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# SEPARATION AGREEMENTS

## INTRODUCTION

Consensual separation has for a long time been accepted by common law as one way of resolving marital conflicts that reach a breaking point. But this has not always been so. Ecclesiastical courts, the predecessors of the divorce jurisdiction of the English High Court, frowned upon the parties making their own private arrangements without the intervention of the church, for it usurped their power to decree judicial separation and grant matrimonial relief; legalizing them would have meant enabling the spouses by their own voluntary agreement to divorce themselves as to everything except the right to contract another marriage. The underlying dogma was that marriage is a sacrament and "what therefore God hath joined together, let no man put asunder" (St. Mathew 19:6). While the theory of sacramental origin of marriage was displaced at the time of Reformation by the contractual theory of marriage, and several inroads were made in the indissolubility of the union, the proposition that the parties by their own volition could not separate, was firmly fixed and never departed from by the spiritual courts.[1] As a result, it was a bad plea, in opposing a decree of restitution of conjugal rights for either spouse to allege that their separation was consensual.

For a long time the secular courts adhered to this doctrinaire approach of the spiritual courts. They were reluctant to invade the latter's sphere of marriage and marital relationships. As a result, at least down to 1780

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[1] *Mortimer* v. *Mortimer*, 2 Hagg. Consist. 310 (1820); 161 E.R. 753.

common law and canon law were in accord in regarding consensual separation as illegal and against public policy. This position could not be maintained with the onslaught of later developments, beginning with Lord Mansfield who in a series of decisions from 1784 to 1794 held separation agreements valid.[2] But under the influence of his successor and arch enemy, Lord Kenyon, these decisions were overturned in *Marshall* v. *Rutton* 8 T.R. 545 (1800); 101 E.R. 1538, a case twice argued before all twelve judges of the common law, the gist of the opinion being as follows:

> The ground on which the plaintiff in this case rests his claim is an agreement between the defendant and her husband to live separate and apart from each other. That is a contract supposed to be made between two parties, who, according to the text of Littleton, f. 168, being in law but one person, are on that account unable to contract with each other; and if the foundation fail, the consequence is that the whole superstructure must also fail. This difficulty meets the plaintiff *in limine*. If it did not, and the parties were competent to contract at all, it would

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[2] *Ringsted* v. *Lanesborough* 3 Doug. 197 (1784); 99 E.R. 610 (K.B.); *Barwell* v. *Brooks* 3 Doug. 371 (1785); 99 E.R. 702 (K.B.); *Corbett* v. *Poelnitz* 1 T.R. 5 (1785); 99 E.R. 940. The earliest case in the common law courts that held separation agreements were valid and binding was *Lister*'s case, 8 Mod. 22 (1721); 88 E.R. 17 but Mr. Justice Peaslee points out that the reporters seem to have disagreed as to the reasons: "Separation Agreement under the English Law" in 15 Harvard Law Review (1902) at pp. 640-41. Before *Ringsted* there was another important decision, *Rex* v. *Mead* 1 Bur. 542 (1757); 97 E.R. 440 in which the Court of King's Bench in terms had held separation agreements to be valid.

> then become material to consider how far a compact can be valid which has for its object the contravention of the general policy of the law in settling the relations of domestic life, and which the public is interested to preserve; and which, without dissolving the bond of marriage, would place the parties in some respects in the condition of being single, and leave them in others subject to the consequences of being married, and which would introduce all the confusion and inconvenience which must necessarily result from so anomalous and mixed a character. In the course of the argument some of these difficulties were pointed out, and it was asked whether, after such an agreement as this, the temporal courts could prohibit it if either were to sue in the ecclesiastical court for restitution of conjugal rights? Whether the wife, if she committed a felony in the presence of her husband, would be liable to conviction? Whether they could be witnesses for and against each other? Whether they could sue and take each other in execution? And many other questions will occur to every one to which it will be impossible to give a satisfactory answer. For instance, it may be asked how it can be in the power of any persons by their private agreement to alter the character and condition which by law results from the state of marriage, while it subsists, and from thence to infer rights of action and legal responsibilities as consequences following from such alteration of character and condition? Or how any power short of that of the legislature can change that which, by the common law of the land, is established as the course of judicial proceedings (at p. 1539 E.R.)?

Shortly thereafter Lord Ellenborough who succeeded Lord Kenyon, decided in *Rodney* v. *Chambers* 2 East 283 (1802); 102 E.R. 377 (K.B.) that separation agreements were valid

relying on little known and ill reported cases from the Chancery side of the court, especially the case of *Nichols* v. *Danvers* 2 Vern. 671 (1711); 23 E.R. 1037 (Ch.), decided over a hundred years earlier.

> *Marshall* v. *Rutton* was not cited by counsel nor alluded to by the court. They conveniently overlooked the battle that had just been fought over the question of the power of the parties to modify the marital status.[3]

Despite this confused state of the law, the use of separation agreements persisted.

> There was practically no divorce obtainable and the sort of armistice was the only relief to be had from a union that had proved unendurable. The agreement was made and the parties trusted to each other's honor to carry it out. If, however, the wife saw fit to resist a suit, her coverture was a defence and the agreement only a rope of sand.[4]

Legal decisions having thus been overtaken by custom and practice, during the next thirty or forty years, the courts vacillated in their strict adherence to principle, and even the House of Lords, which in the first case that had come before it involving a separation agreement, *Warrender* v. *Warrender* 2 Cl. & Fin. 488, 1835; 6 E.R.1239[5]

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[3]Peaslee, *supra*, fn. 2, at p. 649.

[4]*Ibid* at p. 651.

[5]See the very elaborate judgment of Lord Brougham much of which was devoted to the question of domicile of the wife, and of Lord Lyndhurst at E.R. pp. 1252-56; 1265-66 respectively.

had declared these agreements invalid for all purposes, "except the obligation contracted by the husband with trustees to pay certain sums to the wife . . . .", reversed itself only seven years later in *Jones* v. *Waite* 4 Man. & G. 1104, 1842; 134 E.R. 452:[6]

> From this time the courts seem to have been fairly committed to the theory that these agreements were valid. While the judges acknowledged that the situation was illogical, they rested upon the now useful doctrine of *stare decisis*.[7]

And in *Wilson* v. *Wilson* 1 H.L.C. 538 (1848); 9 E.R. 870 the House of Lords held that it will not only enforce the agreement to furnish support and convey property, but also the agreement to live apart.

The Court of Chancery also arrived at the same position despite occasional remonstrance.[8] From the very beginning, the married woman was a darling of courts of equity. In an early decision, *Seeling* v. *Crawley* 2 Vernon 386 (1700); 23 E.R. 847 the Master of the Rolls decreed that the husband pay £160 to his father-in-law under an agreement promising such payment. The court said:

> It seems perfectly clear as a general doctrine, that in cases similar to the

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[6] In a very short judgment, Lord Brougham concurred with Tindal C.J. and held the agreement valid.

[7] Peaslee, *supra*, fn. 1 at p. 1.

[8] *Vansittart* v. *Vansittart* 2 DeG. & J. 249 (1858); 44 E.R. 989 (Ch.).

> principal case, equity will decree or carry into effect an agreement for a separate maintenance for the wife (at p. 848 E.R.).

In *Angier* v. *Angier* Gilb. Rep. 153 (1718); 25 E.R. 107 the Chancery Court declared:

> To decree an Execution of Performance of these Articles was not to invoke the jurisdiction of the Spiritual Court; that the intent of these Articles was to save the Expense of a Sentence in the Spiritual Court; that if these Articles could not be decreed here, they would be of no Force anywhere; that there was no Remedy upon them at Common Law, for there the Wife could not sue her husband; . . . (at p. 107 E.R.).

And in *Hunt* v. *Hunt* 4 DeG., F., & J. 221 (1862); 45 E.R. 1169 at 1170-71 Lord Westbury, enjoined a separated wife from bringing a suit for restitution in the divorce court, because such action would violate the terms of a separation deed;

> . . . while a voluntary separation was an offence against the ecclesiastical law, it was not one against the common law, and therefore the rights in controversy were only private, and public policy was not involved.

In *Besant* v. *Wood* 12 Ch. Div. 605 at 620, Sir George Jessel, M.R. rationalized that,

> . . . after all, it might be better and more beneficial for married people to avoid in many cases the expense and the

> scandal of suits of divorce by settling their differences quietly by the aid of friends out of court.

The divorce courts, successors to the ecclesiastical jurisdiction by virtue of 20-21 Victoria, c. 85, following the decision of the House of Lords that separation agreements were valid in all secular courts, recognized and gave effect to separation deeds, as in *Mathews* v. *Mathews* 3 Sw. & Tr. 161 (1860); 164 E.R. 1235, *Brown* v. *Brown and Shelton* 3 P. & D. 202 (1874) and *Marshall* v. *Marshall* 5 P.D. 19 (1879). And the common law court in *McGregor* v. *McGregor* L.R. 20 Q.B.D. 529, decided in 1888, held that the parties could make the contract with each other without the interposition of a trustee. That decision was expressly put upon common law ground, and does not depend upon the modern statutes enlarging the powers of married women.

> So a long journey had been made from the Church's law and Lord Eldon (and Lord Kenyon) and a breach effected in the ancient ecclesiastical defences of the home.[9]

From this rather long historical narrative it will be seen that separation agreements touch upon many aspects of civil law because of the anomalous situation the spouses occupy by reason of the fact that their marriage still subsists for many purposes. They may enter into specific undertakings in respect of certain

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[9]Note in Solicitor's Journal and Weekly Reporter, Oct. 22, 1927, at 816-817, where the history is briefly traced.

matters, but with respect to many others, whatever may be their mutual understanding or arrangement, they cannot override positive law conferring rights and privileges or imposing responsibilities or disabilities on married persons, such for instance as the laws of succession and inheritance,[10] dower,[11] and family relief;[12] duties and responsibilities of maintenance and guardianship of their children;[13] execution against property (or even person);[14] and laws respecting evidence and crime. Furthermore, assuming the role of exponents of vague public policy and residuary authority of the State, courts often vary or strike down what seemingly were legitimate provisions at the time they were agreed upon;[15] to this end statutes conferring discretion to look at private arrangements are called in aid, or are held to displace any agreement between the parties. Sometimes the reasons for such intrusion are opaque; on other occasions forthright. Judges often display inability to appreciate changed social and economic conditions that have emancipated the

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[10] See *infra* p. 60

[11] See *infra* p. 59, 60-68

[12] See *infra* p. 60-68

[13] See *infra* pp. 68-86

[14] See *infra* chapter V

[15] See *infra* chapter VI

married woman, or to expunge the concept of guilt and punishment more of the husband who can easily pay than of the wife, whatever her share of responsibility for breakdown of the marriage may have been, and whatever the period of espousal, since as the reasoning goes in the last resort she would have to be supported by the welfare state. In such circumstances, one wonders whether any significant advances have been made in private contract law and whether in the ultimate analysis the only safe conclusion that can be drawn is that such agreement is binding on the parties in honor only, and a subsequent change of heart, or dissatisfaction, would give enough grounds to a separated wife to treat it as not worth the paper on which it is written.

Such allegations are of course stoutly resisted and courts often reiterate that agreements should be seldom departed from though such sentiments are expressed more in cases where the payor finds himself in difficult financial circumstances; on the other hand, where an allowance agreed upon proves inadequate in light of later developments, courts are ready to hold the payor guilty of wilful neglect as from the time a demand was made upon him by the wife to increase that allowance.[16]

In striking contrast, courts are prepared to modify an order for maintenance that they themselves have made in a matrimonial cause, and to relieve the payor against

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[16] See *infra*, p.110-112 where the case of *Tulip* v. *Tulip* [1951] 2 All E.R. 91 and *Morton* v. *Morton* (No. 2) [1954] 2 All E.R. 248 (C.A.) are discussed.

arrears in excess of one year;[17] also such arrears cannot be enforced by execution or provable in bankruptcy[18] although they survive the debtor's discharge. Arrears of payment under a separation agreement can be enforced by execution, and are subject only to the law of limitation (*viz.*, 6 years) but it is not clear whether they are discharged or whether the agreement itself is terminated. Under the law prevailing before 1949,[19] there seems to have been little doubt that arrears were provable and discharged, and the agreement terminated, but section 135(1)(c) was introduced into the *Bankruptcy Act* of 1949 (2nd session) c. 7, probably under the influence of the U.S. Code[20] and

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[17] *Hill* v. *Hill* [1964] 46 W.W.R. 158 (B.C.C.A.) and see *infra*, p.

[18] *Linton* v. *Linton* (1885) 15 Q.B.D. 239; 34 L.J.Q.B. 529. *Kerr* v. *Kerr* (1897) 2 Q.B. 439; 66 L.J.Q.B. 838; in *Re Stillwell, Broderick* v. *Stillwell* (1916) 1 Ch. 365. See Duncan and Honsberger, *Bankruptcy in Canada*, 3rd ed. (1961) at p. 777 and in *Re Freedman* 55 O.L.R. 206; 5 C.B.R. 47; [1924] 3 D.L.R. 517.

[19] Under the old law, borrowed from England, they were debts provable and hence discharged: *Victor* v. *Victor* [1912] 1 K.B. 247; 81 L.J.K.B. 354. *Ex parte Bates* in *Re Parnell* [1879] 11 Ch. 914; *ex parte Neale* in *Re Batey* (1880) 14 Ch. D. 579; and probably the contract itself was terminated, though the common law liability to maintain his wife according to his ability was not extinguished: See Duncan *Law and Practice of Bankruptcy in Canada* (1922) at p. 420.

[20] S. 17(2) of the U.S. Act; See McGuigan *Cases and Materials on Creditors' Rights* (1967) at p. 696 (note to *Victor* v. *Victor* (*supra*)). The author suggests that *Victor* v. *Victor* is no longer good law in Canada. Under the U.S. Act the U.S. courts have decided that a separation agreement is an "agreement for maintenance and support" (and hence not discharged); citing in *Re Ridder* (1935) 79 F. 2d. 524.

the law apparently has changed. In other words the same law will apply both to court ordered payments and contractual payments of support, as regards both arrears[21] and survival of the agreement.[22]

In spite of this uneven incidence of the effects of the law, separation agreements are still popular and one wonders why a husband is prepared to resolve his marital conflict by private arrangement knowing that his liability is not diminished in any way. Such motives can only be unravelled by empirical studies and it is not wise to speculate from limited knowledge. But it appears that a consensual arrangement hammered out through independent counsel representing the spouses often provides more generously to a wife than if she were to resort to her legal rights and that such an agreement is more likely to be adhered to faithfully than a court ordered settlement. We encounter these agreements most often in divorce cases where provisions instead of being dictated by the

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[21]Although there is no decision on this point except *Victor* v. *Victor* and other cases cited in fns. 19 and 20, which as stated in fn. 20 may no longer be good law in Canada, it is submitted that this would be the result because it is inequitable to the other ordinary creditors of the husband in bankruptcy that the wife should compete with them for dividend and still be able to recover the balance after her husband's discharge.

[22]The only case under section 135(1)(c) is in *Re Dimitroff* (1966) 8 C.B.R. 253 (Ont.) where the main point concerned costs of recovery of alimony; the court discussed at length the previous law on this point and came to the conclusion that both alimony and costs of the action survive bankruptcy.

courts are fixed by the parties in advance, though there may be many agreements that do not culminate in divorce. Lindey, in his unique work on *Separation Agreement and Ante-nuptial Contracts* points out that

> . . . litigation involves delay, expense bitterness, almost always undesirable publicity, and sometimes open scandal. Settlement by contract is swift, inexpensive, decent and private.[23]

To this one should add that with the rising tide of divorces under the liberal provisions of legislation, a court could not meaningfully go into every fact and circumstance to determine the merits or ability to pay within the very limited time available for disposition of a suit; and would have perforce to rely upon the contractual arrangements if on their face they do not appear unconscionable. For this and other reasons stated above, separation agreements should be encouraged.

This paper is not intended to analyze all the ramifications of separation agreements and their impact on substantive law. After brief excursions into the general validity of these agreements, the analysis would focus upon the scope and validity of the various provisions that are sought to be made by the parties to the marriage, their effect upon substantive rights, the impact of substantive law on these provisions, the effect of matrimonial decrees which either party may proceed to obtain regardless of

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[23]At p. x Forward to the Second Revised Edition (1964, Reprint 1969) at p. x.

their private contract, the effect of breach of the agreement, the effect of reconciliation, and the power the court has or should have to vary such agreements.

# I

## GENERAL REQUIREMENTS FOR VALIDITY

It is now firmly established that a separation agreement *per se* does not offend public policy[24] and courts will specifically enforce them[25] if they otherwise comply with the general law relating to contracts.[26] The law does not nor can the courts, compel a husband and

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[24]In *Hunt* v. *Hunt* (1862) 4 DeG. F. & J. 22; 45 E.R. 1168 Westbury, Lord Chancellor, at pp. 1169-70, said:

> It seems to me . . . impossible to say after the Reformation, as a general proposition, that voluntary separations were contrary to the policy of the law. It certainly was perfectly true that inasmuch as the whole jurisdiction on the subject remained vested in the courts Christian . . . deeds of separation remained forbidden, that is, were treated as of no avail by the Ecclesiastical Law, and in that sense alone could it continue to be rightly said that separation was contrary to the policy of the law.

*Burleigh* v. *Crocker* [1954] O.W.N. 248 (C.A.); [1954] 2 D.L.R. 535.

[25]*Elworthy* v. *Bird* (1825) 2 Sim. St. 372; 57 E.R. 388. So also an agreement to enter into a separation deed will be specifically enforced: *Gibbs* v. *Harding* (1870) 5 Ch. App. 336; 39 L.J. Ch. 374. However, an agreement may be so framed as to be a good answer to a suit for restitution of conjugal rights: *Marshall* v. *Marshall* (1879) 5 P.D. 19.

[26]*Hyman* v. *Hyman* [1929] A.C. 601 at 625 ("Agreements for separation and maintenance are formed, construed and dissolved, and enforced on precisely the same principles as any respectable commercial agreement": per Lord Atkin.)

wife to live together. There is nothing illegal in the parties mutually deciding, without a formal agreement to separate. But a husband's silence upon the wife's departure from their home does not constitute consent to separation; even a signed separation agreement is not conclusive evidence that the parting was consensual. No particular form of contract is required and if supported by legal consideration[27] will be binding, irrespective of whether it is made orally, in writing,[28] or by conduct. There must be intention to create legal relations,[29] the

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[27] *Stern* v. *Sheps* [1966] 58 W.W.R. 612, aff'd [1968] S.C.R. 834: "Immediate prospect of marriage constituted valid consideration for the execution of the deed." *Grant* v. *Grant* (1972) 4 R.F.L. 127 (Alta.); separation agreement under seal held valid and binding--no consideration needed.

[28] *McGregor* v. *McGregor* (1888) 21 Q.B.D. 424 (C.A.): Such an agreement is not one "not to be performed within one year" and so are not caught by section 4 of the Statute of Frauds. However, if land or an interest therein is sought to be conveyed, it must be in writing to comply with the same statute. (Statute of Frauds (1677) 29 Car. 2 c.3).

[29] *Gould* v. *Gould* [1970] 1 Q.B. 275 (C.A.); [1969] 3 All E.R. 728: An oral separation agreement whereby husband agreed to pay "as long as I can manage it" was held unenforceable as there was no intention to create legal relations; the terms were uncertain and there was no *quid pro quo* from the wife. See also *Williams* v. *Williams* [1957] 1 All E.R. 305 (C.A.) per Denning L.J. at 307:

> In promising to maintain herself while she was in desertion the wife was only promising to do what she was already bound to do. Nevertheless a promise to perform an existing duty is I think sufficient consideration to support a promise so long as there is nothing in

[Continued on next page.]

parties must be competent to make the contract[30] and there must be no fundamental mistake of fact going to the root of the contract such as the existence of a valid marriage between them.[31]

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> the transaction which is contrary to the public interest (because she could have pledged his credit . . . although the husband would have a defence he would be put to the trouble of defending the action brought by the tradesman. . . . Secondly desertion is never irrevocable.)

*cf.* *Balfour* v. *Balfour* [1919] 2 K.B. 571, where parties were in amity and there was no separation.

[30] In *Re Jane's Estate* (1950) 2 W.W.R. 313; *Henderson et al* v. *Northern Trusts Co. et al* (1952) 6 W.W.R. 337 (Sask.). In the latter case an infant wife who had contracted out of her rights under the *Intestate Succession Act* by way of a separation agreement, was held to have validly done so, as the agreement was fair to her. Where the agreement is not for the benefit of the infant, it is void and cannot be subsequently ratified: *Hole* v. *Hole* (1948) N.Z.L.R. 42.

