author points out, the *Family Law Reform Act* of Ontario appears to have been the model for the legislation of Prince Edward Island, New Brunswick and the Yukon Territory.[4] While the four pieces of legislation share many strong similarities, there are provincial differences worthy of note.[5] Each statute affirms (i) that every spouse has an obligation to provide support for himself or herself, and for the other spouse, in accordance with need to the extent that he or she is capable of doing so, and (ii) that the court is obliged to consider all the circumstances of the parties in determining the amount, if any, of support in relation to need. While Prince Edward Island lists thirteen factors and Ontario and Yukon Territory list sixteen, the New Brunswick legislation lists twenty factors.[6]

The Ontario legislation lists the needs of the dependant as a factor to be considered by the court. In determining these needs, the court may have regard to the accustomed standard of living while the parties resided together. This provision is mirrored in the Prince Edward Island and the Yukon legislation.

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[1] First edition published in 1948, prepared by W.K. Power; second edition published in 1964, prepared by Julian Payne; third edition published in both 1976 and 1980, prepared by Christine Davies.

[2] C. Davies, *Family Law in Canada* (Toronto, Carswell, 1984) iii.

[3] R.S.C., 1968, c. D-8.

[4] Legislation referred to in the review includes: *Family Law Reform Act*, R.S.O. 1980, c. 152; *Family Law Reform Act*, S.P.E.I. 1978, c. 6; *Matrimonial Property Ordinance*, 1979 (2nd), c.-11 (Y.T.); *Child and Family Services and Family Relations Act*, S.N.B. 1980, c.C-21. Note that the title of the latter was amended to read *Family Services Act* in *An Act to Amend the Child and Family Services and Family Relations Act*, S.N.B. 1983, c.16, s.1(1).

[5] *Supra*, footnote 2, at 195.

[6] *Ibid.*, at 198.

In New Brunswick, however, the legislation considers "the needs of the dependant, having regard to the accustomed standard of living while the parties cohabited".[7] Davies submits that the difference between the two paragraphs is significant.[8] The New Brunswick provision defines need "in terms of the accustomed standard of living".[9] This is not the case in the other three jurisdictions; need may or may not be defined in those terms.

In Ontario and the Yukon, the court is directed to consider whether the dependent spouse has undertaken the care of any dependent child over the age of majority who is unable, by reason of illness, disability or other cause, to withdraw from the charge of the dependant. New Brunswick has a somewhat wider provision in that the person cared for may be an adult dependant. Thus in New Brunswick, the court may, in assessing support, consider that the applicant spouse is caring for an elderly parent. In Ontario, the court will also consider whether the dependent spouse has undertaken to assist in the continuation of an educational program for a child over the age of majority in determining if that child is unable to withdraw from the charge of his or her parents.[10] New Brunswick has a corresponding provision, but substitutes the word "dependant" for the word "child", thus permitting a consideration of a spouse who is assisting in the education of his or her parent.[11]

In Ontario and Prince Edward Island, the obligation to provide support for a spouse exists without regard to the conduct of either spouse; but the court may, in determining the amount of support, have regard to a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the relationship. In New Brunswick, one of the enumerated factors to be considered is the conduct of the parties, if such conduct unreasonably precipitates, prolongs or aggravates the need for support, or unreasonably affects the ability to pay support.[12] Thus, for conduct to be considered a relevant factor in determining the amount of support, the standard of behaviour in New Brunswick is less severe than that of the other two jurisdictions — merely unreasonable in the former; unconscionable in the latter.[13]

Different approaches have been taken toward non-marital relationships in the four jurisdictions. In Prince Edward Island, the obligation to support does not extend to non-marital relationships. In the Yukon, all that is required is that the parties have cohabited in a relationship for some period of time amounting to permanence. Ontario appears to have the most rigorous requirements for the obtaining of support in a non-marital relationship, with the prescribed period of cohabitation being five years, as opposed to three years in

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[7] *Ibid.*

[8] *Ibid.*

[9] *Ibid.*

[10] *Ibid.*, at 200.

[11] *Family Services Act*, S.N.B. 1980, c. C-2.1, s.115(6)(q).

[12] *Ibid.*, s. 115(6)(t).

[13] *Supra*, footnote 2, at 204.

