

Book Review: The Law of Family Property, by B. Hovius and T. G. Youdan

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Citation Information

Ziff, Bruce. "Book Review: The Law of Family Property, by B. Hovius and T. G. Youdan." *Osgoode Hall Law Journal* 31.4 (1993) : 865-868.

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BOOK REVIEW

THE LAW OF FAMILY PROPERTY

By B. HOVIUS & T.G. YUDAN

(Scarborough: Thomson Professional Publishing, 1991) 720 pages.

The Law of Family Property is designed to serve as a reference work of marital property law in Ontario. It is extremely successful in pursuing that goal. A thoughtful monograph, written in a direct, even, and clear style, it is detailed without being pedantic or dry, and carries off the task of explaining complex doctrinal points with a certain amount of aplomb. There is little doubt in my mind that a person relying on this work to pursue a specific area of inquiry would likely find the experience of rummaging through the text, notes, and index, a satisfying one. This is not to say that a researcher will necessarily find their topic of interest covered, let alone find themselves in agreement, yet the book remains accessible, lucid, and a pleasure to use.

The book is divided into two sections. Part one covers the general law. In essence, the "general law" refers to those principles of our property systems which are not specifically designed for marital property disputes, but are nevertheless frequently germane to their resolution. For the authors of a reference work such as this one, the logistical and editorial problems associated with presenting a selected overview of general principles of law must be great. What law is to be presented and how detailed should the explication be? We are told in the preface that the original idea was to present an introductory chapter that dealt with constructive and resulting trusts, and the law of gifts. This grew into eight chapters, covering 181 pages (or about 25 per cent of the text). These chapters are valuable and well thought out.

Take for example, the treatment of the law of gifts. This is an area of general application, though it may be of special importance in a family law context. Gifts among members of a household raise special problems, such as determining whether a sufficient act of delivery has taken place.¹ This chapter is the most successful examination of basic gift principles of which I am aware. From among the topics examined in part one, the discussion of the law of trusts is bound to be the most heavily used portion. It is the analysis in this section of the book that

¹ See, for example, *Re Cole*, [1963] 3 All E.R. 433 (C.A.); and *cf. Langer v. McTavish Brothers Ltd.*, [1932] 4 D.L.R. 90 (B.C.C.A.).

was cited with approval in the recent Supreme Court of Canada decision, *Peter v. Beblow*.²

As the preface notes, issues concerning joint ownership, tax law, the conflict of laws, and support are not comprehensively covered, though they are touched on intermittently throughout the text. The law governing joint bank accounts is another area that would merit inclusion. The law of succession is an area that could felicitously be treated as a part of the law of family property. The most logical item for inclusion would be the law of co-ownership, especially that relating to joint tenancies since the family home is often held in joint tenancy.³

Part two is comprised of a detailed examination of Ontario's *Family Law Act*.⁴ The *Act* is Ontario's second attempt at comprehensive marital property reform. The first generation statute, the *Family Law Reform Act*,⁵ which remained in force for only seven years, adopted a user test to determine sharable property. Under this approach, so-called "family" assets were subject to a norm of equal sharing, and in appropriate cases, "non-family" assets could be divided. Among the many changes introduced in the 1985 *Act* was the adoption of an "accumulations" approach, under which the focus is on the gains in the material wealth of the parties during the marriage. This brought Ontario law into line with proposals outlined by the Ontario Law Reform Commission in the 1970s, and to my mind, is a vast improvement over the 1978 *Act*. The new *Act* takes seriously the notion that marriage is, in part, an economic partnership, and reflects clearly the principle that the fruits of the relationship should be shared. This text, however, reflects the complexity of the issues which arise when the courts attempt to achieve some measure of rough justice between the spouses, which is all marital property laws seem able to allow: it takes hundreds of pages to explain and discuss the legal implications of a few statutory provisions.

Given that the bulk of the book centres on the law of Ontario, one would think it to be of little value outside of that jurisdiction. However, this is neither true of the treatment of the general law in the first section, nor of the account of the Ontario *Family Law Act* in the

² [1993] 1 S.C.R. 980 at 933 (citing p. 126) and at 1023-24 (citing p. 147). The text receives passing mention at 999 (p. 136 *et seq.*) and at 1020.

³ See Law Reform Commission of British Columbia, *Report on Co-Ownership of Land* (Vancouver: The Commission, 1988) at 30.

⁴ S.O. 1986, c. 4.

⁵ R.S.O. 1980, c. 152.

second. Some of the issues canvassed transcend provincial boundaries, such as those relating to the recognition of university degrees or the treatment of pensions.

While *The Law of Family Property* is an effective research tool, there is a great deal that it does not do. The book does not address the larger issues. The authors do not engage in hard-biting critique, nor do they analyze issues at a high level of abstraction. Further, the text does not purport to examine issues from a variety of perspectives, say, for instance, from the vantage point of law and economics.⁶

Developments in the law of constructive trusts in Canada are compared with those in England and Australia and, given the similarity of the issues raised in these three polities, these jurisdictional differences are illuminating. However, no attempt is made to consider other modes of statutory reform. Given the great diversity within Canada, it is unfortunate that these alternative approaches are not more thoroughly examined with a view to applying them here at home. Rather, the book's focus on Ontario's statute leaves no room for a discussion of other systems, except to the extent that these promote an understanding of the Ontario *Act*.

There is no *overt* attempt to engage relevant feminist literature to any significant degree.⁷ At the time, the *raison d'être* of marital property reform was to remedy the law's inability to reward labour in the home or in a family setting in general. In effect, this book is largely about the law's response to a problem that is undeniably related to issues of gender. Thus, in failing to properly engage feminist literature, this book may be seen to lack adequate context. Still, however, there are some contextual issues that are effectively presented. For instance, developments in the marital unity doctrine, as well as the role of equity in preserving separate property for certain women, are well presented. Similarly, the historical development of the statutory reforms of the 1970s is outlined. Going even further, those interested in the sociology of law, or perhaps more accurately, the social anthropology of the

⁶ See, for example, B. Bennet, "The Economics of Wifing Services: Law and Economics on the Family" (1991) 18 *J. of Law and Society* 206; and J. Knetsch, "Some Economic Implications of Matrimonial Property Rules" (1984) *U.T.L.J.* 263.

⁷ See, for example, M.A. Glendon, *The New Family and the New Property*, (Scarborough, Ont.: Butterworths, 1981).

practice of law, might be interested in learning about the ways in which the new Ontario law has changed the way in which family law is practised.

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