[31] *Butcher* v. *Vale* (1891) 8 T.L.R. 93; *Galloway* v. *Galloway* (1914) 30 T.L.R. 531 (plaintiff and defendant believing as was not the fact that they were lawfully married entered into a separation deed; held the deed was void). *Law* v. *Harrigan* (1917) 33 T.L.R. 381 (At the date of the deed neither party believed the defendant's first husband was alive. She had not heard of her first husband for some years and the plaintiff believing she was a widow, married her. In fact the husband was alive at the date of the deed. Held that as the deed was based on the existence of a valid marriage, it was void). *Evans* v. *Evans* (1941) 2 W.W.R. 81 (B.C.). On the other hand, a decree of nullity granted on the ground of incapacity of the wife to consummate marriage does not affect the previous separation deed: *Fowke* v. *Fowke* [1938] Ch. 774. Although the separation agreement may be void where the marriage is a nullity, the innocent wife may not be altogether without a remedy. She may obtain compensation in lieu of maintenance. See *infra* p.102 et seq.

Unlike other business contracts, a separation agreement demands a course of conduct *uberrimae fidei* on the husband's part. All material facts must be disclosed. The wife should know her husband's circumstances and any other facts which might affect the terms of the contract, so that she may accept or reject her husband's proposals. Further it is the duty of the husband, he being in a position of trust, to disclose such facts. The wife is usually in the weaker position, since hers is the necessity for support. Her necessity and the desire to avoid litigation (which is favoured by law), may become a powerful weapon in the hands of the husband or others to obtain from her an agreement which binds her during her life and to which she may accede without full freedom of action which should surround the making of such agreements. But where she has legal advice or where they lived separately for a long time and they are dealing at arm's length, or where the wife is living in independence of or in hostility to the husband, there is no confidential relationship actually existing between them. In such cases the agreement should be enforced strictly.

Under the offence or guilt oriented divorce legislation of the past, the innocent spouse had a considerable leverage in negotiating a settlement and if his (or her) demands were not met the other spouse could refuse to petition for divorce. The new *Divorce Act* by eliminating matrimonial offence not only for the entitlement to maintenance but also for the ground of divorce, "inevitably

brings about a certain measure of equalization of bargaining position".[32]

The agreement may be set aside by the court where it is unreasonable, unfair, unjust or unconscionable,[33] or tainted by fraud,[34] duress,[35] undue influence,

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[32]Payne: "Corallary Financial RElief in Nullity and Divorce Proceedings" App. I Papers reproduced for the Seminar on Developments in Divorce Law (Edmonton, Calgary, April 1970) at p. 18.

[33]See *Bennett* v. *Bennett* (1955) 111 C.C.C. 191 (Ont. Fam. Ct.) where the contract was set aside because the parties were of unequal bargaining power.

[34]*Evans* v. *Edmonds* (1853) 13 C.B. 777; 138 E.R. 1407 (referred to by Lord Herschell in *Derry* v. *Peek* (1889) 14 App. Cas. 337 at 368, "If plaintiff intending to deceive defendant for plaintiff's own advantage and defendant's disadvantage, induced the latter to make the deed by representing a fact to be true which was not true but about which defendant knew nothing, that would amount to fraud and would avoid the deed.") But if the defendant had discredited the fraudulent misrepresentations by the plaintiff wife at the time of executing the separation agreement, it will not be set aside: *Westeneys* v. *Westeneys* [1900] A.C. 446.

[35]*Adamson* v. *Adamson* (1907) 23 T.L.R. 434--where a husband threatened the wife that she will get nothing if she did not sign a separation deed, court held wife was not a consenting party to the deed so that she was not prevented from alleging husband's desertion. Also *De Pret-Roose* v. *De Pret-Roose* (1934) 78 Sol. Jo. 914 where the husband threatened to remove their children from jurisdiction, the agreement was set aside.

illegality,[36] or by concealment of material facts[37] or

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[36]Illegality often arises where the parties enter into separation agreement collusively in order to facilitate divorce. The courts have generally held that such collusive agreements are illegal. Thus contracts stimulating divorce are illegal; they are collusive in character and amount to a fraud on the court: *Emanuel* v. *Emanuel* [1945] P. 115; 2 All E.R. 494 per Denning J. at 495 ff. Collusion is a fabrication of evidence, and includes suppression of evidence or defence: *Hope* v. *Hope* (1857) 8 DeG. M. & G. 731; 44 E.R. 572; *Beale* v. *Beale* [1929] 2 W.W.R. 1 (Sask.C.A.); *Scott* v. *Scott* [1947] 1 D.L.R. 374, Aff'd 1 D.L.R. 918 (Ont. C.A.); *Riley* v. *Riley* [1950] 1 W.W.R. 548 (Man. C.A.). But it is not illegal *per se* to enter into such an agreement where the parties were already contemplating divorce. *French* v. *French* [1947] O.R. 668 (C.A.); *Hutton-Potts* v. *Royal Trust Co.* [1949] 2 W.W.R. 1031; *Armstrong* v. *Armstrong* [1951] 2 W.W.R. 332 (Alta. App. Div.) (agreement before divorce action at wife's insistence held not collusive). *Bell* v. *Bell* [1957] 21 W.W.R. 126 (Alta.); nor is an agreement made after divorce action begun: *Tregillus* v. *Tregillus* [1945] 3 W.W.R. 12 (Alta.). Negotiations between solicitors prompted by a desire for settlement, not collusive: *Alstead* v. *Alstead* [1947] 1 W.W.R. 296 (Sask.); *Burleigh* v. *Crocker* [1954] O.W.N. 248 (C.A.); [1954] 2 D.L.R. 535. *Tannis* v. *Tannis* (1970) 8 D.L.R. (3d) 333 (settlement of alimony action conditional upon grant of divorce held not collusive under s. 2(c) *Divorce Act*). *Pope* v. *Pope* [1940] 2 W.W.R. 509 (B.C.C.A.); agreement between spouses whereby the "other woman" (who he married after divorce) promised to pay, held not collusive. *Christmanson* v. *Christmanson* (1927) 1 W.W.R. 149 (Alta.): wife's paramour agreeing to pay husband's costs in divorce held not collusive. On the other hand where the husband desired a divorce and there were grounds for it but he had agreed not to defend wife's petition, it was held that the agreement was collusive as the wife's real motive was not to seek divorce but to claim maintenance: *Mandolids* v. *Mandolids* (1956) 5 D.L.R. (2d) 180; aff'd [1956] O.W.N. 537 (C.A.). Other cases of illegality: *Elworthy* v. *Bird, supra,* fn. 25, *Rogers* v. *Rogers* [1938] 1 D.L.R. 99 (not illegal to agree to pay maintenance in settlement of a criminal prosecution for non-support). See also Payne, *supra,* fn. 32 at pp. 5-8

[37]*Day* v. *Day* (1923) 23 O.W.N. 566. *Hulton* v. *Hulton* [1917] 1 K.B. 813 (C.A.). Nondisclosure of ante-nuptial incontinence on the wife's part held not such a fraud

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by trickery[38] even where an action for divorce is pending. Where the agreement is the product of negotiation through counsel on both sides such a possibility is rare.

Assuming that the general requirements for validity are satisfied, courts may and often do, scrutinize particular provisions and set them aside without affecting the validity of the remainder,[39] on some of the grounds mentioned above (fraud, concealment, etc.) or on public policy grounds,[40] unless it must be enforced in its entirety if at all.[41]

It is now well settled that for an agreement to be valid separation must have already occurred or be imminent;

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upon the husband as to entitle him to set aside post nuptial settlement; *semble*, adultery committed before separation will invalidate the separation deed of the defendant; husband knew nothing of it: *Evans* v. *Carrington* (1860) 2 DeG. F. & J. 481; 45 E.R. 707 (L.C.). *Ord* v. *Ord* (1923) 2 K.B. 432; All E.R. Rep. 206. *Bullick* v. *Bullick* [1922] 68 D.L.R. 242 (Alta.)

[38] *Re Allen and Allen* (1959) 16 D.L.R. (2d) 172 (B.C.) where the wife who eloped with her lover to Nevada taking the children with her, in order to get a divorce, induced her husband who remained in Vancouver, as the price of her returning to him to sign a separation agreement granting custody of the children to her, the court set aside the agreement and granted custody to the husband.

[39] *Hamilton* v. *Hector* (1872) L.R. 13 Eq. 511.

[40] See *infra*, chapter V

[41] *Vansittart* v. *Vansittart* (1858) 2 DeG & J. 249; 44 E.R. 984.

in the latter case the parties must live apart[42] immediately, otherwise the agreement becomes void.[43] Thus an agreement which provides that the parties may separate in the future by reason of existing cause or causes arising after the execution of the agreement is void as it would induce the breakup of the marriage at the pleasure of either spouse.[44]

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[42]The *Divorce Act*, s. 4(1)(e) provides for divorce on the ground that the parties have been "living separate and apart" for 3 or 5 years depending on whether it is desertion of the petitioner or consensual separation, or desertion by the petitioner. A number of cases have held that there must be separation in fact and where they live in the same household, or where even slight service is rendered to the other spouse, it is not sufficient to constitute "living separate and apart"--see *Reid* v. *Reid* [1969] 71 W.W.R. 375 (B.C.); *Cherewick* v. *Cherewick* [1969] 69 W.W.R. 235 (Man.); *Pybus* v. *Pybus* [1969] 72 W.W.R. 234 (B.C.); *Mouncer* v. *Mouncer* [1972] 1 All E.R. 289 (if parties are living in the same household it is not sufficient to constitute "living apart" even though they reject normal physical relationship and there is absence of normal affection). On the other hand a few cases have held that spouses may be regarded as "living apart" even though they may be living under the same roof provided they do not render any service or have intercourse: *Galbraith* v. *Galbraith* [1969] 69 W.W.R. 390 (Man. C.A.); *Rousell* v. *Rousell* [1969] 69 W.W.R. 568 (Sask.); *Seminuk* v. *Seminuk* [1970] 72 W.W.R. 304 (Sask. C.A.); *Smith* v. *Smith* [1970] 74 W.W.R. 462 (B.C.). There must be *animus separandi* and the reason for living under the same roof would be because of unavoidable circumstances. For a discussion of *jurisprudence* on this, see Payne, *supra*, fn. 32, at pp. 18-23.

[43]*Hindly* v. *Westmeath* (1827) 6 B & C 200, 108 E.R. 427.

[44]*Vane* v. *Vane* (1740) Barn. Ch. 135; 27 E.R. 585 (L.C.); *Durant* v. *Titley* (1819) 7 Price 577; 146 E.R. 1066 (Ex. Ch.); *Westmeath* v. *Westmeath* (sub. nom. Salisbury) (1831) 5 Bli. N.S. 339; 5 E.R. 349 (H.L.); *H.* v. *W.* (1857) 3 K & J 382; 69 E.R. 1157 (This case concerned an ante-nuptial

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There is a failure of consideration where no separation takes place and the agreement will not be enforced. However, it is not fatal to provide in an agreement that it will revive *ipso facto* if the spouses after reconciliation should separate again.[45] Similarly, where the spouses are already living apart and are desirous of reconciliation, they may validly provide for future separation should reconciliation not work.[46]

On the other hand, where the primary purpose of the agreement is to effect a property settlement, its validity is not impaired by the fact that it is entered into with a view to later separation.

Even if the above requirements are satisfied, a valid separation agreement may be rendered void by the subsequent reconciliation and recohabitation of the parties without affecting the rights that have already accrued, or the provisions that have already been executed.[47]

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settlement which, among others, provided for certain trusts in favour of the wife and children to come into force if through any fault of the husband the wife was to live apart from him.); *Thierry* v. *Thierry* (1956) 18 W.W.R. 127 (Sask. C.A.). *Wood* v. *Wood* [1927] 60 O.L.R. 438.

[45] *Meredith* v. *Williams* (1879) 27 Gr. 154; *Woods* v. *Woods* [1927] 60 O.L.R. 438; 3 D.L.R. 321; *Morgan* v. *Morgan* (1931) 3 W.W.R. 292 (B.C.)

[46] *Harrison* v. *Harrison* [1910] 1 K.B. 35; *Re Mayerick's Settlement* [1921] 1 Ch. 311; *Lurie* v. *Lurie* [1938] 3 All E.R. 156.

[47] *Crouch* v. *Waller* (1859) 4 DeG & J 302; 45 E.R. 117. As to the effect of reconciliation on separation agreements, see *infra*, pp. 132 ff.

*RECOMMENDATION #1*

*AN AGREEMENT THAT IS FAIR AND FAIRLY OBTAINED SHOULD NEVER BE SET ASIDE. THE FAIRNESS OF THE PROVISIONS SHOULD BE JUDGED AS AT THE DATE OF ITS EXECUTION.*

## II

## EFFECT OF SEPARATION AGREEMENT ON SUBSTANTIVE RIGHTS

Before discussing the effects of a separation agreement on the substantive right of the spouses, both common law and statutory, it should be pointed out that these agreements range from simple executory contracts providing for maintenance on a continuing basis with or without conditions or covenants, to very elaborate settlements whereby property may be shared or distributed, or transferred absolutely or to trustees for use of the wife and children. Their effect on substantive rights may be analyzed in terms of the usual clauses and covenants that are to be found in separation agreements, the more important of which are:

(1) Covenant to pay alimony;
(2) Covenant not to molest or annoy;
(3) *Dum sola et casta vixerit* clause;
(4) Covenant to indemnify husband against post separation debts incurred by wife;
(5) Covenant to condone all past offences, *Rose* v. *Rose* clause;
(6) Covenant not to sue for any matrimonial relief;
(7) Clauses contracting out of statutory rights of dower, intestacy, family relief, etc.;
(8) Provision with respect to custody and maintenance of children;

(9) Clause relating to reconciliation and resumption of cohabitation.

In the absence of express provision to that effect, these clauses and covenants are deemed to be independent so that a breach of one or more of them does not entitle the innocent party to refuse to carry out his obligations, though the latter can claim damages.[48] Even if they are expressed to be interdependent, courts may on grounds of public policy override them as, for example, where a wife covenants not to sue for alimony for herself or for children or to seek their custody. Generally, however, courts construe a separation agreement like any other contract[49] and will not imply particular provisions except where the parties have agreed to enter into an agreement with "usual" clauses in which case certain clauses are held to be "usual", e.g., covenant to pay alimony, covenant to indemnify,[50] but a *"dum casta"* clause[51] is not.

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[48] *Fearon* v. *Aylesford* (1884) 14 Q.B.D. 792; *Re McDougall* [1916] 10 W.W.R. 1001 (Man.); *Marshall* v. *Marshall* [1923] 2 W.W.R. 820 (Sask. C.A.); *King* v. *King* [1942] 3 W.W.R. 699; *Quinn* v. *Quinn* [1949] O.W.N. 614.

[49] *Bourne* v. *Bourne* [1913] P. 164.

[50] *Gibbs* v. *Harding* (1870) 5 Ch. App. 336; 39 L.J. Ch. 374.

[51] *Fearon* v. *Aylesford* (*supra*, fn. 48) *Hart* v. *Hart* (1881) 18 Ch. D. 670; *Sweet* v. *Sweet* [1895] 1 Q.B. 12; *Marshall* v. *Marshall* (*supra*, fn. 48); *Jasper* v. *Jasper* [1935] O.R. 269, aff'd [1936] O.R. 57 (C.A.) (even though marriage dissolved on the ground of subsequent adultery); *Hirtle* v. *Hirtle* [1950] 1 D.L.R. 508 (N.S.C.A.) (though in the absence of *dum casta* clause adultery is not a breach of the agreement, yet openly adulterous conduct may in some circumstances constitute a breach of covenant against molestation and annoyance).

(1) Covenant to Pay Alimony[52]

This is perhaps the most important covenant not only because of the recurring controversy surrounding the entitlement to alimony in this day and age, but also because of numerous cases that indicate frequent clashes between spouses whose marriage had hit the rocks long ago. Inept language used by the draftsmen is one cause of these disputes; another and far more serious cause is dissatisfaction over the amount of payments in light of changed circumstances which either spouse finds herself in: the wife (or former wife) may find the amount inadequate because of inflation or simply because of a gross disparity between her income from this source and her husband's, and the husband may feel the weight of payments he had undertaken to make when bad times or new burdens have befallen him.

The legal duty of maintaining a wife during coverture and after its cessation, has been the bulwark of matrimonial law since very early times when jurisdiction over domestic relations was the exclusive preserve of spiritual courts,[53] and has not diminished in any way in spite of the great

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[52]The Ontario Court of Appeal in *Re Carey* [1946] O.R. 171 at 175 states that it is quite proper to use the term "alimony" for payments made under a separation agreement; the leading English cases *Gandy* v. *Gandy*, *Wood* v. *Wood* (1887) 57 L.J. Ch. 1, *Powell* v. *Powell* (1874) L.R. 3 P. & D. 186 speak of payments under separation agreements as alimony; though among lawyers the term is more usually applied to an allowance made to a wife by order of the court.

[53]*Oxenden* v. *Oxenden* 2 Vern. 493; 23 E.R. 916 (1705). Ecclesiastical courts could compel the husband to maintain his wife out of his own property or by his own labour.

transformation that has taken place in the legal, economic and social position of women. In the old days, alimony was a useful device to discourage husbands from abandoning their wives, and the loss of alimony was the punishment most often resorted to when a wife left her husband. Although the decree of restitution of conjugal rights could be obtained by either party, and the deserting spouse compelled to return to the plaintiff, as Sir James Hannen points out in *Marshall* v. *Marshall* [1879] 5 P.D. 19 at page 23, the decree was not used literally to enforce the spouse's return (and if she did not return, she could have been thrown into prison for contempt) but only to enforce a money demand, i.e., alimony.[54] Common law courts played a second fiddle by recognizing the wife's right to pledge her husband's credit for necessaries; they implied an agency relationship, and, where her husband had deserted her without adequate support, an agency of necessity.[55]

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[54]In spite of this observation, he was forced by Mrs. Weldon in her long drawn out matrimonial war to throw her husband into prison for contempt: See *Weldon* v. *Weldon* [1883] 9 P.D. 52 at 55 where he cites *Barlee* v. *Barlee* and *Lakin* v. *Lakin* and other cases from Ecclesiastical courts as authority. To prevent Mr. Weldon languishing in jail the U.K. Parliament passed the *Matrimonial Causes Act*, 1884 abolishing imprisonment for contempt in restitution proceedings and created "statutory desertion" (See 71 Sol. Jou. 817).

[55]As the Morton Royal Commission points out, this right in practice is not of much value to a wife if she cannot persuade tradesmen and others to give her credit (See Cmd. 9678 §467, pp. 129, 30, where the law is very briefly sketched). But it recommended that courts should be empowered to order maintenance on the ground of wilful neglect to provide reasonable support for her or for the children and that she should be able to enforce that order *without leaving her husband:* (§1045 at p. 272); this in effect would reverse the decision of the English court in

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As a *quid pro quo* to his obligation to maintain, the husband was conferred several rights: he was entitled to his wife's consortium and services, to her earnings and to income from her property.[56] The nineteenth century movement to emancipate the married woman from her position of utter dependency on her husband, and giving her exclusive rights over her property and earnings, however did not lessen in any way the legal obligations laid down by the spiritual courts and continued by secular courts after transfer of jurisdiction, but in recent times this

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*Evans* v. *Evans* [1947] 2 All E.R. 656 (K.B.D.) which had held that while the parties live together no order for maintenance could be made against the husband. It further recommended that the payments should be made direct to the wife unless the court considers that, in the particular circumstances, it would be preferable that payment should be made to the court collecting officer: (§1050 at p. 273).

[56]The duty to cohabit and duty to maintain are co-extensive. A wife's right to maintain depends on her ability to justify her living apart from her husband and not on mere fact that she is a wife: *Edwards* v. *Edwards* (1873) 20 Gr. Ch. 392; *Price* v. *Price* [1951] P. 413 per Hodson L.J. at 420-21; *Marjoram* v. *Marjoram* [1955] 1 W.L.R. 520 per Lord Merriman P. at 527-28. Thus were wife's allegations of persistent cruelty against the husband had been dismissed and she had no other ground for living apart from him, it was impossible to find the husband guilty of wilful neglect to maintain: *Reading* v. *Reading* (1968) 112 Sol. Jo. 418; *Reid* v. *Reid* (1970) 10 D.L.R. (3d) 118 (Ont.); *Schartner* v. *Schartner* (1970) 10 D.L.R. (3d) 61 (Sask.); *McKinney* v. *McKinney* (1972) 26 D.L.R. (3d) 517 (Ont.) (where the court finds that the husband left his wife without sufficient cause but also finds that the plaintiff wife has no sincere desire to resume marital cohabitation, an action for alimony must be dismissed --for a petitioner to be entitled by the Law of England to a decree of restitution he or she must show a sincere desire for a real restitution of those rights).

trend seems to have been arrested and possibly reversed at least in the context of divorce,[57] where, as Disbery J. remarks in *Schartner* v. *Schartner* (1970) 10 D.L.R. (3d) 61 at 69, "at long last what was sauce for the goose alone now becomes sauce for the gander also."