New Brunswick. In contrast to the Ontario statute, the New Brunswick provision adds to the prescribed period the requirement that the relationship must have been one in which one person was substantially dependent upon the other for support.[14] The word "cohabit" is defined in Ontario and the Yukon Territory as "to live together in a conjugal relationship with or within or outside marriage". In New Brunswck, "cohabit" is defined as meaning "to live together in a family relationship".[15]

The Ontario legislation provides that every parent has an obligation (to the extent that the parent is capable of doing so) to provide support in accordance with need for his or her child who is unmarried, and is under the age of eighteen years. It also states that the obligation does not extend to a child of sixteen years or over who is no longer under parental control. The New Brunswick legislation does not have such a provision.[16] In New Brunswick, the determination of the paternity of a child born outside wedlock, for the purposes of establishing the obligation to support, cannot be made ancillary to the court proceedings themselves. A declaratory order must be first sought under part six of the Act. This procedure follows from a definition of "parent" in the New Brunswick statute — a situation clearly in contrast to that which pertains in Ontario.[17]

All four jurisdictions include within the definition of "parent", a person "who has demonstrated a settled intention to treat a child as a child of his or her family".[18] Only New Brunswick makes it a further condition that the child ordinarily reside with the alleged parent.[19] Furthermore, Ontario, Prince Edward Island and the Yukon interlock the definitions of "parent" and "child": the latter includes "a person whom the parent has demonstrated a settled intention to treat as a child of his or her family". However, in New Brunswick, "child" includes "a child to whom a person stands *in loco parentis*, if that person's spouse is a parent of the child"; the "settled intention" concept is missing. Davies states that this failure to interlock the two definitions is unfortunate and confusing.[20]

In New Brunswick, a child is defined so as to include an unborn child. Thus, support may be ordered in respect of that child in New Brunswick. In Ontario and Prince Edward Island, a child is defined as a child born within or outside marriage.[21] It has been held that this description precludes an order being made in respect of an unborn child.[22] As Davies suggests, it is uncertain whether a parent can demonstrate a "settled intention" to treat an unborn

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[14] *Supra*, footnote 11, s. 112.

[15] *Ibid.*, s.1.

[16] *Supra*, footnote 2, at 213.

[17] *Ibid.*, at 216.

[18] *Ibid.*

[19] *Ibid.*

[20] *Ibid.*

[21] *Ibid.*, at 220.

[22] *Swanson v. Coombe* (1982), 26 R.F.L. (2d) 416 (Ont. Prov. Ct.).

child as a child of his or her family.[23]

All four statutes under discussion make provision for agreements entered into between the spouses or cohabitees relating to, *inter alia*, support.[24] The New Brunswick legislation provides that where a person owing an obligation to support a dependent enters into an agreement relating to that support, the agreement may be filed with the court, and thereupon has the same force as an order made under the Act. As the New Brunswick Court of Appeal has stated, this particular section applies in respect of agreements entered into before or after the enactment of the Act.[25]

The Ontario, Prince Edward Island and Yukon legislation provide that an order for support may be discharged, varied or suspended where the court is satisfied that there has been a material change in the circumstances of the dependent or the respondent, or evidence has become available that was not available on the previous hearing.[26] The New Brunswick statute goes further, providing that an order may be discharged, varied or suspended if the conduct of the dependant has unreasonably prolonged or aggravated the need for support.[27]

Finally, as regards enforcement, all legislative provisions mark a departure from the traditional garnishee procedure by seizing not only the debt owing at the time the order is served upon the employer, but all debts accruing thereafter by the employer to the debtor for so long as the order remains operable. While the Ontario and Prince Edward Island statutes provide for orders for the attachment of wages, and the Yukon ordinance provides for writs of continuing garnishment, the New Brunswick statute provides for payment orders.[28]

While the chapter on the examination of support legislation in Ontario, Prince Edward Island, Yukon Territory and New Brunswick is a thorough and complete analysis, almost every case cited in the heavily footnoted text is a judgment issued out of an Ontario court. There is but a minimal reference to case law emanating from the New Brunswick, Yukon and Prince Edward Island courts.

Included in the book is an examination of Bill C-10, a bill to amend the *Divorce Act* of 1968. In January 1984, Bill C-10 was given first reading in the House of Commons and then Minister of Justice, Mark McGuigan, described the proposed legislation as striving toward a more humane resolution of marital differences. As expected, the Conservative justice critic described the bill as shallow, superficial and simplistic.[29] Difference of opinion aside, there

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[23] *Supra*, footnote 2, at 220.

[24] *Ibid.*, at 224.

[25] *Moulton* v. *Moulton* (1983), 33 R.F.L. (2d) 383 (N.B.C.A.).

[26] *Supra*, footnote 2, at 228.

[27] *Supra*, footnote 8, s. 118.

[28] *Ibid.*, s. 125.

[29] *Supra*, footnote 2, at 603.

is no question that the proposed amendments will drastically revise all areas of divorce law.

The *Divorce Act* provides two grounds for divorce: matrimonial offence and permanent breakdown of marriage. The offences include adultery, cruelty, bigamy, rape, sodomy and beastiality. Marriage breakdown can be inferred from five specified indicia, the most common being separation — five years where the petitioner is in desertion, three years in all other cases. To obtain a divorce on the basis of marriage breakdown, the petitioner must satisfy the relevant criteria, the parties must be living apart when the petition is filed, and there must be a causal connection between the marriage breakdown and the specified indicia.[30] Under the proposed act, there would be only one ground for divorce, that of marriage breakdown, with the indicia limited to two: both spouses assert that the marriage has broken down, or the spouses have lived apart for a period of one year or more that immediately precedes, includes, or immediately follows the date of presentation of the petition.