In spite of this great social revolution in the status and position of women, the attitude of courts generally speaking has not changed significantly over the generations. Starting with the common law hypothesis that a husband is under a legal obligation to maintain his wife, they tend to interpret their power to award or vary alimony very liberally. If the separation agreement provides for no alimony, or if what is provided is inadequate to maintain a "reasonable" standard of living, public policy is used to justify an award or an increase. Statutes such as the *Divorce Act* confer broad discretion on them to fix the quantum of maintenance or to vary it from time to time, despite an agreement between the spouses.[58]

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[57] The *Divorce Act*, R.S.C. 1970, c. D-8, s. 11(1) places both spouses in an equal position for entitlement to maintenance, but in the nature of things in most cases the husband has to pay. Even where a wife is earning, the device of "nominal" maintenance order is used to preserve the husband's liability! For an enlightened view of the right of support, see Hofstadfer, J. in *Doyle* v. *Doyle* (1957) 158 N.Y.S. (2d) 909 at 911-913.

[58] Agreements made in settlement of these matters however are seldom attacked by the wife when made just prior to divorce proceedings. Courts have very little time to look at all such agreements and accept them unless challenged. As *Pilpel & Zavin* point out in 18 Law & Contemp. Problems at p. 33, "court rules on the technicalities of the divorce while the essential questions are settled by the parties extra judicially," thus making most divorces a [Continued on next page.]

Provincial legislation in non divorce situations also empower courts to override separation agreements in some instances, such as failure to provide any support or to provide adequately, but unlike the Divorce legislation, a matrimonial offence may be an absolute bar to entitlement.[59] It must be conceded that in many cases, the economic reality faced by a wife who is untrained and middleaged or older and hence unable to support herself adequately, may make her right to sue for divorce meaningless if she had no right to support from her husband; it would mean the same thing as allowing the husband to decide whether there should be a divorce or not.[60] On the other hand, divorce is not an easy way out of his problems for a husband whose income is insufficient to maintain two families; he would be effectively denied the right to contract a further marriage, while all that his wife has to do is to transfer that burden from one man to another by the expedient of

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semi-bootleg affair in which ordinarily only a small and relatively unimportant part of the total picture ever gets into court. Ordinarily unless the terms are blatantly outrageous or the agreement itself is a result of fraud, overreaching or duress the courts tend to accept whatever arrangements have been made by the parties themselves. The Supreme Court of Canada has held in *Maynard* v. *Maynard* [1951] S.C.R. 346 that financial arrangements made by the parties to facilitate a pending divorce action may be engrossed in the divorce decree pronounced by the court; such an arrangement is normally not considered collusive.

[59]See, e.g., *Saskatchewan Deserted Wives and Childrens Maintenance Act*, R.S.S. 1965, c. 341, s. 10; *Wives and Childrens Maintenance Act*, R.S.M. 1970, c. W-170, s. 16.

[60]Peele, Catherine G. in *"Social & Psychological Effects of Alimony"*, 18 Law & Contemp. Problems 283 at 291.

re-marriage, assuming that is possible, or refuse to marry at all (and live "common law") because of the allure of the life long pension she gets from her husband. This reinforces the view often held that "desertion is the poor man's divorce" even where divorce is easy to obtain.[61] The divorce reform legislation has thus benefited mainly that class of husbands that has ability to meet alimony demands! And it is apparent from section 9 of the *Divorce Act*, R.S.C. 1970, c. D-8, that courts may deny divorce to a husband who has no ability to meet alimony payments.

There is thus an urgent need for reconsideration of the entire notion of common law liability of the husband in a totally different world we are living in today. As Thornton J. observed in *Martin* v. *Robson* (1872) 65 Ill. 129, speaking of the wave of married women legislation,

> . . . the ancient landmarks are gone. The maxims and authorities and adjudications of the past have faded away. The foundation hitherto deemed so essential for the preservation of the nuptial contract and the maintenance of marriage relations, are crumbling. The unity of the husband and wife has been severed. . . . She no longer clings to and depends upon man, but has the legal right and aspires to battle with him in the contests of the forum; to outvie him in the healing art; to climb with him the steps of fame; and to share with him in every occupation. His legal supremacy

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[61] *Pilpel & Zavin, supra*, fn. 58 at 35.

> is gone, and the sceptre has departed from him.[62]

At the time the above words were written, they were more eloquent than true. Perhaps our courts are still awaiting the day when the legal and economic realities have become so universal as to discard the fundamental common law rule that they have inherited from the ancient courts.[63] This day can of course be accelerated by legislation, and it is submitted that it should be.

(a) Duration of Alimony

If the agreement states that alimony is payable "during her life" the wife is entitled to it even after the husband is dead and gone.[64] Without specific qualifications she is entitled to it after divorce whether or not the court has made other financial provisions (though not in addition thereto),[65] and even

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[62] Quoted in Vernier, III *American Family Laws* (1935) (Reprint 1971) at p. 3.

[63] For a penetrating analysis of the role of alimony in a changing society, see Kelso, R. W. "*The Changing Social Setting of Alimony Law*" in 18 Law & Contemp. Problems 187-196.

[64] *Charlesworth* v. *Holt* (1873) L.R. 9 Ex. 38 (adultery by wife no bar because deed silent on it). *Kirk* v. *Eustace* [1937] A.C. 491; 2 All E.R. 715; *Re Gale; Cox* v. *Gale* (1949) 2 W.W.R. 419 (B.C.). *Haldorson* v. *Campbell* [1953] 8 W.W.R. (N.S.) 188 (Man. Q.B.).

[65] *May* v. *May* (1929) 2 K.B. 386. *Horne* v. *Roberts et al* (1971) 4 W.W.R. 663 (B.C.) (if the divorce court has ordered maintenance, the rights under separation agreement are merely suspended as long as the maintenance order is outstanding; these rights revive if and when the maintenance order ceases to operate).

after remarriage.[66] It is here that the *dum sola et casta* clause becomes important. If such a clause is not inserted, and there are no other similar words of limitation, such as "so long as she remains chaste"[67] or "during the term of this agreement"[68] or "while the parties are living separate and apart"[69] or "while the marriage subsists"[70] or "until remarriage",[71] a husband

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[66] *Rust* v. *Rust* (1927) 1 W.W.R. 491 (Alta.) (in the absence of a *dum casta* clause and no fixed duration she is entitled even if she is divorced and has remarried). *Richards* v. *Richards* (1972) 23 D.L.R. (3d) 68 (Ont.); *Hayfield* v. *Hayfield* (1957) 1 All E.R. 598 (P.D.A.).

[67] While this clause puts an end to alimony if wife is guilty of adultery, if she is not payments must be continued even after husband's death: *Bennett* v. *Can. Trust Co.* (1960) 31 W.W.R. 311 (B.C.C.A.).

[68] *Montgomery* v. *Montgomery* (1945) 1 W.W.R. 636 (B.C.C.A.) (held covenant to pay "during term of agreement", no express time being fixed, ceases on divorce.)

[69] *Re Gilling; Proctor* v. *Watkins* (1905) 74 L.J.Ch. 335; 92 L.T. 533; 49 Sol. Jo. 401 (ceases upon death); *Re Irwin* (1912) 21 O.W.R. 562, 4 D.L.R. 803.

[70] *Grini* v. *Grini* (1971) R.F.L. 255 (Man.)

> When the parties executed their agreement in 1958 they could not have had in contemplation the wide changes in the law to be effected by the Divorce Act some 10 years later. Indeed when their agreement was signed, the wife could only lose her right of support by her own misconduct, whereby the husband might, if he chose, petition for divorce, or by her own election to dissolve the marriage, assuming adultery on his part. And while to be sure, intended arrangements sanctified by the most formal agreements are sometimes frustrated by a later change in the law, since *Hyman* v. *Hyman* (1929) A.C. 601 the law has denied to a

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[71] This footnote on next page also.

has no right to stop payment if the wife is living in adultery, or has obtained divorce, or even remarried. As Lush on *Husband & Wife* (4th edition) (1933) at 448 says:

> A separation agreement is, after all, a contract, and the ordinary rules of interpretation of contract must be applied thereto. The contract has existence by act of the parties, and it is their joint or several misfortune if they have proved so inept as to fail to express their intention accurately.

If the payments are limited to the term of their "joint lives"[72] then they cease upon husband's death and if she

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> wife the right by her own covenant to disentitle herself to maintenance, and this is on the broad ground of public policy whereby, if her husband or former husband will not support her (not being quit of this responsibility) and she is unable to do this by her own efforts, she must become a public charge. . . . Were she able to support herself, then of course, the petitioner need not be called upon.

[71] Such a provision is not considered a device to restrain or discourage the wife from entering into a second marriage; it merely defines the period during which she shall receive support from her first husband. But a promise to pay "as long as I can manage it" is too vague and hence unenforceable. *Gould* v. *Gould* [1969] 3 All E.R. 728 (C.A.)

[72] *Stogson* v. *Lee* (1891) 1 Q.B. 661 (annuity ceases on death of either husband or wife). *Murdoch* v. *Ransom* (1963) 2 O.R. 484; 40 D.L.R. (2d) 146 ("during term of joint lives so long as the parties live separate and apart"--held divorce and adultery no bar to maintenance
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has also bartered away the rights of inheritance, family relief, dower, etc., she will have no other source to tap except her own industry. Where there is no express provision the presumption is that the deed is intended to operate only during the life of both parties: *Langston* v. *Hayes* [1946] 1 K.B. 491 (C.A.) (dicta to the contrary per Lord Atkin in *Kirk* v. *Eustace* ignored).[73] But there is a conflict of opinion in Canada whether payments terminate on divorce or death of the husband where the agreement does not fix the duration of payments.[74]

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but remarriage of wife after divorce terminates the agreement.) "By remarrying the wife had substituted her right to support from her second husband for her right to support from the first." Construing the term ". . . medical expenses etc." and saying this also pointed out that the agreement was not intended to survive remarriage, Kelly J. remarked "it would be an extraordinary result if perchance the wife became pregnant after her second marriage and the plaintiff was called upon to pay the hospital and confinement expenses and any other hospital and medical expenses after the wife's remarriage."

[73]Scott L.J. in giving the court's judgment observed that there is no rule of law that in a deed of separation covenants are to be construed as intended to bind the estate of the covenantor. There is no question here of the scope or limitation of the *maxim actio personalis moritur cum persona* (at pp. 116-117).

[74]*Montgomery* v. *Montgomery* (1945) 1 W.W.R. 636 (B.C.C.A.). *Covell* v. *Covell* (1968) 2 All E.R. 1016; *Bayne* v. *Bayne* (1969) 71 W.W.R. 230; (1971) 1 R.F.L. 269 (B.C.) (payments cease). *Re McDougall Estate* [1916] 10 W.W.R. 1001. *Newing* v. *Newing* (1952) 6 W.W.R. (N.S.) 698 (Alta. App. Div.) (there being no *dum casta* clause nor a clause providing for termination on divorce, the agreement does not cease to operate on divorce. The court distinguished *Montgomery* v. *Montgomery* stating that in that case there was a covenant stating payments are to be made "during term of agreement"). The B.C. Supreme Court in *Bayne* v. *Bayne* was unable to distinguish *Montgomery* case and refused to follow *Newing*.

A wife who sues for divorce however is in a stronger position; unlike her widowed separated sister she can ask the court to exercise its discretion and award maintenance in an amount in excess of that agreed to in the separation agreement. Under the *Divorce Act* R.S.C. 1970, c. D-8, s. 11, the court is not restricted in its discretion, though it may give due weight to what the parties have agreed to.[75] A court order has certain advantages, but when it ceases to be effective, e.g., when limitations are imposed as to "chastity"[76] or "remarriage", the divorced wife can fall back upon the separation agreement which may not have imposed similar limitations.[77] Conversely, the restrictions in separation

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[75]This may work to the detriment of the wife; see *Goldney* v. *Goldney* (unreported) cited in *Bayne* v. *Bayne* (*supra*, fn. 74) and *Bayne* v. *Bayne; Wells* v. *Wells* (1971) 2 R.F.L. 353 (B.C.) (where the lady was held to her bargain). *McKay* v. *McKay* (1971) 2 R.F.L. 398 (Man.).

[76]It may include a *dum casta* clause in an order for maintenance made in favour of a wife. See *Perrin* v. *Perrin* (1969) 3 D.L.R. (3d) 139 (Sask. Q.B.); *Laur* v. *Laur & Gott* (unreported, March 24, 1969, (Ont. S.C.)).

[77]*Findlay* v. *Findlay* [1952] 1 S.C.R. 96 per Rand J. at p. 106: (The rights under the agreement and statute are based on different considerations: they remain co-existent but, related to a period of time, the performance of only one can be exacted, and the operation of one and suspension of the other will depend on the circumstances. Election cannot be taken as between the statutory right and the agreement as a whole. To bring an action under the agreement, cannot affect the right under the statute.) Cartwright J. dissenting stated that she should be deemed to have made her election by suing under the statute rather than under the agreement.

agreements may termainte the allowance on divorce, and the husband would be unable to set up the separation agreement as a bar to the relief claimed by the wife in her petition.[78] Thus a husband by agreeing to pay maintenance "as long as the marriage subsists" cannot rid his obligation of paying the amount by suing for divorce. The instrument of divorce as a corrective to marriage breakdown thus penalizes the husband to a greater degree than it does a wife for his economic circumstances will prevent him from contracting another marriage; whereas the wife is not thus restricted for she would only shift the burden from one man to another. As Disbery J. in *Kinghorn* v. *Kinghorn* (1960) 34 W.W.R. 123 puts it, "a divorced husband cannot be permitted to shun the marital obligations arising out of the first marriage by entering into a second." The contrary view is expressed by Mayrand J. of the Quebec Superior Court in Lois Nouvelles II, University of Montreal Press, 1970 at p. 61, thus:

> The obligation to pay an alimentary pension must not be allowed to constitute an obstacle standing in the way of remarriage. Remarriage and even adoption of other children are perfectly legitimate activities, and the right of the former spouse to receive the alimentary pension should not be considered to be absolute, merely because the other

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[78] *Knight* v. *Knight* (1971) 1 R.F.L. 51 (B.C.) (a wife guilty of matrimonial offence is still entitled to maintenance in a divorce action. The husband was ordered to continue to support his wife at $200 per month notwithstanding the clause in the separation agreement that payments were to continue "as long as she remains his wife".) *Grini* v. *Grini*, *supra*, fn. 70.

> party to the marriage has fully chosen to remarry or to adopt other children.[79]

In agreeing with this view of his colleague, Pothier J. in *Auzat* v. *de Mauche* (1972) 6 R.F.L. 119 at 120-21, states:

> . . . to hold otherwise would be to render divorce proceedings illusory in many instances. Furthermore, the law relating to divorce does not require certain divorced parties to remain celibate until the obligations to their former spouses have been completely discharged.

In the same vein, MacFarlane J. in *Hock* v. *Hock* (1971) R.F.L 333 at 336 states:

> I don't think that the wife is entitled to a lifetime of maintenance to flow from this ill-advised trip to the altar and short marriage.

After a divorce is obtained the former spouses can compromise payments due under the maintenance agreement or order, and such an agreement is subject to the ordinary rules of contract. The status of the parties is no longer in issue, and public policy disappears: *McClelland* v. *McClelland* (1972) 6 R.F.L. 91(Ont.).

On the death of the separated husband the payments agreed to in the separation agreement would continue as

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[79]Quoted with approval by Pothier J. in *Auzat* v. *de Mauche* (1972) 6 R.F.L. 119 at 120-21 (translation at 123).

also the widow's other statutory rights. But if the husband leaves a will making bequests to her, the presumption that a legacy given by a debtor to his creditors is in satisfaction of the debt may be rebutted by slight circumstances, such as direction to pay debts, and she may take the bequest under the will and sue for her maintenance.[80] Where there are no such directions or other means of finding the intention of the deceased, she may have to elect.[81]

The husband cannot escape from or diminish his liability to pay the amounts covenanted under a separation agreement by declaring bankruptcy.[82] The wife however seems to have an advantage in this respect; while arrears under an alimony or maintenance order are not provable in bankruptcy, arrears under a separation agreement being contractual are provable and the wife is eligible for

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[80] *Horlock* v. *Wiggins* (1888) 39 Ch. D. 142 (C.A.); *Re Pottruff* (1972) 27 D.L.R. (3d) 405 (Ont.). (Agreement dated May 31, 1967, will made October 30, 1967, leaving substantial bequests to wife. Held the direction to pay debts rebutted the presumption that a legacy given by a debtor to his creditors is in satisfaction of the debt. So she took both under the will and under the contract.)

[81] *Atkinson* v. *Littlewood* (1874) 31 L.T. 225; *Rissmuller* v. *Rissmuller* (1917) 3 W.W.R. 535; *Ross* v. *Ross* (1930) 1 W.W.R. 375 (B.C.C.A.).

[82] *Bankruptcy Act*, R.S.C. 1970, c. B-3, s. 148(1)(c). The position is no different in the case of a maintenance or affiliation order, and debt or liability for alimony s. 148(1)(c). See *supra*, p. 11.

dividend along with other ordinary creditors.[83] This has an obvious purpose; to keep the obligation on the husband and relieve society of the burden.

*RECOMMENDATION #2*

> *UNLESS EXPRESSLY STATED IN THE AGREEMENT, ALIMONY PAYMENTS SHOULD CEASE UPON THE DEATH OF THE SPOUSE OR UPON REMARRIAGE OF THE PAYEE, WHICHEVER EVENT OCCURS FIRST. HOWEVER IF THE WIFE HAS CONTRACTED OUT OF HER STATUTORY RIGHTS OF SUCCESSION OR FAMILY RELIEF, AND THE COURT FINDS THAT HER OWN RESOURCES, INCLUDING EARNING POTENTIAL, ARE INADEQUATE, THE AGREED PAYMENT SHOULD BE CONTINUED UNLESS THE CONTRARY IS INDICATED IN THE AGREEMENT. IN THE LATTER CASE, THE COURT SHOULD DECIDE ON THE AMOUNT OF HER NEED.*

(b) Periodic Payments versus Lumpsum

Instead of providing for periodic payments, spouses may desire to end all future dealings and make a full and final settlement by way of a lumpsum payment. Where they have no young children, such a settlement could write a definite *finis* to their unfortunate matrimonial experience and they could start a new life of their own, freed of emotional and financial ties. In many instances

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[83] In *Dewe* v. *Dewe*, *Snowdon* v. *Snowdon* [1928] P. 113; 138 L.T. 552; [1928] All E.R. Rep. 492, Lord Merrivale P. held that the husband is discharged from his liability under the agreement but the common law liability to maintain is not thereby extinguished as the wife's right is not in contract but is an incident of matrimonial status. The Canadian position is different. See pp. 10-11 *supra*.

a lumpsum is more advantageous to the wife; she is spared the problem of enforcement and its unpleasant consequences, and she no longer has to live at the mercy of her husband's subsequent earning power. On the other hand, there may be some disadvantages to the wife; she may be paid too little or she may squander the money or lose it through no fault of hers. Where children are in her custody, by her extravagance or misfortune, children may suffer.

Courts do not treat lumpsums too kindly and such payments run afoul of the House of Lords decision in *Hyman* v. *Hyman* [1929] A.C. 601, that a wife cannot give up her right of future support. That decision discourages a husband from agreeing to pay substantial sums in gross, and thus it seriously impairs the desired flexibility and utility of separation agreements.[84] It is therefore submitted that the decision in *Hyman* v. *Hyman* forbidding

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[84]See also *Mathews* v. *Mathews* [1932] P. 103; 1 All E.R. Rep. 323, and *Johnson* v. *Johnson* [1946] P. 205; 1 All E.R. 573. The husband can also not claim tax deduction on a lumpsum payment, though he can if he makes periodic payments: *Wilton* v. *M.N.R.* [1971] Tax ABC. 102; *McWhirter* v. *M.N.R.* [1968] Tax ABC 225; on the other hand the Exchequer Court in *M.N.R.* v. *Hansen* [1967] C.T.C. 440 held that, where the husband agreed to pay $20,000 in "full and final settlement of his obligation to maintain his wife" and paid $6,000 forthwith and the balance of $14,000 in monthly instalments of $100, the monthly instalments were paid on a "periodic basis" and are tax deductible under section 11(1)(l) of the *Income Tax Act*, R.S.C. 1952, c. 148, as amended by Stat. Can. 1957, c. 29, s. 4(2) (Now Stat. Can. 1971-72-73, c. 63, s. 60 (b), (c)).

lumpsum settlements should be abrogated by statute in the same manner as it has been done in the context of divorce by the *Divorce Act*, R.S.C. 1970, c. D-8, s. 11(1)(a) and (b). While the decision may have been sound in the period before the notion of the welfare state found common acceptance, it may very well be that public policy--that unruly horse--has now shifted;

> . . . if the husband has provided for his wife and she has lost the money and is penniless, the husband should not provide a second time; but the duty of the State should commence . . .
> Joske, 26 Aust. L.J. 198 at 199.

for the same reason that the State is expected to provide against lack of funds caused by the misfortune and vicissitudes of life.

*RECOMMENDATION #3*

> *WHERE THE PARTIES HAVE AGREED TO AN AMOUNT THAT WAS FAIR AT THE TIME OF THE EXECUTION OF THE AGREEMENT, NO PROCEEDINGS SHOULD BE ALLOWED TO INCREASE THE SAME UNDER THE DESERTED WIVES STATUTES OR ANY OTHER STATUTES; IF THERE IS A REAL NEED, THE COURT SHOULD PROCEED TO VARY THE AGREED PAYMENTS IN ACCORDANCE WITH RECOMMENDATION #13. LUMPSUM PAYMENTS SHOULD BE SPECIFICALLY RECOGNIZED.*

(c) Other types of payments

Few separation agreements involve sums large enough to warrant trust arrangements. Where the husband has sufficient capital it is obviously to his advantage to

settle property in trust for his wife, the trustee being responsible for making periodic payments. Another method would be to buy an annuity for the wife.

(d) Security for alimony

The agreement may call for security to be furnished by the husband or create a charge on his real estate. The normal rules will apply. In some cases, the husband may be required to purchase a life insurance and to keep it in force, giving a right to the wife to make payments on his behalf in case of default, and making her the sole and irrevocable beneficiary. Such arrangements if agreed upon can be legally enforced.

(e) Quantum of alimony

The common law liability of the husband requires him to provide according to his means for the reasonable needs of his wife and if she is given custody of children, for their needs as well. This has been supplemented by statutory provisions enabling a wife to obtain alimony in higher courts or a maintenance order from a magistrate's court on various grounds, the most important of which are his adultery, cruelty, desertion or wilful neglect to provide reasonable maintenance for her or her and their children.[85] Both common law and statute bar her right of

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[85]Parts 3 and 4 of *Domestic Relations Act*, R.S.A. 1970, c. 113; *Deserted Wives and Children's Maintenance Acts* of Saskatchewan (R.S.S. 1965, c. 341) and Ontario (R.S.O. 1970, c. 128); *Wives and Children's Maintenance Act*, R.S.M. 1970, c. W-170; *Family Relations Act*, Stat. B.C. 1972, c. 20.

maintenance if she commits adultery which is not condoned, or if she herself is guilty of desertion or other uncondoned matrimonial offences.[86] An 'innocent' wife's right to reasonable maintenance lasts as long as she lives and if her husband predeceases her, she would qualify for maintenance out of his estate.[87] Obviously the standard of reasonableness varies with the husband's means and if he has no money to maintain himself, he will not be able to maintain his wife and children who will then be thrown on public assistance.[88] On the other hand if the wife has been provided with periodic sums under contract for her maintenance, the husband's lack of means is no answer to her claim for payment and she can enforce them by an ordinary action.[89] (Discussed briefly below and more fully in another section.)

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[86] *Ibid*, sections 9 and 27 (Alta.);s. 11 (Sask.); s. 15 (Man.); s. 2(5) (Ont.). But under the *Divorce Act*, R.S.C. 1970, c. D-8, there is no absolute bar though the conduct (i.e., more often misconduct) will be considered by the court in fixing the quantum.

[87] *Family Relief Act*, R.S.A. 1970, c. 153, s. 4; *Dependants' Relief Act*, R.S.S. 1965, c. 128, s. 4; *Testator's Family Maintenance Act*, R.S.M. 1970, c. T-50, sections 3, 6; etc.

[88] Although lack of means is not a ground for refusing an order for alimony under Part 3, it is apparently a ground under Part 4 (s. 27(1)); *Earnshaw* v. *Earnshaw* [1896] P. 160 (it cannot be said that his neglect to maintain is 'wilful' unless he wilfully refuses to work). The position in other provinces is different: see *McMillan* v. *McMillan* (1962) 39 W.W.R. 571 (under Sask. Act).

[89] See chapter V *infra*.

If the payments agreed to by the husband prove inadequate because of changing economic conditions, and the wife is unable to maintain a reasonable standard of living, courts are prepared to assist her; both the common law decision in *Hyman* v. *Hyman* [1929] A.C. 601 and statutory provisions specifically dealing with inadequacy of maintenance[90] assist her in seeking a variation of the quantum; courts however would not assist a husband who has found it impossible to keep up payments because of his misfortunes (Variation of Alimony is fully discussed in another section[91]).

Many agreements contain an escalator clause providing for changes due to fluctuations in money value and in husband's income. A few also provide for arbitration for adjusting payments to take account of changed conditions. The idea behind these provisions is to assure that the wife enjoys the same measure of support as she would have if she were living with her husband. The validity of an arbitration clause in the context of separation agreements has not been tested in courts, but given the obvious distaste for such clauses it is desirable that they should be statutorily recognized so that differences between the spouses could be more agreeably settled than by resort to courts.

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[90]Saskatchewan *Deserted Wives and Children's Maintenance Act*, R.S.S. 1965, c. 341, s. 10; Manitoba *Wives and Children's Maintenance Act*, R.S.M. 1970, c. W-170, s. 16.

[91]See pp. 141-158 *infra*.

(f) Enforcement of alimony

The normal rules of contract governing enforcement apply. While a court order for alimony can be registered against land and enforceable as a charge, a separation agreement unless it specifically charges land cannot thus be registered. The problem of enforcement is dealt with in detail in a later section.

(2) Covenant not to Molest or Annoy

Another clause usually to be found in a separation agreement is to the effect that "neither party shall compel or seek to compel the other to dwell with him or her, by proceedings for restitution of conjugal rights or otherwise." Such a clause is valid and as was pointed out earlier, courts are now only able to apply economic sanctions (by way of alimony) if the restitution decree is disobeyed.[92] It has been held that to constitute molestation there must be intention to annoy and actual annoyance.[93] So if one of the spouses in an attempt to seek reconciliation encroaches upon the peace and privacy of the other, he is not deemed to be in breach of the covenant. In the absence of a covenant not to sue for any matrimonial relief, the covenant not to molest or annoy

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[92] See p. 27 *supra*.

[93] *Fearon* v. *Aylesford* (*supra*, fn. 48); *Sweet* v. *Sweet* [1895] 1 Q.B. 12; *Hunt* v. *Hunt* (1897) 2 Q.B. 647. It is not certain whether molestation and annoyance are distinguishable. *Sweet* v. *Sweet*.

is not violated by a spouse taking proceedings for divorce[94] or judicial separation (see *Thomas* v. *Everhard* (1861) 6 H & N 448; 158 E.R. 184), assuming there are grounds therefor, but under such a covenant either spouse may not bring a suit for restitution of conjugal rights.[95]

Furthermore, in the absence of a *dum casta* clause, adultery whether followed by birth of a child or not is not a breach of covenant against molestation unless the child is represented to be that of the husband[96] or the wife is living continuously in open adulterous cohabitation with her lover (see *Hirtle* v. *Hirtle* (*supra*, fn. 51)).

As pointed out earlier, the covenant not to molest or annoy and the covenant to pay alimony being independent,

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[94] *Hunt* v. *Hunt* (*supra*, fn. 93); *Kuhler* v. *Kuhler* (1920) 3 W.W.R. 875.

[95] *Hunt* v. *Hunt* (*supra*, fn. 93). But in *Smith* v. *Smith* [1945] 2 All E.R. 452 Pilcher J. held on the evidence that the non-molestation clause was in no way inconsistent with the wife's express wish that the husband should return or to afford him an excuse for continuing to refuse to return. (Evidence indicated that she was an unwilling party to his living apart.) And in *Tickler* v. *Tickler* [1943] 1 All E.R. 57 at 59 the Court of Appeal on similar evidence held that the agreement was *not* a bar to desertion; Scott L.J. in delivering the judgment of the court points out that "the mutual undertaking 'not to molest one another' could certainly not be read, in this context, as precluding a friendly attempt at reconciliation by either spouse." (p. 59).

[96] *Fearon* v. *Aylesford* (*supra*, fn. 48); *Hawboldt* v. *Hawboldt* [1938] 3 D.L.R. 30; *Quinn* v. *Quinn* [1949] O.W.N. 614.

if a wife molested her husband her conduct would not avoid the agreement but would merely give her husband a right to claim damages that he actually incurs by reason of the alleged molestation (see *Quinn* v. *Quinn* (*supra*, fn. 96)). However the court may be impelled to uphold a provision that says in so many words, that if the wife persistently vexes and harasses the husband, his obligation to make payments under the agreement will be *suspended* so long as her wrongful conduct continues. If it is fair and just that the payment of alimony could be suspended so long as the wife denies him his right of access to the children,[97] it would seem equally fair and just to accord him the same relief when his wife refuses to leave him in peace; suspension is the only kind of deterrent likely to work with a malicious and disturbing wife.[98]

(3) *Dum sola et casta vixerit* Clause

The opprobrium to adulterous conduct has diminished over the last few generations since the Victorian era, which has seen immense sexual freedom, and the moral sensibility of courts seems to have dulled with changing social attitudes. While certain aspects of statutory law such as orders for alimony and maintenance in non-divorce cases still cling to the old concept of chastity as a prerequisite for grant of alimony (*Domestic Relations Act*, R.S.A. 1970, c. 113, s. 29 ), superior courts are not thus limited when dissolving a marriage, as the *Divorce Act* has abolished the

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[97] See p. 83, *infra*.

[98] For a useful analysis of this clause see Blom-Cooper L.J. "*Separation Agreements and Grounds for Divorce*" in 19 Modern L.R. 638 at 641-645.

bars to maintenance founded on a matrimonial offence though they are required to consider the conduct of the spouses in determining the quantum.[99] In *Martin* v. *Martin* [1965] 51 W.W.R. 318 (B.C.) a *dum casta* clause was inserted on pronouncing the decree, and the court was called upon to enforce it on proof of wife's subsequent adultery; Wilson J. applying *Gower* v. *Gower* (1950) 66 T.L.R. 717, 114 J.P. 221,[100] did terminate the maintenance order. Perhaps with the abolition of bars to maintenance, such a clause will no longer be tolerated; if adultery during marriage is no ground for denial of maintenance, there is no reason why adultery after divorce should terminate it.

In the enforcement of separation agreements judicial change in attitude is more evident. Ostensibly applying the ordinary rules of construction of contract, courts refuse to imply any clause that is not expressly included in the agreement, and *dum sola et casta clause is no*

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[99] *Divorce Act*, R.S.C. 1970, c. D-8, s. 11(1): in view of this requirement courts may lean toward a figure lower than what the husband could bear, providing however that the level so fixed does not force the wife to live in adulterous union.

[100] But Wilson J. indicated that in future he would be chary of *dum casta* clauses adding "I do not see why a husband, who has by his own infidelity broken up a home and left a woman alone, should be relieved of financial responsibility because, in her loneliness, she has sexual relations with a man." The wife was however allowed to reapply for maintenance at a later date.

*exception*.[101] This has not always been so. In *Morall* v. *Morall* (1881) 6 P.D. 98, Sir James Hannen P. stated that a separation agreement

> . . . was not a license to the husband to commit adultery, incestuous or otherwise, but merely an arrangement for living apart, and while it continued she was entitled to no more than what was stipulated for in the deed. But when she has established that her husband has been guilty of incestuous adultery, a state of things arises not in contemplation when the deed was executed, and the wife is not restrained by the deed.

He reiterated this view in *Gandy* v. *Gandy* (1882) 7 P.D. 77 at 82-83:

> . . . after much consideration, I remain of opinion that to adopt the opposite conclusion would not only be to make the general words of the contract extend to a state of things not in contemplation of the parties, but would lead to results in a high degree prejudicial to morality, it would be in effect to hold that a husband who has entered into an agreement with his wife to live apart, making her a certain allowance, obtains thereby a licence to commit adultery for the rest of his life without subjecting himself to any liability beyond those imposed by the deed.

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[101] *Jee* v. *Thurlow* (1824) 2 Barn & Cress 547; 107 E.R. 487; *Baynon* v. *Batley* (1832) 8 Bing 256; 131 E.R. 400; *Fearon* v. *Aylesford* (1884) 14 Q.B.D. 792; *Sweet* v. *Sweet* (*supra*, fn. 93); *Westeneys* v. *Westeneys* [1900] A.C. 446; *Crouch* v. *Crouch* [1912] 1 K.B. 378; *Jasper* v. *Jasper* [1936] O.R. 57; [1936] 1 D.L.R. 193; *Rust* v. *Rust* (*supra*, fn. 66).

> It appears to me that in all such cases as this it is implied in the contract contained in the deed that it has reference only to the parties living separated, and not to their living apart in a state of adultery.

Sir James Hannen was reversed on appeal (*Gandy* v. *Gandy* (1882) 7 P.D. 168), and Jessel M.R. castigated public policy as a dangerous weapon (*Gandy v. Gandy* (1882) 7 P.D. 168 at 172). Referring to the remark that "if you do not allow the wife to ask for increased alimony in such a case as this you allow the husband to commit adultery with impunity" He said that he was not prepared to say that that remark was correct, adding

> It is not impunity merely because he is not obliged to pay more money. I do not consider that payment of alimony is the only punishment for adultery if the word "punishment" should be used in connection with it. It appears to me a very strong thing to say that by his committing an act which does not affect the wife either directly or indirectly her rights to participate in his fortune should be altered. . . . (7 P.D. at 172-173)

Although by this eloquent reasoning Jessel M.R. demonstrated how twisted public policy can be, it offended the moral tenets of Lord Shaw of Dunfermline who in *Hyman* v. *Hyman* [1929] A.C. 601 at 619 said that the whole of the reasoning in *Gandy* v. *Gandy* was a mistake. He stated that in such a case the contract was repudiated and the true repudiator was the husband who committed adultery after the separation deed was executed. He put it thus:

> There are two ways of it. The contract either contemplated, or it did not, adulterous conduct subsequent to its date. If it did not, such conduct, not in contemplation and not provided for, opens legitimately and effectively the attack upon the continuance of the contract as mutually binding. If, however, it did contemplate such misconduct, and this whether expressly or by implication, then, in my opinion, it was a contract immoral in its nature, opposed to the fundamental sanctity of marriage and contrary to the law of England. . . . It was a species of condonation *ab ante* . . . it would be equivalent to an indulgence for the future--an indulgence obtained or purchased for mutual convenience or for money--that the marriage obligation should be maintained and yet its obligations defied. . . . But, in my opinion, the law of England would not uphold the sanctity of any contract the plain object and effect of which is to undermine the sanctity of marriage, for this would be contrary to and subversive of one of the fundamental elements upon which society itself is based.
>
> (pp. 621-622)

The other noble Lords did not accept this view and although *Gandy* v. *Gandy* was heavily criticized it was not overruled. It is submitted that Jessel M.R.'s reasoning in *Gandy* v. *Gandy* is unassailable; neither the court nor Parliament has any business to legislate on the morals that should prevail in the nation's bedrooms. It is gratifying to note that England has very recently abolished all matrimonial offences including adultery as grounds, *ipso facto*, to divorce; the sole ground for divorce is irretrievable breakdown of marriage (see *Divorce Reform Act*, 1969, c. 55, s. 1) resulting from any one of a number of causes, including adultery (see *Divorce Reform Act*, 1969,

c. 55, s. 2). Notwithstanding *Hyman* v. *Hyman*, *Gandy* v. *Gandy* reasoning has prevailed.[102] In *Fearon* v. *Aylesford* (1884) 14 Q.B.D. 792, Cotton L.J. who was party to the judgment in *Gandy* v. *Gandy* stated at p. 808:

> I am at a loss to see how public opinion requires that when a woman commits adultery she shall at once be made destitute and be entirely stripped of all those means which her husband provided for her when they separated, so as to prevent her falling into a state of indigence and want.

and in *Jasper* v. *Jasper* [1936] O.R. 57, Riddell J.A. at p. 59 added:

> And I am equally at a loss to see how public policy requires this, if the husband pursues her for her adultery and procures a divorce.

Therefore, if the husband has not been wise enough to insist upon a *dum casta* clause, the wife may very well form an adulterous common law union and the husband will get no relief from the court; it may be unfair to the

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[102]Lord Shaw's worst fears apparently have been confirmed; he said (at p. 623):

> I will not further dwell upon the merits of the *Gandy* v. *Gandy*; it had none. Nor could I be even now sure of its final disappearance. For nothing will avail--not the judgment of the House, not even the words of an Act of Parliament--to stay the spade of the legal resurrectionist.

husband to be obliged to subsidize the adulteress but he should have been better advised.

Although a wife's unchastity may not impair her contractual rights, it may adversely affect legal rights, independent of contract, which she may have against the husband and his property; e.g., alimony or maintenance, dower, inheritance, etc.

(4) Covenant to Indemnify Husband

The relationship of husband and wife *ipso facto* is a letter of credit to the wife for necessaries suitable and proper to the sphere in which she moves. While the law zealously guards the wife's right to support, the husband will not be held to his obligation at the instance of a creditor if his wife leaves him without cause or if she leaves him with cause but subsequently commits adultery. In any event the husband will be deemed to have discharged his obligation if he has provided her with necessaries or made payments to her under an alimony order of the court.[103] If the wife has separated under an agreement

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[103] If the parties have been judicially separated, the *Domestic Relations Act*, R.S.A. 1970, c. 113, s. 13(1) and s. 19 provide that

> 13.(1) After a judgment of judicial separation and during the continuance of the separation, the husband is not liable in respect of any engagement or contract his wife has entered or enters into, or for a wrongful act or omission by her, or for any costs she incurs in any action.

[Continued on next page.]

which has secured to her proper maintenance and the husband has regularly kept up payments, he ceases to be liable for necessaries. The general reputation of separation will be sufficient to protect the husband, for a person extending credit to a married woman known to be living apart from her husband, deals with her at his peril.[104]

In view of this established law it is unnecessary to put in an express covenant whereby the wife promises not to contract debts for which the husband may be responsible and to indemnify him if she does so contract; but the clause is usually inserted *ex abundanti cautela*. (See Recommendation #6.)

(5) Covenant to Condone; *Rose* v. *Rose* Clause

By this covenant, the parties mutually agree to condone all past matrimonial offences or misconduct, and its effect is to prevent either spouse from relying on such misconduct in any proceeding for relief at a later date. However, if a subsequent offence should arise (e.g., adultery) the forgiveness is cancelled and the old cause of complaint revives (see *Graves* v. *Graves* (1963) 38 D.L.R. (2d) 295 (Ont.). This result may be avoided by what is

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[continued from page 54.]

19. Where an interim or other order for alimony is subsisting, and the payment of alimony is not in arrears under that order, the husband is not liable for necessaries supplied to his wife.

[104]The incidents of the agency of a deserted wife will be discussed more fully in a separate study.

known as the *Rose* v. *Rose* clause which is the name given to the most comprehensive form of withdrawal of charges hitherto contrived. In *Rose* v. *Rose* (1883) 8 P.D. 98 the parties used the clause in the widest possible terms. It provided:

> No proceedings shall be commenced or presented by or on behalf of either party against the other in respect of any cause of complaint which now exists or has arisen before the date of these presents (irrespective of whether the offence is known or is not known) and every offence (if any) which has been committed or permitted by either party against the other shall be considered as hereby forgiven and condoned, and in case hereafter either shall commence or prosecute any proceedings against the other in respect of any cause of complaint which may hereafter arise, no offence or misconduct which has been committed or permitted before the execution of these presents, and no act, deed, neglect or default of either party in relation to any such offence or misconduct shall be pleaded or alleged by either party or be admissible in evidence.

This clause has become commonform and was approved by Lord Merrivale, P. in a very full and useful judgment in *L* v. *L* [1931] P. 63 in which he pointed out that such a clause meant a "final condonation" of all offences known or unknown, or to use the words of Lord Chelmsford L.C. in *Rowley* v. *Rowley* (1866) L.R. 1 Sc. & Div. 63; 35 L.J.P. & M. 110 (H.L.) amounted to an "absolute release".

If a *Rose* v. *Rose* clause is inserted in a separation agreement, the parties cannot rely on any conduct before

the date of the separation to found an action for matrimonial relief; they can only rely on grounds available after the agreement. That clause however is not a licence for future misconduct.[105] But if the other party has repudiated his obligations the agreement is at an end and the *Rose* v. *Rose* clause will fall with the agreement.[106]

(6) Covenant not to Sue

The precise ambit of a covenant not to sue depends on the width of the clause; it may cover suits for alimony or suits for matrimonial decrees or other relief for which specific provisions may have been made in the agreement itself; or it may be an omnibus clause covering all sorts of actions between a husband and his wife. The clause, like all others, is given ordinary construction by the courts.[107]

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[105] A covenant not to sue for divorce on the ground of future misconduct was held void in *Worth* v. *Worth* (1924) 24 S.R. (N.S.W.) 150.

[106] Note the dictrine of revival of past offences has been abolished by s. 9(2) of the *Divorce Act*, R.S.C. 1970, c. D-8.

[107] *Keeble* v. *Keeble* [1956] 1 All E.R. 100--covenant to the effect that either party ". . . shall not molest or annoy or institute proceedings for restitution or otherwise" held not to bar divorce petition; the word "otherwise" refers to proceedings by which they would be compelled to resume cohabitation. *Tuxford* v. *Tuxford* (1913) 4 W.W.R. 894 (Sask.)--agreement bar to suit for restitution; maintenance will not be increased in an action for restitution.