Under the *Divorce Act*, seven bars to divorce are set out in s. 9(1). The bars of condonation and connivance are clearly only applicable to matrimonial offences and thus have no part to play in the proposed amending act. However, the bill goes further and removes all the bars save one, that where the granting of a decree would prejudically affect the making of reasonable arrangements for the maintenance of children of the marriage.[31]

Section 11(1) of the *Divorce Act*, insofar as it pertains to orders for permanent maintenance, has changed little. There are, however, some significant differences. One major alteration would allow a court to order a spouse to secure and pay a sum of maintenance. This addition is clearly attributable to the decisions of the Supreme Court of Canada.[32] In those judgments, it was held that the section was not broad enough to warrant an order requiring the payor spouse to pay maintenance and to post a security to which resort could be had in the event of non-payment. The proposed amendment would ameliorate this problem and, as Davies asserts, would be most welcome.[33] Another major difference introduced in the amending s.11(1) is the deletion of conduct as a factor to be considered in awarding maintenance. The new s. 12.1(2) complements s.11 by providing that, when deciding to award maintenance or in assessing or otherwise making a provision respecting maintenance, the court may not have regard to any misconduct committed by a party in the capacity of a spouse of the marriage.

Under the present law, the only court with power to vary an order for maintenance, custody or access is the one that made the order.[34] The new bill would alleviate this situation by broadening the basis for exercising jurdisiction to vary. The original court may still vary its own order, but so also may a

[30] *Toth* v. *Toth* (1976), 23 R.F.L. 282 (Ont. H.C.).

[31] *Supra*, footnote 2, at 606.

[32] *Nash* v. *Nash* (1974), 47 D.L.R. (3d) 558 (S.C.C.); *Van Zyderveld* v. *Van Zyderveld* (1976), 23 R.F.L. 200 (S.C.C.).

[33] *Supra, footnote 2, at 607.*

[34] *Ibid.*, at 609.

Canadian court agreed upon by the parties and a court for the province in which either of the parties resides.[35]

Unlike the present *Divorce Act*, the new bill would specifically provide that the paramount consideration in matters relating to children is their best interest. It further permits the court to make interim and permanent orders for access. Of more practical significance is the elimination of conduct as a factor to be considered in making an order of permanent custody, and the enumeration of specified principles that should be given effect in making orders respecting children. As Davies points out, recent judicial pronouncements from the New Brunswick Supreme Court reflect the view that custodial parents should determine if and when access should be exercised by the non-custodial parent.[36] Such judicial decisions, Davies states, support the controversial theory that the welfare of children of divorced parents would be best served in most access cases if a clean break were made, particularly in the case where the parents remarry and establish new family units. Davies dismisses such theories, stating that Canadian courts have generally granted access to the non-custodial parent except in the most extreme cases.[37]

Yet another change concerns the jurisdictional basis for entertaining a divorce petition. The new amendments will widen and simplify such a basis. At present, the court lacks the jurisdiction unless the petitioner is domiciled in Canada and either spouse has been ordinarily resident in the relevant province for twelve months immediately preceding the filing, and actually resident there for ten months of that period. Under the proposed law, the requirements of domicile and actual residence are deleted; only the 12 month requirement remains. The amendments would aiso simplify the divorce process by abridging the period between the two decrees. Under current law a divorce is obtained in two stages, a decree nisi followed ninety days later by a decree absolute. Under the proposed legislation, there would be but one decree, effective following a thirty day period. No longer will one of the parties have to make application for a final effective decree.

Finally, under the new amendments, s.9 would be altered to delete the prohibition against granting a decree on the consent admissions or default of the parties or either of them, and to eliminate the requirement that there be a trial. Section 19 would be amended to permit a court to make rules providing for unopposed divorce petitions to be processed without a trial, and for the performance of the court's duties in relation to reconciliation to be carried out by an officer of the court. As Davies points out, the effect of these new procedures will be to minimize the adversarial nature of divorce proceedings, lessen the strain on the petitioner, save court time and reduce costs.[38]

As the author states in her conclusions, the bill clearly marks a departure from the present law. For example, the elimination of matrimonial offence as

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[35] *Ibid.*, at 609-610.

[36] *Thomson* v. *Thomson* (1976), 23 R.F.L. 376 (N.B.S.C., Q.B.); *Camick* v. *Camick* (1977), 30 A.P.R. 441 (N.B.S.C., Q.B.).

[37] *Supra*, footnote 2, at 611.

[38] *Ibid.*, at 615.

a ground for divorce will bring Canada into line with most other modern states, including the United States, England, Australia, New Zealand, Germany and Sweden.[39]

Family Law in Canada is undoubtedly a successful endeavour to raise and examine the various aspects of family law in Canada today. Overall, the text is a concise and thorough work, and follows in the footsteps of its predecessors. It should prove most valuable to both academic and practitioner alike.

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[39] *Ibid.*

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