However such a covenant may offend public policy in respect of various rights which courts have decided that the spouses cannot barter away. For instance, the court has held that a covenant not to sue for maintenance, cannot deprive it of its right and power to grant alimony in a proper case.[108] Nor by such a covenant can a parent compromise the rights of the children to maintenance, or contract away the right to their custody, care and control.[109]

The effect of an agreement not to sue for statutory or common law rights is more fully discussed in the next section.

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[108] In *Morall* v. *Morall* (1881) 6 P.D. 98 Sir James Hannen, P. held that although a wife had agreed by deed to accept an annuity for her maintenance, she was entitled to seek permanent maintenance on dissolution of the marriage, because of incestuous adultery, because the adultery was not a circumstance contemplated by her as a party to the deed, as it was not discovered until afterwards. In *Gandy* v. *Gandy* (1882) 7 P.D. 168 the husband who had committed adultery agreed to pay his wife an annuity and maintain two youngest children in his custody, and she agreed not to seek greater maintenance. The Court of Appeal held that in the case of judicial separation the Legislature had not given the court the power to bury settlements as they had done in the case of divorces. There was no *dum casta* clause and none was implied by public policy. Lindley L.J. considered that the covenant was *prima facie* just and that the wife must show that she should be relieved of it. In divorce cases, the leading case of *Hyman* v. *Hyman* [1929] A.C. 601 put the wife's right to sue for maintenance, notwithstanding her covenant against such suit, on grounds of public policy as embodied in the English Act. For a full discussion of this case see pp. 144-146. See also *Spillett* v. *Spillett* [1943] 3 W.W.R. 110.

[109] *Holten* v. *Holten* [1928] 1 D.L.R. 546 (Alta.); *Sansum* v. *Sansum* [1952] 6 W.W.R. 528 (B.C.). But statutes have modified this proposition: see *infra*, pp. 84-86.

(7) Contracting out of Statutory Rights

A lawfully wedded wife[110] has been conferred in addition to her common law right of maintenance during coverture, and by way of an extension of that right, certain other rights.[111] Dower or homestead legislation[112] gives her an inchoate right to the matrimonial home which her husband cannot dispose of without her consent;[113]

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[110]And in Alberta perhaps in the sole instance where she is not available, the common law wife takes benefit under *Workmen's Compensation Act*. Manitoba and B.C. are however more progressive in this regard: See *Wives & Children's Maintenance Act*, R.S.M. 1970, c. W-170, s. 6 (common law wife's entitlement) and *Family Relations Act*, 1972, c. 20, s. 15(e) definition of spouse entitled to maintenance includes common law wife.

[111]Some of these rights are however reciprocal in some provinces such as Alberta and Manitoba (dower) but in Saskatchewan and British Columbia only wife is entitled.

[112]See *Dower Act*, R.S.A. 1970, c. 114. *Homestead Act*, R.S.S. 1965, c. 118, *Dower Act*, R.S.M. 1970, c. D-100, Homestead Act, *R.S.B.C.*, 1960, c. 175 and *Wife's Protection Act*, R.S.B.C. 1960, c. 407 and common law rights of dower confirmed by legislation of Ontario and the Martime provinces. The extent of the property in which dower rights exist varies. The right is also subject to the same general principles as entitlement to alimony, viz., that she is not living in circumstances disentitling her to alimony.

[113]The wife's consent may be dispensed with by a court order: under certain conditions, among which are "living apart from the spouse" and a release: *Ibid*, s. 11 (Alberta), s. 3 (Sask.), s. 22 (Man.), and she may forfeit dower under certain circumstances such as living apart in adultery. There is no dower right if the wife claims under intestacy. Manitoba's provisions (sections 15 and 16) are most generous.

divorce law (*Divorce Act*, R.S.C. 1970, c. D-8, s. 11) gives her a right to maintenance after dissolution of the marriage; succession law gives her a right to inherit her husband's property even if she is judicially separated[114] and if her husband has unkindly cut her out of his will, she may claim widow's relief under family relief legislation.[115] The Uniform Insurance legislation of Canadian provinces also gives the wife unattachable benefits if she has been named a beneficiary of a life policy.[116]

While a wife cannot contract out of her right to maintenance, as will be discussed presently, some statutes, like the *Dower Act* of Alberta, expressly permit her to release all her rights in the matrimonial home,[117] and

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[114] But there is no reciprocity in Alberta here: see *Domestic Relations Act*, R.S.A. 1970, c. 113, s. 26.

[115] R.S.A. 1970, c. 153, R.S.S. 1965, c. 138, R.S.M. 1970, c. T-50, R.S.B.C. 1960, c. 3, R.S.O. 1970, c. 126, etc.

[116] See re *Insurance Act*, R.S.O. 1970, c. 190, sections 164, 167-169, 170, 171-184 and Insurance Act of Alberta R.S.A. 1970 c. 187, Part 6-ss. 247-274 and Appendix A ss. 244-261

[117] R.S.A. 1970, c. 114, ss. 8 and 10(1), (2); *Harries* v. *Harries* [1963] 41 W.W.R. 230 (Man.); *Stern* v. *Sheps* [1966] 58 W.W.R. 612; aff'd [1968] S.C.R. 834. Under the Ontario *Dower Act* provisions, a release of dower rights would in fact debar her from sharing in husband's estate on his intestacy under the *Devolution of Estates Act* and also her preferential share: *Re Wiggins* (1952) O.W.N. 66. R.S.S. 1965, c. 118, s. 19; R.S.M. 1970, c. D-100, ss. 6, 23 and 24; *Wife's Protection Act* (B.C.) s. 11; clauses contracting out of statutory rights are strictly construed: See *Re Dalton* (1934) O.W.N. 691; *Re Winters* (1954) O.W.N. 726; *Re Draper* (1956) O.W.N. 106. For a very interesting and helpful discussion of the origin and extent of the dower rights in western Canada, see Dean Bowker's pioneer article in 1961 Alberta Law Review 501-515.

some others bar her rights where she has been guilty of misconduct.[118] Where the statute is silent, courts in some cases have held that a wife may validly contract out of her statutory entitlement. Thus in *Re Rist Estate* [1939] 1 W.W.R. 518 the Alberta Supreme Court, Appellate Division and in *Re Jane's Estate* [1950] 2 W.W.R. 313, the British Columbia Supreme Court, held that a release of right to inheritance was effective; and in *Henderson* v *Northern Trust Co.* [1952] 6 W.W.R. 337 (Sask.) an infant wife was held to have validly contracted out of her rights under the *Intestate Succession Act* of Saskatchewan.[119]

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[118] R.S.A. 1970, c. 112, ss. 8, 10(1); R.S.S. 1965, c. 118, s. 3; R.S.M. 1970, c. D-100, s. 22. *Intestate Succession* legislation of Alberta (R.S.A. 1970, c. 190, s. 18); Saskatchewan (R.S.S. 1965, c. 126, s. 20); B.C. (R.S.B.C. 1960, c. 3, s. 115); and family relief legislation (R.S.A. 1970, c. 153, s. 4(5)); R.S.S. 1965, c. 128, s. 9(8); R.S.M. 1970, c. T-50, s. 3(3)--wife's character and conduct to be taken into conduct; cf. R.S.O. 1970, c. 126, s. 9 where it is an absolute bar.

[119] The adequacy of maintenance provided in the separation agreement is really immaterial, although the Saskatchewan Court in this case went to great lengths to show that in the circumstances of the case the wife who had disentitled herself to alimony by her adultery and birth of illegitimate child soon after marrying her old man, she was properly provided for. In this case the *Dependants Relief Act* did not apply. In view of the fact that a husband can effectively bar inheritance rights by making a will conforming to the *Wills Act*, it really cannot be doubted that a release of rights is valid. Widow's claim can only be under family relief legislation. See also *Re Schoop* (1948) O.W.N. 338. For a criticism of this case, see Vol. III of the Ontario's Study on "Property Subjects" at pp. 481-82.

In the case of alimony, it was held in the leading English case of *Gandy* v. *Gandy* (1882) 7 P.D. 168 by the Court of Appeal that a separation agreement was an effective answer to a wife's claim under the *Matrimonial Causes Act* 1857 (20 & 21 Vict. c. 85, s. 32), she having sued for judicial separation. In that case, Jessel M.R. said that "public policy requires that contracts should be kept and covenants fulfilled." Although this case was severely criticized in later cases and especially by the House of Lords in *Hyman* v. *Hyman* [1929] A.C. 601, it has never been overruled.[120] In *Bishop* v. *Bishop* (1897) P. 138 Lindley L.J. who had agreed with Jessel M.R. in the *Gandy* case, pointed out at p. 162 that in *Gandy* v. *Gandy* "nothing was decided respecting any of the statutory powers of the divorce court in suits for dissolution of marriage." Thus a distinction was made between cases involving divorce and those involving judicial separation, and it would appear that the authority of *Gandy* v. *Gandy* though shaken has been left unimpaired. In the writer's opinion, the decision in that case is sound. It is often true to say that the sole reason for bringing a suit for judicial separation is to attack the maintenance provisions in a separation agreement for the court's decree otherwise does not materially add to or subtract from the status of the marriage. One could go even further and say that the remedy of judicial separation in view of the

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[120] See pp.51-53 *supra*, especially the vehement attack by Lord Shaw of Dunfermline who considered the whole of the *Gandy* case was a mistake. The House of Lords took the view that as a matter of principle the power of the court given by statute to award maintenance was the same in judicial separation as in divorce; however this was not borne out by the language used in the Acts there under consideration.

modern developments in divorce law, should be abolished. If the parties need increased maintenance, the better solution would be to permit variation of separation agreements under certain circumstances, rather than to undermine the agreement by the back door.

If the wife has grounds for and seeks divorce, however, it is now settled that the divorce court is not fettered by the separation agreement in its discretion in awarding maintenance. As Sankey, L.J. in *Hyman* v. *Hyman*, *Hughes* v. *Hughes* [1929] P. 1 at 78-79 puts it,

> It is impossible to fetter the discretion [of the judge] where there are children of the marriage--divorce, children, alimony are inextricably mixed up together, and the jurisdiction of the divorce court refers to delicate matters which cannot be treated as you would treat a contract for the sale of goods. . . . the parties to a contract of marriage are not at liberty to do as they like with regard to the contract. There are public and national interests to be concerned.

In affirming the decision of the seven-man Court of Appeal (in which two judges had dissented) Lord Atkin in the House of Lords [1929] A.C. 601 struck at the heart of the matter; at p. 628-29 he said:

> When the marriage is dissolved the duty to maintain arising out of the marriage then disappears. In the absence of any statutory enactment the former wife would be left without any provision for her maintenance other than recourse of the poor law authorities. In my opinion the statutory powers of the court were granted partly in the public interest to provide a substitute for this husband's duty of maintenance and

> to prevent the wife from being thrown upon the public for support. If this be true, the power of the court in this respect cannot be restricted by the private agreement of the parties. In my view no agreement between the spouses can prevent the court from considering the question whether in the circumstances of the particular case it shall think fit to order a husband to make some reasonable payment to the wife "having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties." The wife's right to future maintenance is a matter of public concern which she cannot barter away.[121]

The same reasoning will apply in Canada; under the *Divorce Act*, R.S.C. 1970, c. D-8, s. 11, the court is given complete discretion by Parliament to award maintenance to either spouse having regard to a number of behavioural, financial and other factors.

Under the "lazy husband" laws, however, statutes in some jurisdictions expressly provide that where the sums agreed to be paid by a husband are inadequate to maintain a reasonable standard of living, or if he is in default in making payments, the wife may ask the court to set aside the agreement or without doing so seek a maintenance order if she is innocent of any misconduct.[122]

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[121]For an interesting discussion see Kerbel, *Contracting out of the Right to Further Support* (Faculty of Law Rev. 130 at 133) (1962), (Vol. 20).

[122]See, e.g., *Deserted Wives and Children's Maintenance Act*, R.S.S. 1965, c. 341, s. 10; *Wives and Children's Maintenance Act*, R.S.M. 1970, c. W-170, s.16

other objects of his love and affection should be restricted, otherwise his widow will be forever barred and left to the mercy of welfare legislation. (The same provision should apply where a wife has disposed of her property with no consideration for her husband.) If however in "contracting out" agreement the testator has made adequate provision for the widow after his death, there is no need to resort to dependent relief legislation. In *Re Anderson's Estate* [1934] 1 W.W.R. 430[124] the Appellate Division of the Alberta Supreme Court dismissed a widow's application on the ground that she had not satisfied the onus upon her to prove that it was just and equitable for an allowance to be made to her out of the estate of her deceased husband and contrary to his will.

In *Dower* v. *Public Trustee* [1962] 38 W.W.R. 129 the Alberta Supreme Court dismissed an action by a widow to set aside the transfers or gifts of property made by her husband during his lifetime. The transfers were attacked under 13 Eliz. c. 5 alleging an intent to defeat her claim to a "fair" or "proper" share of her husband's estate under the *Family Relief Act*. It was held that the latter *Act*

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[124]See also in *Re Widow's Relief Act*, in *Re Rist Estate* [1939] 1 W.W.R. 518 (Alta. App. Div.); *Olin* v. *Perry* (1946) E.R. 54; *Smith* v. *National Trust Co.* (1959) 15 D.L.R. (2d) 520. See also *Re Hawley Estate* (1962) 38 W.W.R. 354 (Sask.); *Re Edwards Estate* (1961-62) 36 W.W.R. 605 (Alta.).

It has been decided by the Canadian Supreme Court in *Findlay* v. *Findlay* [1952] 1 S.C.R. 96 that a wife is not required to elect conclusively between suing on the agreement and under such an *Act* of the Legislature.[123] Since Part 4 of the Alberta *Domestic Relations Act*, R.S.A. 1970, c. 113, is silent on the effect of a separation agreement, it would appear from the requirement of "wilful neglect" in section 26(1) that such a course is not open to the wife in this province; she will not get a protection order from the magistrate's court. This difficulty should be removed not by legislation on Saskatchewan and Manitoba lines but by provisions for variation of separation agreements. In a separate paper on the *Domestic Relations Act* of Alberta it has been proposed that the benefits of Part 4 legislation should be available to the husband as well where a financially stronger wife deserts him and he is or he and their children are left without the means.

In the case of a widow's entitlement to relief under family relief legislation, a much stronger argument can be made for not allowing a wife to contract out of her statutory rights if adequate maintenance is not provided for her by the agreement; on the grounds of public policy a husband's absolute power to dispose of his property to

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[123] See pp. 104-113 *infra* for further discussion of this enactment. There is a case for Uniformity of Legislation on this matter among the several provinces presently enforcing maintenance orders under the *Reciprocal Enforcement of Maintenance Order Acts*.

confers no legal or equitable right to a share of deceased's estate and therefore 13 Eliz., c. 5, has no application. Riley J. observed:

> It may well be socially undesirable to allow a husband to deliberately impoverish himself by denuding himself of well nigh all his assets during his lifetime to the point that an application under the *Family Relief Act* would be abortive; and I quite concede that the State may well have an interest in seeing that a husband carries out his responsibilities for the support of his wife and his dependants, both during his life time and following his death--an interest in the avoidance of penury--an interest in a workable *Family Relief Act*. That, of course is a matter for the Legislature and not for the courts. (at p. 142)

It is recommended that where an agreement was fair and fairly obtained, the contracting out provisions should in all cases be held valid and effectual, and there should be legislation accordingly.

Professor Bora Laskin (as he then was) points out in an illuminating article (16 Canadian Bar Review 676) that the dependent relief *Acts* of the various provinces do not go as far as permitting a widow to obtain maintenance out of a testator's estate, where she had been adequately provided for in a separation agreement. However, he says, this does not mean that she can contract out of her rights under that *Act*; what it means is that where she makes an application the court may consider the provision made for her in that agreement and only if it were inadequate would

it set aside the covenant (16 Canadian Bar Review 689-90).[125]

*RECOMMENDATION #4*

> *THERE SHOULD BE NO DISTINCTION BETWEEN SUCCESSION AND FAMILY RELIEF LAWS, AND THE SPOUSES SHOULD BE AT LIBERTY TO CONTRACT OUT OF ALL STATUTORY RIGHTS. IF HOWEVER ALIMONY PAYMENTS ARE EXPRESSED TO CONTINUE FOR THE DURATION OF THEIR JOINT LIVES, THE PAYEE SPOUSE SHOULD BE ENTITLED TO HAVE PAYMENTS CONTINUED IF THERE IS NO OTHER LAWFUL WAY SHE CAN MAINTAIN A DECENT STANDARD OF LIFE. THIS MAY BE DONE BY VARIATION OF THE PERIOD FIXED BY THE AGREEMENT.*

(8) Provisions for Children's Maintenance and Custody

Another most controversial provision of a separation agreement relates to the maintenance and custody of children. As the Morton Royal Commission points out,

> Of the problems resulting from the dissolution of marriage none is more serious than that of trying to ensure the future well-being of the children.
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> Cmd. 9679, Para. 360, p. 103.

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[125] One should bear in mind that the family relief legislation may disqualify a dependent from maintenance if she or he was separated from her or his spouse and living in adultery: see legislation cited in *supra*, fn. 122: *Re Carey* (1946) O.R. 171; *cf. Olin* v. *Perry* (*supra*, fn. 124). It would appear therefore that while a widow may not contract out of her right to family relief, she may forfeit that right by her misconduct--by living in adultery after separation from her husband, or in some cases as in Ontario by living apart in circumstances disentitling her to alimony (i.e., by her desertion, cruelty or adultery).

an observation which is true in all types of marriage breakdown whether or not it ends in divorce. The parents proceed on the basis that they have the sole right to decide matters of maintenance and custody of their children, and in the great majority of cases this must be so; if there is an agreement between the parents, a court exercising matrimonial jurisdiction should not go behind the agreement and import principles which it is called upon to apply in other types of jurisdiction, such as those invoked in proceedings under various child welfare legislation.[126] It should enquire into the welfare of the child only when one of the parties *contests* it in proceedings under the *Divorce Act*, R.S.C. 1970, c. D-8, s. 9(1)(e)[127] or in proceedings

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[126]E.g., *Child Welfare Act*, R.S.A. 1970, c. 45. As Bowen L.J. says in *Re Agar-Ellis* (1883) 24 Ch.D. 317 "It is far better that people should be left free, and I do not believe that a Court of Law can bring up a child as successfully as a father, even if the father was exercising his discretion . . . in a way which critic's might condemn."

[127]The *Divorce Act* provides that where a decree is sought on the grounds of marriage breakdown (i.e., under section 4(1) the court must refuse the decree if it would prejudicially affect the making of reasonable arrangements for their maintenance: Perhaps when they have executed a satisfactory separation agreement, this requirement is complied with. Although Professor Olive Stone suggests that there should be adequate follow up machinery to see that the terms of the agreement are complied with, it is submitted that such machinery should not be under the divorce jurisdiction of the court but under the general child welfare jurisdiction. See her article in (1967) 6 Western Ontario Law Rev. at 21. See Also Professor Payne's criticism of this area of the law in his paper on the *Divorce Act* (Canada) 1968, (mimeographed" Aug. 15, 1969) at pp. 37-40).

directed to custody and maintenance only, and award relief on the merits.[128]

(a) Maintenance

It is now well settled that the father is primarily liable to maintain the child of the marriage and that this obligation does not terminate upon divorce.[129] The child has an independent right of support at law and the mother cannot bargain away her right to apply to the court for the child's maintenance.[130] Her covenant not to claim maintenance for the child is void.[131] But the parents may agree to give the child, or on its account, more than

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[128] See fn. 139 re Ontario Bill imposing duties on official guardian.

[129] *Poor Relief Act*, 1601, s. 7, as incorporated in the *Maintenance Order Act*, R.S.A. 1970, c. 222, sections 3 and 4. *Mattson* v. *Mattson*, [1971] 3 W.W.R. 428 (Sask.) held that even though the mother had a large income and the father less, the father is required to pay maintenance to the child whose custody was granted to the mother; this notion is based on the Poor Law of a society that has long been extinct. For a history of the Poor Law of the 17th century, see *National Assistance Board* v. *Wilkinson* [1952] 2 Q.B. 648; 2 All E.R. 255 per Lord Goddard C.J. and L. Neville Brown in 18 Modern L. Rev. 110-119. Provincial and divorce legislation have of course extended the entitlement of maintenance to children in other categories such as illegitimate children, children to whom the man is *in loco parentis*, etc.

[130] *Holten* v. *Holten* [1928] 1 D.L.R. 546 (Alta.); *Sansum* v. *Sansum* [1952] 6 W.W.R. 528 (B.C.).

[131] *Bennett* v. *Bennett* [1952] 1 K.B. 249 at 255 (C.A.); *Goodinson* v. *Goodinson* [1954] 2 Q.B. 118 (C.A.).

what the law would consider adequate for its maintenance, and for a longer duration, but the child cannot under the doctrine of privity of contract[132] enforce the right conferred by the contract unless there is a declaration of trust[133] or, being competent to contract it is a party to the contract under seal, for then even though the child is a volunteer the deed dispenses with any need for consideration (*Cannon* v. *Hartley* [1949] 1 All E.R. 50). For the same reason the right of the child does not depend on the adherence to the agreement by either parent, so that if the mother who has been granted custody refuses to perform her part of the bargain, e.g., by refusing access to the child, the child's rights are not terminated; however its rights are not under the contract but at law.[134] And the child can look to the mother to the extent that the father is unable to meet his legal obligation under the *Poor Law*.[135]

The child's inability to enforce the contract in its own right where the mother for the sake of "tranquility" neglects to exercise the right, or is disentitled

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[132] *Tweedle* v. *Atkinson* (1861) 1 B & S 393; 121 E.R. 762; *Dunlop* v. *Selfridges* [1915] A.C. 847; *Scruttons* v. *Midland Silicones* [1962] A.C. 446; [1962] 1 All E.R. 1

[133] *Gandy* v. *Gandy* (1885) 30 Ch.D. 57; *Tomlinson* v. *Gell* (1837) 6 Adl. & El. 564; In *Re Schebsman* [1943] 2 All E.R. 768 (C.A.).

[134] *Shoot* v. *Shoot* and *Hunt* v. *Hunt* (*supra*, fn. 93).

[135] *Supra*, fn. 129.

by her breach to do so, may prejudice it, especially where the father had been generous, for the considerations which the law would take into account might vary;[136] and they may only be for the duration of the child's minority under that Act. It often is true to say that a father would tend to make more liberal provision for a child under an agreement (than for his wife) but if he is forced to provide by a court order he would be far less willing to do so. And a court generally takes the view that its power to force a father to make generous allowances is restricted.[137]

Giving the child an independent and unqualified right of action under a separation agreement may in some cases prejudice any future reconciliation of the parents (and a child who has been generously provided for may sometimes be instrumental in preventing such a

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[136] See s. 3(2) *Maintenance Order Act* (*supra*, fn.129), which defines maintenance to include food, clothing, medical aid and lodging. The court may however consider the financial circumstances of the father.

[137] The divorce court however is now displaying a regrettable tendency that the obligation to maintain a child is higher under the law when the marriage breaks up than when it subsists: *Crump* v. *Crump* [1971] 1 W.W.R. 449 (Alta. App. Div.); *Jackson* v. *Jackson* [1973] 29 D.L.R. (3d) 641 (S.C.C.) which also held that a divorce court knows of no age limitation. The court's tendency is perhaps due to its unconscious desire to compensate the child so far as money can do it for the emotional problems that might develop as a result of the breakdown of its parents' marriage!

reconciliation) and it will run counter to the well established rule that on reconciliation and recohabitation of the spouses a separation agreement falls in its entirety, except as to those arrangements which are construed to be permanent, e.g., settlement, transfer of property, etc.[138] In many cases however the child would be in a better financial position and its future plans would not be frustrated by its mother's breach of contract. Although this may mean that the mother would be able to break the provisions relating to access, etc., with impunity, it at least ensures that the child does not suffer the consequences of its mother's breach. This is no doubt an important consideration, but it is submitted that the preferable solution would be to make the mother jointly and severally liable for the maintenance of the child rather than force the father to shoulder the entire burden; it is more in accord with modern realities and it would recognize what the father was not the sole cause for bringing the child into existence![139] In divorce situations

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[138] *Re Sparks Trusts; Spark* v. *Massy* (1904) 1 Ch. 451; 2 Ch. 121 C.A. (Settlement in favour of children not affected by termination of separation). The different effects of the two types of agreement, a separation agreement simpliciter and a separation agreement which is in the nature of a settlement, are discussed at pp. 132-140 *infra*.

[139] See the Recommendations of the Morton Royal Commission (Cmd. 8678) at para. 569 (pp. 153-154) to the effect that courts should have power to make orders against the mother as well as the father. There is presently a Bill (No. 100/1972) before the Ontario Legislature imposing a duty on the official guardian to investigate and report to the court upon all matters relating to the custody, maintenance and education of a child under 16 years of age, or 16 or 17 years of age in certain circumstances. The English [Continued on next page.]

section 11 of the *Divorce Act*, R.S.C. 1970, c. D-8, is broad enough to allow the court to apportion liability in this way. It would probably ensure that the mother will not violate the terms of the contract.

*RECOMMENDATION #5*

> *THE LAW SHOULD RECOGNIZE THAT THE FATHER AND THE MOTHER ARE JOINTLY AND SEVERALLY LIABLE FOR THE MAINTENANCE OF THE CHILD. THE RESPONSIBILITY IN THE FIRST PLACE SHOULD BE THAT OF THE PARENT HAVING PHYSICAL CUSTODY OF THE CHILD, WITH A RIGHT OF ACTION AGAINST THE OTHER PARENT. THE OBLIGATIONS OF THE PARENTS TO MAINTAIN THE CHILD SHOULD BE NO HIGHER WHEN THEY ARE SEPARATED THAN WHEN THEY WERE LIVING TOGETHER. IN THE ABSENCE OF A SPECIFIC AGE LIMIT, THE OBLIGATION SHOULD TERMINATE WHEN THE CHILD REACHES THE AGE OF MAJORITY AS PRESCRIBED BY VARIOUS PROVINCIAL LEGISLATION.*

(b) Guardianship

In matters of custody, care and control and other incidents of guardianship the father at common law had almost as sweeping powers as the *patria potestas* of the Roman father. "The law," said Lord Eldon, in *Wellesley* v. *Duke of Beaufort* (1827) 2 Russ 1, 21 (38 E.R. 236, 243), makes the father the guardian of his children by nature

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[Continued from page 73.]
Divorce Court already has power under Rule 44(3) of the M.C.A. Rules 1950, to order separate representation of the children in matters of secured provision, settlement of a wife's property if it considers that their interests may be adversely affected. In Para. 397 (p. 112) the Royal Commission recognizes that it may be necessary to order separate representation in custody matters and it has so recommended ( para. 927, p. 243). See the interesting solution in *Hansford* v. *Hansford* et al (1972) 30 D.L.R. (3d) 192 where Galligan J. directed that payments for the support of children be made by the father into Court, on notice to the official Guardian, as the mother was not keen on asserting those rights.

and nurture." He could not derogate from his rights; any attempt to do so would contravene public policy. Hence an agreement by the father to give custody to the mother was invalid[140] and if founded on a single consideration, would vitiate the entire separation agreement: *Vansittart* v. *Vansittart* (1858) 27 L.J. (N.S.) Ch. 222; aff'd 289 by Court of Appeal; *Hunt* v. *Hunt* (1884) 28 Ch. D. 606 per Bowen L.J. at 612. The wife was a mere chattel and for all practical purposes her identity as well as her property merged in that of her husband.

In matters of religious education, it was well settled that the wishes of the father must be enforced by the court unless there is some strong reason for disregarding them; in consequence a widow may find herself compelled to bring up her child in a religion which she abhors: In *Re McGrath (infants)* [1893] 1 Ch. 143; in *Re Scanlan* (1888) 40 Ch.D. 200. The problem is

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[140] *Lord St. John* v. *Lady St. John* (1803) 11 Ves. 526; 32 E.R. 1192; *Hope* v. *Hope* (1857) 8 DeG. M. & G. 731; 44 E.R. 572. See also King, L.C. in *ex parte Hopkins* (1732) 3 P.Wms. 152; 24 E.R. 1009 (Ch.) at 154 (E.R. 1009-10). In *Blisset*'s case in the King's Bench court (Lofft 748; 98 E.R. 899) Lord Mansfield stated (at p. 749; E.R. 899) that the natural right is with the father; but if the father is bankrupt, if he contributed nothing for the child or family, and if he be improper (for such conduct as was suggested at the Judge's Chambers) the court will not think it right that the child should be with him. In *King* v. *Greenhill* (1836) 4 Ad. & E. 624 (111 E.R. 922) Lord Denman held that the father's adulterous connection which still continued will not entitle the court to hand over custody to the mother, if it appears that he has never brought the adulteress to his house or into contact with his children and does not intend to do so.

acute in mixed marriages which break up due to divorce or death and the child has been brought up in religion different from the mother's. And even an agreement surrendering the child to a different religion was retractable, as in *Queen* v. *Barnardo* [1891] 1 Q.B. 194. In that case the Roman Catholic mother of an illegitimate child had agreed with Dr. Barnardo that the child should be taken care of by his Home in the Protestant faith and after eighteen months withdrew her consent. Lord Esher points out:

> The law is perfectly clear that parents cannot bind themselves by any such agreement. No such agreement can deprive a parent of the right of absolute control over his or her own child. This applies precisely to the mother of an illegitimate child. The court is bound to give effect to the wish of the mother, unless there is some good reason to the contrary.
>
> (p. 208)

The father was also entitled by statute (12 Car. 2, c. 24) to dispose of the guardianship of his children under 21 by will; such a disposition will be binding "unless some misbehaviour be shown in the guardianship in which case it being a matter of trust the court had a superintendency over it" (Lord Macclesfield L.C., in the case of *Mr. Justice Eyre* v. *Countess of Shaftesbury* (1722) 2 P. Wms. 103 at 107; 24 E.R. 659 at 660).

The Court of Chancery representing the Sovereign as *parens patriae*, however, exercised from early times a jurisdiction quite independent of the common law; it had power to take the children from the father and give them

> Now, upon what does Lord Somers, upon what does Lord Nottingham, upon what does Lord Hardwicke, upon what does every Chancellor, who has been sitting on the bench, in the Court of Chancery since that time, place the jurisdiction? They all say, that it is a right which devolves to the Crown, as *parens patriae* and that it is the duty of the Crown to see that the child is properly taken care of.
> (p. 130; E.R. 1081)

And in affirming the decision of Lord Eldon, L.C., the House of Lords held that the Court of Chancery has jurisdiction to appoint a guardian for infants, being wards of the court, excluding the father; and upon evidence that the father was living in a state of adultery, and had encouraged his children in swearing, keeping low company, etc., a fit case to exercise the power to exclude him from the guardianship, had been made. Lord Manners also concurred with Lord Redesdale, and added:

> If there be a jurisdiction, of which I entertain no doubt, I cannot suggest to myself a case which more imperiously calls on the Chancellor to interfere, and exercise that jurisdiction, than the present, to take the children away from the person who has a total disregard to their moral and religious principles, and who is setting such a dangerous and mischievous example to these children.
> (p. 146; E.R. 1086)

But as Lord Upjohn points out in *J.* v. *C.* [1969] 1 All E.R. 788 (H.L.) at 829:

> But whereas equity had done much to protect the wife's property against the strictness of the common law by

to the mother or to a third person.[141] This was done on grounds of public policy, the underlying principle being that the right of guardianship was a trust for the benefit of the children, and the father was not at liberty to abuse it.[142] As Lord Redesdale puts it in *Wellesley* v. *Wellesley* (1828) 2 Bligh N.S.P.C. 124; 4 E.R. 1078:

> We find that, now for 150 years, the Court of Chancery has assumed an authority with respect to the care of infants. . . .

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[141]The Court of Wards & Liberies, established by Henry VIII developed some measure of protection for children. Its jurisdiction was transferred to Chancery by a 1660 Statute. The father was regarded as the natural guardian and it was almost impossible to make a showing of unfitness against him. Although Chancery came to recognize the mother as the natural guardian upon the death of the father, it was not until 1839 that the Chancellor was given the power by statute (*Talfourd's Act*, 1839, 2 & 3 Vict., c. 54) to award custody of infants under 7 years to her rather than the father. The *Infants Custody Act*, 1873, (36 & 37 Vict., c. 12) increased this age to 16 and the *Guardianship of Infants Act*, 1886, to 21. *Talfourd's Act* specifically provided that Chancery was not to award custody to an adulterous mother. See Foster & Freed *"Child Custody"* in 39 N.Y.U.L. Rev. 423-426 for the historical note.

[142]See Cockburn C.J.'s direction to the jury in *Regina* v. *Hopley* 2 F & F 202, 206 (175 E.R. 1024 at 1026) where a shoolmaster was convicted of manslaughter for unreasonable corporal punishment inflicted on the child. And in *Whitfield* v. *Hales* 12 Ves. 492 (33 E.R. 1806)(Ch.) Lord Erskine following Lord Eldon's opinion in *De Manneville*'s case (10 Ves. 52; 32 E.R. 762, granted an order for the guardianship and maintenance of infants upon proof of gross ill-treatment and cruelty by their father. In *Wellesley* v. *Duke of Beaufort* (1827) 2 Russ 1, 21 (Ch.) the court said it would exercise jurisdiction on proof of the allegation of "profligate and immoral conduct" of their father, Mr. Wellesley, the Duke of Beaufort. See also *Shelley* v. *Westbrooke* Jac. 266; 37 E.R. 850 (1817) (Ch.) where Lord Eldon deprived the poet, Percy Shelly, the custody of his children because of his romantic admonitions and religious heresy.

> inventing such doctrines as the separate use, and the restraint on anticipation, yet in respect of infancy matters, while recognizing the dominant consideration of the welfare of the child, in practice in the presence of the early Victorian *pater familias* equity too dutifully followed the law.

The jurisdiction of Chancery to deprive a father of guardianship of his children was however kept within strict bounds by Sir J. L. Knight Bruce, Vice Chancellor, in the leading case of *Re Fynn* (1848) 2 DeG & Sm. 457; 64 E.R. 205. He says at pp. 474-75 (p. 212 E.R.):

> A man may be in narrow circumstances; he may be negligent, injudicious and faulty as father of minors; he may be a person from whom the discreet, the intelligent, and the well-disposed, exercising a private judgment, would wish his children to be for their sake and his own, removed; he may be all this without rendering himself liable to judicial interference, and in the main it is for obvious reasons well that it should be so. Before this jurisdiction can be called into action between them, the court must be satisfied that the father has conducted himself, or placed himself in such a position, as to render it not merely better for the children, but essential to their safety or welfare that the father's right should be interfered with. If the word "essential" is too strong an expression, it is not much too strong.

*Re Fynn* was followed by the Court of Appeal in *Re Agar-Ellis* (1883) 24 Ch. D. 317[143] which Lord Upjohn

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[143] In *Hepton* v. *Maat* [1957] S.C.R. 606 Rand J. at 608 approved the following dictum of Bowen L.J. in *Re Agar-Ellis:* ". . . it must be the benefit to the infant having

[Continued on next page.]

in *J.* v. *C.* describes as "dreadful" because the court there allowed a "monstrously unreasonable father to impose on his daughter of 17 much unnecessary hardship in the name of his religious faith" (at p. 829). In *Agar-Ellis* the father of a 17-year old child who had separated from his Roman Catholic wife, refused to allow her to pay visits to her mother, to see her mother more than once a month, to allow his daughter and mother to correspond except upon the condition that the letters be shown to himself or third parties, apparently out of fear that the mother may poison her mind against him, but the court refused to interfere. It held that the courts will not interfere with the father's legal right to control and direct the education and bringing up of his children until they attained the age of 21 years, except where by his gross moral turpitude he forfeited those rights, or where by his conduct he abdicated his paternal authority or where he sought to remove his children, being wards of court, out of the jurisdiction without the consent of the court. The father did not come within these exceptions.[144] Later developments of the law[145] and in particular the passing

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[Continued from page 79.]
regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can" (at p. 608).

[144]This case was disapproved by a majority of the judges of Nova Scotia Court of Appeal in *Re Nellie Marshall* 33 N.S.R. 104 another unfortunate case resulting from a mixed marriage.

[145]See e.g., in *Re Newton* [1896] 1 Ch. 740 (C.A.) (where the children were brought up in the faith of the mother (a Protestant) until the first of them was 15 and the second 11, and the father's conduct in the court's view showed that he had abdicated his parental rights.
[Continued on next page.]

of the *Guardianship of Infants Act* in 1886 made a notable departure from the existing law, by putting the rights of the mother on an equality with those of the father; the tide from then on ran more strongly against the father, but not far enough so that pressure has been mounting in England for the reversal of that state of the law, and a Private Member's Bill to give both parents equal rights over the guardianship of their children is presently before Parliament.[146]

The common law position as mellowed by equity and modified by child welfare legislation, is still the law in Canada, as the English legislation on guardianship, of and subsequent to 1886, is not applicable here; but again turning to the observation of Lord Upjohn in *J v. C.*, though the English authorities are valuable

> They have developed, are developing and must, and no doubt will, continue to develop by reflecting and adopting the changing views, as the years go by, of reasonable men and women, the parents of children, on the proper treatment

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Kekewich J. (whose decision was affirmed on appeal) refused the father's application stating that it would be injurious to the welfare of the children that their religious training should be altered. *McKee v. McKee* [1950] A.C. 352; in *Re Adoption Application No. 41* [1962] 3 All E.R. 553 per Dankwerts, L.J. at p. 559.

[146] See Vol. 122 New L. J. 1082; this bill passed the first reading on November 29, 1972. In some Canadian provinces there is already legislation treating both parents as equal. See Pound *"Individual Interests in the Domestic Relations"* (XIV Mich. L.Rev. 177-196 at 182) for a note on the balancing of interests of the State and the Rights of the Father (and also of Husband).

> and methods of bringing up children; for after all, there is the model which the judge must emulate for as pointed out in *Re Fynn* he must act as the judicial reasonable parent.
> (at p. 831)

The foregoing authorities somewhat elaborately traced will demonstrate that welfare of the children is zealously guarded by the courts, and as Lord Simonds in *McKee* v. *McKee* [1950] A.C. 352 (P.C.); (1951) 2 W.W.R. (N.S.) 181; reversing [1950] S.C.R. 700 points out

> . . . it is the law of Ontario (as it is the law of England) that the welfare and happiness of the infant is the paramount consideration in questions of custody . . . to this paramount consideration all others yield.
> (at p. 191 W.W.R.)

Despite the early cases which held that a father could not validly agree to give up custody of his children to the mother, the modern developments have recognized the validity of such an agreement unless it is not in the welfare of the child to be in the custody of the mother. England in 1873 by 36 and 37 Vic., c. 12 (*Custody of Infants Act*) enacted that no separation deed made between the father and mother of an infant should be held to be void by reason only of its providing that the father of such an infant should give up the custody or control thereof to the mother; provided always that no court should enforce any such agreement if the court shall be of opinion that it will not be for the benefit of the infant to give effect thereto.[147] The court considers

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[147] *Domestic Relations Act* of Alberta, R.S.A. 1970, c. 113, s. 45 and similar provisions in other provinces
[Continued on next page.]

many factors and each case turns upon its own merit. Thus in *Re Besant* (1879) 11 Ch. D. 508 the court refused to enforce an agreement where the mother was of doubtful character and had refused to allow the child any religious education. Often as part and parcel of the agreement, reciprocal obligations are undertaken by the parents, the father agreeing to pay certain amounts for maintenance on account of the expense the mother is put to for taking care of the children, but retaining right as to the mode of upbringing, education (including cultural, religious and moral) and visitation. If the mother is in breach of any of these provisions, the father is entitled to suspend some of the obligations he has undertaken (e.g., maintenance) until his rights are restored. Thus, in *McLellan* v. *McLellan* [1925] S.C.R. 279; 3 D.L.R. 281, the Supreme Court of Canada held that the mother has no right to refuse any access to the child on the ground that the father is of bad character and that he was justified in stopping payments; the only way she could deny him those rights is by obtaining a court order overriding the terms agreed upon. In the absence of a court order neither party can unilaterally refuse to perform the obligation undertaken without being liable for breach of contract.[148]

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(R.S.S. 1965, c. 342, s. 22(2); R.S.M. 1970, c. C-80, s 137(2); R.S.B.C. 1960, c. 130, s. 11; R.S.O. 1970, c. 187, s. 2(2); R.S.N.S. 1967, c. 145, s. 5; etc.) have validated agreements between spouses.

[148] *Besant* v. *Wood* (1879) 12 Ch. D. 605 as explained by Newcombe J. in *McLellan* v. *McLellan* [1925] S.C.R. 279.

The courts now generally take the view that they are not bound by any agreement between the parents if the welfare of the child dictates otherwise;[149] at any time the custody of the child may be recommitted by the court in the exercise of its discretion or taken away from both parents if they are grossly unsuitable to bring up the child.[150] The latter course will be taken in

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[149]The case of *Kruger* v. *Booker* [1961] S.C.R. 231 decided by a bare majority, it is submitted, goes against sound equitable principles laid down in numerous cases; in spite of the finding of the court below that handing over custody to the mother would be equivalent to handing over custody to Kruger whose adulterous conduct with her was the cause of the break up of the plaintiff's home, the plaintiff being throughout blameless, the majority held that the express power given to parents of an infant who are not living together to enter into a written agreement as to which parent shall have the custody (section 2(2) of the *Ontario Infants Act*) is not abrogated by the circumstance that an order of the court dealing with the custody is in effect. Although under the *Divorce Act*, R.S.C. 1970, c. D-8 such a case will be decided differently, it is still an authority where provincial statutes empower parents to enter into agreements in non-divorce situations. It is submitted that the minority view of Locke J. with whom Kerwin C.J. concurred, that the agreement entered into by the parents ignored the interests of the children and therefore it was of no legal effect, should be preferred.

[150]Custody given to strangers in preference over mother and father in *Price* v. *Price* [1956] O.W.N. 410; 4 D.L.R. (2d) 652; Aff'd [1957] S.C.R. 341; *Taillon* v. *Donaldson* [1953] 2 S.C.R. 258 (mutual rights of parents displaced where child abandoned). This is generally done under child welfare legislation, but as the case of *Wellesley* v. *Duke of Beaufort* discussed in the text, *supra*, fn. 142, suggests, the child may be taken from one parent when the other parent is dead (or, semble, unsuitable) and given to persons selected by the court.

extreme circumstances but the principles enunciated in *Re Fynn* will apply with greater force in such a case than where custody is taken from one parent and given to the other.[151]

Welfare of the child has thus assumed primacy over the rights of parents; but the notion of what is good for the child still depends on a large measure on the wisdom and experience of the judge rather than on any objective criteria. Too often children are pawns in the battle fought by the belligerent parents in getting them the best terms possible, and it is right and just that in this matter public policy should override any agreement between the parties. At the same time it would be a mistake to entrust this matter to the unguided discretion of the judge for there are few judges with the proverbial wisdom of Solomon. It is imperative that before a judge awards custody he should have expert

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[151]This topic is specifically dealt with elaborately in a separate study by Mrs. Anne Russell, to which reference should be made. For provisions respecting maintenance, custody and guardianship in child welfare legislation, see *inter alia: Domestic Relations Act*, R.S.A. 1970, c. 112, Part 4 & 5, s. 45 and *Maintenance Order Act*, R.S.A. 1970, c. 222, ss. 3, 4. *Infants Act*, R.S.S. 1965, c. 342, ss. 2, 22 and *Deserted Wives & Children's Maintenace Act*, c. 341, s. 26. *Child Welfare Act*, R.S.M. 1970, c. C- 80 , ss. 102, 103, 104 and 137(2) and *Wives & Children's Maintenace Act*, R.S.M. 1970, c. W-170, ss. 3, 17. *Equal Guardianship of Children Act*, R.S.B.C.1960 c. 130, ss. 5, 11, 12, 13, 21 and *Family Relations Act*, 1972, c. 20, ss. 15, 16, 17, 25. *Infants Act*, R.S.O. 1970, c. 187, ss. 1, 2, 17, 34 and *Deserted Wives & Children's Maintenance Act*, R.S.O. 1970, c. 128, s. 3. The child may also claim as a dependent on the death of the parent under family relief legislation. All the child welfare statutes lay down a widely applicable definition of "neglected" children and empower the State to take them away from their parents for a time, board them out or even give them away for adoption.

testimony based upon investigations of a qualified social worker, and the representations, if any, of independent counsel appointed on behalf of the child.[152]

*RECOMMENDATION #6*

*(1) THE COURT SHOULD NOT INTERFERE WITH AN AGREEMENT GRANTING CUSTODY TO ONE PARENT UNLESS IN ALL THE CIRCUMSTANCES OF THE CASE, THE PARENT HAVING CUSTODY IS UNFIT TO TAKE CARE OF THE CHILD. THE RELEVANT CRITERIA TO DETERMINE UNFITNESS SHOULD BE THE SAME AS IN CHILD WELFARE LEGISLATION.*

*(2) IN ALL MATTERS OF GUARDIANSHIP, NOT COVERED BY THE AGREEMENT GRANTING CUSTODY, BOTH PARENTS SHOULD HAVE EQUAL RIGHTS AND THESE RIGHTS WHEN THEY DISAGREE, SHOULD BE DETERMINED BY THE COURT WHOSE DECISION SHOULD BE BASED ON EXPERT TESTIMONY; THE CHILD SHOULD HAVE THE RIGHT TO BE REPRESENTED BY INDEPENDENT COUNSEL. THE OFFICIAL GUARDIAN MAY BE ENTRUSTED WITH SUCH RESPONSIBILITY WHERE THE CHILD IS NOT THUS REPRESENTED.*

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[152] See the very interesting and helpful articles on child custody by Foster, H. H. in 22 Buffalo L.R. 1; Dr. Watson in 21 Syracuse L. Rev. 60; Foster & Freed in 39 N.Y.U.L. Rev. 423 and the note in 73 Yale L.J. 151.

## III

## EFFECT OF SEPARATION AGREEMENT ON SUBSTANTIVE RIGHTS

Having outlined the principal provisions of a typical separation agreement, we may now proceed to analyze the effect of the agreement on substantive rights conferred upon the spouses and on the children of their marriage. To some extent this has already been discussed in the previous section, and for convenience will be referred to again very briefly.

At common law, a wife is entitled to be maintained by her husband according to his means, and she can enforce this duty of her husband by an action of alimony, or by pledging his credit for necessaries. She cannot run away from him without cause and the law recognized cruelty and adultery as the only valid grounds for her living apart from him.[153] If she did run away without cause, she would be guilty of desertion, and she would forfeit her common law right of maintenance and the right of pledging her husband's credit for necessaries, the so-called agency of necessity of a deserted wife whereby the trader who sold goods to her is subrogated to her rights to sue the husband.

In *Attwood* v. *Attwood* (1718) Prec. Ch. 492 (24 E.R. 220-221) the Chancery Court held that

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[153] If the husband wilfully neglects to provide her reasonable maintenance and she is forced to live apart from him, he is in desertion and she can obtain a protection order under Part 4 of the *Domestic Relations Act*. See *infra*, pp. 108 ff for a full discussion.

> . . . a wife cannot either by herself or her *Prochein Amy* bring a *Homine Replegiando* against her husband, for he has by law the custody of her and may, if he thinks fit, confine her; but he must not imprison her--if he does it will be good cause for her to apply to the Spiritual Court for a divorce, *propter servitiam*.

In an earlier case Hale C.J. stated that *salva moderata castigatione* in the register is not meant of beating, but only admonition and confinement to the house, in case of her extravagance. . . ." (*Lord Leigh*'s case 3 Keb. 433 (84 E.R. 807). One hundred years later Lord Eldon confirmed the husband's right of custody to the person of his wife, "but he must not pursue a legal object by illegal means; as by force of arms or a conspiracy to do it by force of arms; and although his object is most legitimate, he may become criminal by the means used to attain it" (*De Manneville* v. *De Manneville* (1804) 10 Ves. 52 at 62 (32 E.R. 766 at 766). So also *In Re Cochrane* (1840) 8 Dowl. 630 held that as a last resort a husband might physically restrain his wife's liberty to prevent her from deserting him. But the privilege of restraint and correction is no longer recognized. Lord Campbell C.J. in *Ex parte Sandilands* (1852) 21 L.J.Q.B. 342 refused to issue a writ of *habeas corpus* to the husband whose wife had left him voluntarily, stating that the husband had no right to the custody of his wife at common law. And finally in *Queen* v. *Jackson* [1891] 1 Q.B. 671 Lord Halsbury L.C. dismissed the husband's contention that, whereas the court never had the power to seize and hand over the wife to the husband, but only the power to imprison her as for a contempt for disobedience of the decree for restitution of conjugal rights and even that power has now been taken away, the husband may

himself of his own motion, if she withdraws from conjugal consortium, seize and imprison her person until she consents to restore conjugal rights. He stated at p. 680:

> I am of opinion that no such right exists or . . . ever did exist. Moreover, assuming that sufficient authority existed for such a proposition, it is subject in any case to the qualification which I observe is always imported that where the wife has a complaint of or reason to apprehend ill-usage of any sort, the court will never interfere to compel her to return to her husband.

If the husband abandons his wife for no fault of hers or she is compelled to live away from him by reason of his misconduct, he is guilty of desertion and she can bring proceedings for restitution of conjugal rights to ensure that she would at least get maintenance from him. While before jurisdiction in matrimonial causes was taken over by common law courts through Parliamentary legislation, ecclesiastical courts would enforce the conjugal duty of husband and wife by incarcerating the guilty spouse until she (or he) repented, since the 1857 legislation, the conjugal duty cannot be enforced in this manner, but only by way of economic sanctions, i.e., by conferring power on courts to award alimony for the support of the wife.[154] However adultery was, and still is, a complete bar to alimony unless the husband was guilty

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[154] *Domestic Relations Act*, R.S.A. 1970, c. 112, s. 3. The Action itself which had become obsolete was abolished in England in 1970 and recently also in British Columbia (*Family Relations Act*, 1972, c. 20).

of connivance or he had condoned it; and adultery subsequent to the decree of alimony would terminate it *ipso facto* without the husband having to take steps to set it aside.[155]

It is obvious that a guilty wife is more anxious in this state of the law to enter into a separation agreement, for if she does so her right would not be dependent on law but on the contract. A suitably worded agreement is, then, an answer to any subsequent charge of desertion and no relief can be obtained by the husband, so long as the parties perform their part of the bargain, on the sole ground of desertion. Similarly, there is no implied duty on the wife to remain chaste in order to continue to get alimony from the husband, in the absence of a *dum casta* clause, but the husband could proceed to get judicial separation or divorce on the ground of her subsequent adultery; his contractual duty to support does not terminate. However, with the expansion of grounds for divorce, and particularly section 4(1)(e) of the *Divorce Act*, R.S.C. 1970, c. D-8, the mere fact of separation for the three year statutory period where it was consensual or five years where it was not, would enable either spouse to sue for divorce, and it would not matter whether at the time of entering into the separation agreement there was the possibility of a change of law. As a consequence, a covenant in a separation agreement which precludes future divorce proceedings would be void

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[155]See *infra*, pp. 108-113, *Domestic Relations Act*, R.S.A. 1970, c. 112, s. 27.

as it is against the express provisions of the *Divorce Act*.[156] It may also be void on the ground of public policy, as the divorce reform was intended to provide relief for the spouses whose marriage has broken down for whatever reason irrespective of whose fault it has been. One may still argue, however, that in some instances the court may sustain such a restrictive clause as the *Divorce Act* itself imposes a duty on the court to refuse a decree sought on the ground of separation as defined in section 4(1)(e),

> . . . if the granting of the decree would be unduly harsh or unjust to either spouse or would prejudicially affect the making of such reasonable arrangements for the maintenance of either spouse as are necessary in the circumstances, . . .
> (*Divorce Act*, R.S.C. 1970, c. D-8, s. 9(1)(f).)

or a decree sought on any other ground provided by section 4;

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[156]This was formerly not so because of the limited grounds of divorce which were predicated upon matrimonial offence. If the separation agreement condoned all past offences by means of the *Rose* v. *Rose* clause, there would be an absolute release; and if the parties lived by their agreement and no subsequent adultery is proved, there is no ground available for divorce. It was thus not against public policy to covenant not to sue for divorce. There is however no authority on this point. (There could probably not be a blanket clause prohibiting divorce under any circumstances, even under the old law; *Rose* v. *Rose* clause was the widest the courts had construed. It could not cover subsequent adultery as it would be a licence to engage in illicit relationships, which is against public policy. *Harrison* v. *Harrison* [1910] 1 K.B. 35; *Higgins* v. *Higgins* (1924) 41 T.L.R. 25.)

> . . . if there are children of the marriage and the granting of the decree would prejudicially affect the making of reasonable arrangements for their maintenance.
>
> (*Divorce Act*, R.S.C. 1970, c. D-8, s. 9(1)(e).)

The dower and homestead rights and rights under *Family Relief Act* have already been discussed earlier (*supra*, pp. 59-68); apart from these, which may generally be contracted out of by a fair agreement, the law is silent as to the rights of spouses in each other's property and any agreement that they make will be conclusive. It is submitted that neither under the *Divorce Act*, nor under the *Domestic Relations Act*, R.S.A. 1970, c. 113, can a court under the guise of making maintenance or alimony awards, divide up the property according to the notions of equity that the judges may possess; its power is limited to making reasonable provision having regard to the standard of living of the parties during marriage, and the present as well as potential resources, of the spouse seeking maintenance, and maintenance thus confined can then take the form of lumpsum payment or even an outright transfer of certain properties. It has also been pointed out that where spouses are living apart under an agreement, in the absence of a provision to the contrary, one spouse does not lose her right to succeed on intestacy of the other;[157] on the other hand the separation agreement may expressly provide that property shall pass as if the surviving

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[157] *Molony* v. *Kennedy* (1839) 10 Sim. 254; 59 E.R. 611.

spouse had predeceased the other (*Allen* v. *Humphreys* (1882) 8 P.D. 16) a result expressly provided for in the case of the judicially separated wife's property alone by the *Domestic Relations Act*, R.S.A. 1970, c. 113, s. 12.

If the parties wish to destroy all the other legal incidents of marriage, such as domicile,[158] secrecy of marital communications, etc., in respect of which they have not been "emancipated", they may presumably adopt

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[158]This is expressly provided for in the *Domestic Relations Act*, R.S.A. 1970, c. 113, s. 11. In the absence of legislative enactment it is not settled whether the spouses can by agreement change their domicile which while the marriage subsists is that of the husband (rule laid down in *Le Mesurier* v. *Le Mesurier* [1895] A.C. 517 and re-affirmed by the House of Lords in *Lord Advocate* v. *Jaffery* [1921] A.C. 146): See *Warrender* v. *Warrender* (1835) 2 Cl. & Fin. 488 (H.L.); 6 E.R. 1239; per Lord Brougham at pp. 525-6 (E.R., p. 1252) where the learned judge was prepared to concede that a deed may permit her to acquire a separate domicile ". . . for that (deed) by the utmost possible stretch of the supposition, could only give her the option of taking a new domicile, other than the husband's; and until she did exercise this option her married or marital domicile would not be changed." Lord Lyndhurst based his decision on the unenforceability of the entire separation agreement (The House of Lords shortly thereafter reversed itself on the latter point in *Wilson* v. *Wilson* (1848) 1 H.L. Cas. 538; 9 E.R. 870 (H.L.)). The question was unresolved because it was not material to the decision. Similarly, while the Privy Council in *Att. Gen. for Alberta* v. *Cook* [1926] A.C. 444; [1926] All E.R. Rep. 525; decided that a judicially separated wife retained the domicile of her husband (this rule of law so far as Alberta is concerned was immediately changed by legislation: see section 11 *Domestic Relations Act*, R.S.A. 1970, c. 113) left the question open for a later decision: See Lord Merrivale's judgment referring to Lord Brougham's (and of other law Lords) doubt in *Warrender* v. *Warrender* at pp. 456-57; (531 All E.R. Rep.).

the provisions of section 11 of the *Domestic Relations Act* which govern judicial separation.

With respect to the maintenance, custody, care and upbringing of children, while the parties live apart under the agreement, their rights will be governed by it, the children having their independent right at law. The sins of the mother do not affect the legal position of the children. In case of subsequent divorce proceedings, the divorce court has been conferred a discretion (". . . if it thinks fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them" (*Divorce Act*, R.S.C. 1970, c. D-8, s. 11(1))[159]) to make an order providing for the maintenance (*Divorce Act*, s. 11(1)(a), (b)), custody, care and upbringing of the children of the marriage (*Divorce Act*, s. 11(1)(c)). The position taken by divorce courts on this point is uncertain though it would appear that their general philosophy of treating the obligations when it subsists (see *supra*, p. 72 ) may lead them to ignore the agreement where in their opinion it works against the interests of the children concerned.[160]

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[159]There is no mention of the "welfare of the children". Would the divorce court be happy with the agreement entered into by the parties? This is an open question.

[160]See *supra*, pp. 84-85 where it was stated that a court would not be bound by the private agreement of the parties with respect to children. This will be discussed in a separate study pertaining to children.

*RECOMMENDATION #7*

*(1) WHILE A SEPARATION AGREEMENT IS IN FORCE, AND THERE IS NO DEFAULT UNDER IT, ALL SUBSTANTIVE RIGHTS OF THE SPOUSES SHOULD BE SUSPENDED. THUS, NO ACTION FOR RESTITUTION OF CONJUGAL RIGHTS, JUDICIAL SEPARATION, ALIMONY OR SUMMARY MAINTENANCE SHOULD BE PERMITTED. BUT THE PARTIES SHOULD NOT BE AT LIBERTY TO AGREE NOT TO SUE FOR DISSOLUTION OF THE MARRIAGE. [THIS IS ALSO PROVIDED FOR IN THE 1968 DOMESTIC PROCEEDINGS ACT OF NEW ZEALAND, NO. 62, s. 58.] THE AGENCY OF NECESSITY WHEREBY A DESERTED WIFE COULD PLEDGE HER HUSBAND'S CREDIT SHOULD BE ABOLISHED, EVEN IF THE HUSBAND IS IN DEFAULT OF PAYMENT. THIS RIGHT HAS LITTLE UTILITY AT THE PRESENT TIME AND IT ONLY GIVES AN UNWARRANTED RIGHT TO A TRADESMAN TO SUE THE HUSBAND.*

*(2) THE INCIDENTS OF A SEPARATION AGREEMENT IN ALL RESPECTS, INCLUDING ACQUISITION OF DOMICILE, SHOULD BE THE SAME AS THOSE OF A JUDICIAL SEPARATION. IN THE ABSENCE OF A PROVISION TO THE CONTRARY, NEITHER SPOUSE SHOULD BE ENTITLED TO SUCCEED TO THE OTHER'S PROPERTY. THE SPOUSES SHOULD IN ALL RESPECTS EXCEPT FOR CONTRACTING ANOTHER MARRIAGE BE DEEMED TO BE INDEPENDENT PERSONS, AS IF UNMARRIED. THIS COULD BE ACHIEVED BY A SYSTEM OF REGISTRATION OF THE AGREEMENT AS PROVIDED FOR IN NEW ZEALAND BY ITS 1968 DOMESTIC PROCEEDINTS ACT, NO. 62, ss. 55 AND 57.*

## IV

## EFFECT OF MATRIMONIAL DECREES ON SEPARATION AGREEMENT

To some extent the discussion on this topic will overlap with that in the previous section, but the section will be confined to the effect of a decree or orders pronounced in matrimonial or family courts on the agreements entered into by the spouses, i.e., divorce, judicial separation, restitution of conjugal rights, alimony and maintenance, all of which are awarded by the Superior Courts either under the *Divorce Act* or under the *Domestic Relations Act*, and "protection orders" issued out of family courts under Part 4 of the latter enactment or their counterpart in other provinces of Canada.

### (1) Divorce

(a) Under the reformed divorce legislation, a marriage may be dissolved on several grounds. Some of these may be excluded by agreement. Desertion, for instance, in most cases[161] will not continue to run in the face of such agreement. All other matrimonial offences may be condoned by express provision, and the *Rose* v. *Rose* clause will preclude revival of such offences on the occurrence of subsequent offences. It is in each case a question of construction. While it was

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[161] An agreement to pay maintenance need not necessarily consent to the desertion of the party; see *supra*, p. 15.

true to say, that before the 1967-68 reform, divorce proceedings could have been ruled out either by express covenant to that effect or by effective condonation and only new grounds could provide the basis for such relief, it is probably not so any longer because as stated earlier either party on the mere ground of separation, consensual or otherwise, can present a petition for divorce subject only to the court's discretion to refuse a decree under the "unduly harsh and unjust" proviso of section 9 or on the ground that satisfactory arrangements have not been made with respect to the children of the marriage.

While most separation agreements contemplate future divorce proceedings,[162] and the *Divorce Act* has expressly laid down that such agreements are not collusive, their real purpose is to provide satisfactory settlement of the consequences of an imminent dissolution of the marriage; and when the spouses part in amity they are likely to be more reasonable than when forced to do so by a power above. The divorce courts have taken the position, following the leading case of *Hyman* v. *Hyman* (1929) A.C. 601, that they are not bound by any agreement between the parties basing their decision either on grounds of public policy or on the "implied" right conferred by statute, such as sections 10 and 11 of the *Divorce Act* (See *Vinden* v. *Vinden* (1971) 5 W.W.R. 673 (B.C.)), or on the rather tenuous doctrine that divorce creates higher

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[162] Conscientious objections to divorce may be shared by both parties and they may expressly lay down that neither party shall seek divorce.

obligations on these matters than when the spouses are living together in peace.[163] Whatever may be the impact of such pronouncements on the willingness of a well informed or well advised husband to enter into a separation agreement in the future, it is reasonable to expect a general hardening of attitudes in making liberal allowances for the simple reason that the agreement may provide a starting point for the court in fixing maintenance. And a wife does not have to invoke court's assistance if she is satisfied with the arrangements; she would only want to do so if she feels that she did not get a square deal.[164]

(b) Under the *Divorce Act*, the court has power to fix the maintenance of a wife or husband whether or not they are guilty of a matrimonial offence,[165] and to over-

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[163] *Crump* v. *Crump* (*supra*, fn. 137); *Jackson* v. *Jackson* (*supra*, fn. 137).

[164] *Bayne* v. *Bayne* (1970) 71 W.W.R. 230 (B.C.). If the allowance provided for is adequate the court will refuse to augment such benefits by ordering maintenance. *Bauder* v. *Bauder* (1969) 2 O.R. 730; 6 D.L.R. (3d) 597.

[165] *Tucci* v. *Tucci* (1971) 1 R.F.L. 253 (Ont. C.A.). The court refused to exercise discretion to award maintenance for the following reasons:

(a) she had been able to support herself for a long period (6 years);
(b) there was no evidence of present need nor was there a likelihood of her becoming destitute;
(c) when she deserted the husband she wished to be completely dissassociated from him;
(d) the husband was in debt and supporting a family as a result of his relationship with the co-respondent.

[Continued on next page.]

ride any settlement or other arrangement made by the spouses (*Wells* v. *Wells* (1971) 2 R.F.L. 353 (B.C.)).

If the Divorce Court makes an order for maintenance disregarding the provisions of the separation agreement previously entered into by the spouses, the divorced wife will have a choice either to enforce the court's order or the provisions of the agreement, but not both at the same time. The Supreme Court of Canada has held in *Findlay* v. *Findlay* [1952] 1 S.C.R. 96 that an order of the court does not have theeffect of terminating the agreement, but that it is only suspended and revives when the wife elects to abandon her rights under that order or when that order is no longer effective (e.g., where the court has inserted a *dum casta* clause or its order is to terminate on remarriage, etc.).

It may often happen that the provisions agreed to by the spouses in their separation agreement may go beyond the express powers of the Divorce Court under the *Divorce Act* or even within the constitutional jurisdiction of the federal Parliament. There is nothing in the *Divorce Act* that authorizes the court to incorporate the agreement in the decree, and the English Court of Appeal in *Hinde* v. *Hinde* [1953] 1 All E.R. 171 held that the parties could not by consent give the court a jurisdiction which it did not otherwise possess, following the "well known rule"

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See also *Rosa* v. *Rosa* (1971) 1 R.F.L. 189 (Sask.) following *Moshenko* v. *Moshenko* (1969) 70 W.W.R. 762; (1970) 7 D.L.R. (3d) 749 (Man. Q.B.). But it can be less than the agreed amount too: *Sims* v. *Sims* (unreported Feb. 26, 1970, Ont. S.C.).

referred to by Lord Esher M.R. in *Re Ayler, Exp. Bischoffsheim* (1887) 20 Q.B.D. 258. Furthermore, the court may not be justified in "varying" a separation agreement that contains an integrated property settlement, where support provisions and other covenants constitute reciprocal considerations so that it is impossible to separate the two. Rather than expressing any opinion on this matter, the court may follow the wiser course of approving the agreement in the sense of "recognizing" the contractual obligations undertaken by the parties. It would then merely be an evidence of the agreement and the court's process cannot be used for enforcing it as an order; the parties will be able to enforce it in the same way as any other contract. In a recent case, *Burkett* v. *Burkett* [1970] 71 W.W.R. 479 (B.C.), Seaton J. refused to incorporate a separation agreement in the divorce decree granted to the wife because in his view many of the provisions of the separation agreement (such as property settlement) went beyond the jurisdiction of the court as conferred by the *Divorce Act*; he merely "approved" of them, with the result that they remained contractual obligations.[166] This appears to be a sound way of getting round the constitutional problems involved in a divided jurisdiction.

Where the agreement is not formally presented to the court (though the court must under the *Divorce Act*,

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[166] In *Warnock* v. *Warnock* [1968] 63 W.W.R. 529, Seaton J. held that the words "approve" meant that the court was merely recognizing the existence of the contract between the parties; it was not a judgment of the court. See also *Mann* v. *Mann* (unreported, Dec. 9, 1969 (B.C.)).

ensure that proper arrangements are made for maintenance of the spouse and children and custody of the children: (section 9(1)(2)(f)) and the court *upon* pronouncing the decree nisi makes no award at all, then it is *functus officio* and the parties cannot reopen the question at a later date; they have then to rely solely on the agreement which will operate on its own terms undaunted by the unruly horse of public policy.[167] And where there is no statutory provision for granting relief to a divorced wife after the decree (and it is submitted that only the federal Parliament has jurisdiction to enact such legislation)[168] the rights of the former wife will forever be barred. On the other hand, if the court orders maintenance or custody, it has jurisdiction to rescind or vary it by virtue of section 11(2) of the *Divorce Act*.[169]

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[167] *Charlesworth* v. *Holt* (1873) L.R. 9 Ex. 38. Although this case was doubted by three members of the Court of Appeal in *Hyman* v. *Hyman*, *Hughes* v. *Hughes* [1929] P. 1 and by some of the noble Lords on appeal, (1929) A.C. 601, the Court of Appeal in *May* v. *May* [1929] 2 K.B. 386 unanimously affirmed it, Scrutton L.J. at p. 392, Greer L.J. at p. 396, and Russell L.J. at p. 397, basing their decision on the ground of *stare decisis*.

[168] The provisions in the *Domestic Relations Act*, R.S.A. 1970, c. 113, such as sections 22 and 23 will probably now become unconstitutional, as the federal Parliament has occupied the divorce field, except in those matters not inconsistent with the express provisions of the *Divorce Act* (section 19(3)).

[169] *Zacks* v. *Zacks* (1972) 29 D.L.R. (3d) 99 (B.C.C.A.). If the court "incorporates" the agreement in its decree, where it is legitimate to do so, the agreement probably "merges" in the decree, in which case it may be enforced [Continued on next page.]

(2) Nullity of Marriage

Where the parties have contracted an invalid marriage and get a decree of nullity, then the separation agreement founded upon the validity of the marriage is void for failure of consideration. Thus, if the wife has concealed an undissolved marriage or the divorce of her previous marriage has since been declared invalid, the agreement falls. On the other hand if she was innocent of all blame and the fault lay in the putative husband the agreement is valid. Or, if the parties agreed to pay maintenance notwithstanding the outcome of nullity proceedings, they may

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as an order of the court; the agreement itself would then be extinct. The court will then have power to rescind or vary the provisions. This case has gone on appeal to the Supreme Court of Canada. It was held by the Court of Appeal of British Columbia that unless the trial judge fixes the precise amount of maintenance at the time of perfecting the decree nisi, he loses jurisdiction. The registrar's award of $700 per month to this wife who was meantime vacationing in Palm Springs, was set aside as it was made after the decree nisi was pronounced. This case is presently being argued in the Supreme Court of Canada as two other constitutional issues have been raised (a) that the federal Parliament has no jurisdiction to award maintenance to a divorced spouse as the B.N.A. Act confers the power under section 92(13) exclusively to the Provinces; and (b) that the judge trying a divorce case cannot delegate his duty of awarding maintenance to a "non-judge", e.g., to the Registrar(presumably also by a non-section 96 judge). There was a similar attack on constitutional grounds by the Ontario High Court in *Bray* v. *Bray* [1971]1O.R. 232 ; (1971) 15 D.L.R. (3d) 40 where Wright J. held that although the federal power in relation to children of divorcing spouses is *intra vires*, the Provinces have primary jurisdiction in this matter; and indicated the paramountcy of the latter (See pp. 49-51).

be deemed to have taken the risk. In the leading case of *Adams* v. *Adams* [1941] 1 All E.R. 334 the English Court of Appeal has held that a decree of nullity upon incapacity of the wife to consumate the marriage had no effect upon the separation agreement; the marriage was not void *ab initio*, but merely voidable and the decree of nullity did not affect any prior obligations as it operated as from the time of court's declaration of nullity.

Courts lean toward validity of the marriage. Decency and morality call for the preservation, whenever possible, of the marital status created by a ceremonial marriage. The presumption is raised not only for the benefit of the defendant spouse in an action to void the marriage, but also for the benefit of the society which has vital interest in safeguarding marriage. Otherwise the spouse may become a public charge.

But there should be a marriage as defined in the leading English case of *Hyde* v. *Hyde* (1866) 1 P & D 130; "a union of one man and one woman for life to the exclusion of others".[170] It is because of this rule that courts cannot adjudicate in respect of polygamous or bigamous marriages nor, contrary to recent authority, where there is a homosexual "marriage".[171]

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[170] *The Matrimonial Proceedings (Polygimous Marriages) Act*, 1972, c. 38 (England) now enables the court to give matrimonial relief in such cases.

[171] *Talbot* v. *Talbot* (1967) 111 Sol. Jo. 213 and *Corbett* v. *Corbett* [1970] 2 W.L.R. 1306 added a further ground of nullity. It was held that where two persons of the same sex "marry" each other, either of them is entitled to a

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(3) Judicial Separation

The decree of judicial separation probably accomplishes very little. Apart from conferring a judicially sanctioned status it is no different in its incidents from a separation agreement which expressly covers the specific effects flowing from the decree. Hence no public policy is in question where the parties contract out of judicial separation. The same result may be accomplished by eliminating the grounds for judicial separation by way of provisions for condonation,[172] although here again the subsequent adultery of the spouse may provide a new ground to the other to sue for judicial separation. But unless the spouse stands to gain financially by such a decree, there is no need for such a suit. In the leading case of *Besant* v. *Wood* (1879) 12 Ch. D. 605, the Court of Appeal refused judicial separation on the ground of cruelty as the separation deed barred such a decree. The clergyman husband was given an injunction against the suit brought by his famous wife, Annie Besant, for restitution of conjugal

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[Continued from page 104.]
decree of nullity of marriage with the consequential right to apply for financial provision. Tolstoy in his text *Divorce* (7th edition 1971) at p. 27 says that these cases are wrong. The *Nullity of Marriage Act*, 1971, c. 44 (England) makes a marriage void, *inter alia*, where the parties are not respectively male and female (section 1(c)). Manitoba by its *Wives and Children's Maintenance Act*, R.S.M. 1970, c. W-170, s. 6 and B.C. by its recent *Family Relations Act*, 1972, v. 30, dd. 15(e), 18 gives a right of maintenance; Manitoba when there is a child of that union and B.C. when the couple has cohabited for at least two years.

[172] *Sharper* v. *Sharper* (1956) 19 W.W.R. 173 (B.C.C.A.) (the agreement had provided for permanent separation; since the parties were living apart by agreement, the case which might otherwise have been on desertion must fail).

rights.[173] Similarly in *Gandy* v. *Gandy* (1882) 7 P.D. 168 the Court of Appeal held that a wife may not claim alimony in the courts on a judicial separation, because of her covenant in the separation agreement not to do so; although this case has been severely criticized it is still the law.[174]

If the action for judicial separation was abolished, the spouses would be forced to negotiate a settlement of their maintenance rights without having to seek court's help. Where they are of such a frame of mind that it is absolutely impossible for them to come to terms, then without seeking a court decree of separation the wife could obtain a protection order from the family court, and thus save valuable judicial time in the Supreme Courts. (See Recommendation #7.)

(4) Restitution of Conjugal Rights

As discussed previously, spouses living separately by agreement may foreclose restitution proceedings by delcaring their separation to be permanent, or by covenanting not to sue for restitution (*K.* v. *K.* [1921] 1 W.W.R. 1072 (Sask.)). The sole reason for seeking this decree is now to obtain maintenance, and if maintenance has already been

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[173] Followed in *King* v. *King* [1925] 2 W.W.R. 641; 3 D.L.R. 872 (B.C.). (Court held that the suit was brought only to claim alimony).

[174] Followed in Canada by the Ontario Court of Appeal in *Smith* v. *Smith* [1955] O.R. 695; [1955] 3 D.L.R. 808; see Roach J.A. at pp. 817-821, esp. 821 (D.L.R.); and applied by the Alberta Supreme Court in *Olsen* v. *Olsen* [1946] 3 W.W.R. 389.

provided for in the agreement, the court will refuse the decree because it will be an attempt to increase the maintenance.[175] However a wife may sue for support in the Superior Court by proceedings confined to alimony or in the Family Courts under the "protection order" provision discussed below (see *infra*, p. 108-113). (See Recommendation #7.)

(5) Action for Alimony

A separation agreement has been held to be a bar to an action for alimony whether or not the wife has been provided with support money.[176] In *Smith* v. *Smith* (1955) O.R. 695 (C.A.); 3 D.L.R. 808, the Ontario Court of Appeal took the position that there is no public policy involved where a wife binds herself not to assert her right to alimony by a separation agreement; it is otherwise when marriage is dissolved:

> . . . since the husband's liability to maintain is extinguished by divorce, it was necessary in the public interest for the court to exercise its duty to award maintenance, and the wife could not by her covenant deprive the public of the benefit flowing from the exercise of that jurisdiction or preclude the court from exercising it. pp. 810-815

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[175] *Tuxford* v. *Tuxford* (1913) 4 W.W.R. 894 (Sask.). England by the *Matrimonial Proceedings and Property Act*, 1970, c. 45, s. 20 and British Columbia by the *Family Relations Act*, 1972, c. 20, s. 4(1) have abolished this remedy.

[176] *Day* v. *Day* (1923) 23 O.W.N. 566--(unless there is a ground for invalidating the agreement such as erroneous representation, duress, etc.). *Frémont* v. *Frémont* [1912] 26 O.L.R. 6 (C.A.); 6 D.L.R. 465.

While a separation agreement is in force, the duty to support is in abeyance and the husband cannot be sued for alimony so long as he observes the terms and makes regular payments: *Re Carey* [1940] O.R. 171 at 175 (C.A.); 1 D.L.R. 362. But if the agreement is set aside for any reason, the duty springs up again, and that duty is measured by the current financial condition of the husband.

On the other hand if the separation agreement makes no provision for wife's support or makes a provision but there is no covenant not to sue for alimony, the court will grant alimony in an action whether restricted to that relief or is combined with a claim for judicial separation (where the latter is not forbidden by the agreement).[177] But a wife cannot claim both under the agreement and under the statute, and so long as the former claim stands it is a bar to statutory alimony.[178]

One can conclude from the authorities that a properly drawn separation agreement free from fraud, duress or undue influence and providing for alimony in lumpsum or periodic payments and accepted by the wife in lieu of alimony constitutes a bar to a claim to alimony if there is no default in the payments. (See Recommendation #7.)

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[177] *Fremont* v. *Fremont* (*Supra*, fn. 176); *Olsen* v. *Olsen* (1946) 3 W.W.R. 389 (Alta.).

[178] *Henke* v. *Henke* (1928) 1 W.W.R. 337; 1 D.L.R. 1090 (Sask.). *Duke* v. *Duke* (1937) 2 W.W.R. 245. *Callander* v. *Callander* (1927) 3 W.W.R. 449. *Wells* v. *Wells* (1970) 75 W.W.R. 473 (B.C.).

(6) Summary Maintenance

A separation agreement which provides maintenance for the wife is generally a bar to an application for summary maintenance unless there is statutory provision to the contrary. Statutes in the various Canadian provinces differ considerably; some like Alberta still carry on with the old England provisions,[179] and others like Saskatchewan have a separate enactment covering maintenance to deserted wives and children.[180] As a result there are conflicting decisions from various jurisdictions on the precise ambit of statutory relief. Certain principles however clearly emerge. If the spouses are living apart under an agreement, which provides for reasonable maintenance, and the husband is in default (*Walker* v. *Walker* (1934) 2 W.W.R. 554 (Man. C.A.)), the wife may proceed to claim statutory relief without abandoning the agreement, for she would come within the definition of "deserted wife". If the husband is not in default, then generally she cannot claim maintenance, unless what is provided is not adequate;[181] and it has also

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[179] *Domestic Relations Act*, R.S.A. 1970, c. 113, Part 4. *Family Relations Act*, 1972, c. 20 (Stat. B.C.).

[180] *Deserted Wives' and Children's Maintenance Act*, R.S.S. 1965, c. 341; *Wives' & Children's Maintenance Act*, R.S.M. 1970, c. W-170. Ontario's *Deserted Wives' & Children's Maintenance Act*, R.S.O. 1970, c. 128.

[181] *Brown* v. *Brown* (1954) O.W.N. 862 (C.A.); *Skinner* v. *Skinner* (1953) 31 M.P.R. 113 (Nfld. C.A.); *Nychuk* v. *Nychuk* [1952] 6 W.W.R. (N.S.) 353 Man. Co. Ct. (where a lumpsum payment is made it should be at least equal to what the wife would have got under the *Dower Act* had she been a widow calculated on an actuarial basis).

been held that where a husband has according to his financial circumstances at the time of separation made a lumpsum settlement, the wife whose ship of fortune founders can claim more and if the husband does not accede to her request, notwithstanding her prodigality if any (provided after separation she is not guilty of adultery which is not condoned),[182] she can claim statutory relief by way of "protection" or maintenance order.[183] Her entitlement to statutory relief is not defeated by an express covenant releasing the husband of all claims under these statutes and courts have arrived at the same result both under express statutory provisions[184] and

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[182] Adultery which has not been condoned is an absolute bar in all cases and it then matters not whether she is in necessitous circumstances or is a public charge.

[183] *Bennett* v. *Bennett* (1955) 111 C.C.C. 191 (Ont.) (held public policy will not tolerate such release of statutory entitlement).

[184] *McMillan* v. *McMillan* (1962) 39 W.W.R. 511 (Sask. C.A.); *Rezansoff* v. *Rezansoff* (1965) 54 D.L.R. (2d) 6 (Sask.) (R.S.S. 1965, c. 341, s. 10 specifically deals with this situation). *Stephens* v. *Stephens* (1941) 1 O.R. 243 (C.A.) held wife's right to sue upon a separation agreement was suspended while an order under the *Deserted Wive's and Children's Maintenance Act* was outstanding in her favour. The court found it unnecessary to determine whether the order abrogated the wife's rights under the separation agreement. The court in *Morr* v. *Morr* (1945) O.W.N. 463 answered this in the negative saying her rights are revived when the order has expired. In *Re Wiley & Wiley* (1919) 46 O.L.R. 176, the court held that if the Supreme Court has decided that the wife is not entitled to alimony, she cannot subsequently go to justices to get a summary maintenance order.

under legislation based on English precedents.[185]

In a leading English case, *Tulip* v. *Tulip* [1951] 2 All E.R. 91, the Court of Appeal entertained a wife's application for increased support on the basis of section 5(1) of the *Law Reform (Miscellaneous Provisions) Act*, 1949. The court held that the existence of a separation agreement was no bar to its jurisdiction, and that the husband may be guilty of wilful neglect under that statute if, having the means, he did not concede to the demands made by his wife for an increase where she was in need. And in another leading case, *Morton* v. *Morton* [1954] 2 All E.R. 248 (C.A.) the court held that the question of reasonableness under the statute must be related to the time of making the application and not to the time of the agreement. As Singleton L.J. put it in *Morton* v. *Morton*.

> *Tulip* v. *Tulip* in effect would permit the wife to say "my husband has been guilty of neglect to provide reasonable maintenance for me, though I recognize that I entered into an agreement with him which I thought would bind me at the time it was made and that he has kept his side of the bargain."
> (pp. 249-50)

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[185] *Brown* v. *Brown* (1924) 3 W.W.R. 94 (Man.); *Bennett* v. *Bennett* (1935) 1 W.W.R. 589 (Man. C.A.) following *Mathews* v. *Mathews* [1932] P. 103 (1932) All E.R. Rep. 323. Since this decision the Manitoba Legislature amended the Act; Saskatchewan also has similar provisions. *National Assistance Board* v. *Parkes* (1935) 3 All E.R. 1; *Tremaine* v. *Tremaine* (1970) 10 D.L.R. (3d) 358 (where the authorities are reviewed in detail).

He conceded that the *Tulip* decision was far reaching and it may be that the effect of the subsection may well cause the husband to say at p. 273:

> Why should I enter into an agreement? If I do, and I fall out of work, or if my means become less, I am bound by the terms of the agreement, but why should I or any other husband enter into an agreement if the other party is not going to be bound by it?

He added:

> Thus it may be thought that the effect of what is now s. 23(1) of the Act of 1950 takes away something from the sanctity of an agreement between husband and wife. In view of this, I regard it of the utmost importance that the existence and the terms of an agreement should not be overlooked in considering whether an order should be made under this subsection. The courts ought not lightly to upset, or to go behind, the terms of an agreement freely entered into between the parties, even though, under a decision of this court, the court is clothed with power by s. 23(1) to make an order in a proper case in which it is shown that the husband has been guilty of wilful neglect to provide reasonable maintenance for his wife.

However, the wife must bring her case within the four corners of the statute. If she has no grounds under it, even though she is in necessitous circumstances or is a public charge, she cannot claim relief. Thus adultery which is uncondoned is an absolute bar and the husband

may also have a "sufficient cause" to refuse to maintain his wife if he is without the means himself.[186] And where the wife herself was in desertion prior to the agreement and the husband did not acquiesce in such desertion but nevertheless made provision for maintenance, the wife's rights can only be under the agreement and not under the *Act* for she has been the deserting spouse.[187] In such a case of course the table may be turned by a genuine offer to return. (*Pardy* v. *Pardy* [1939] P. 288.)

One should bear in mind that the wife who has obtained a measure of certainty under the agreement may be in a much better position than she would have been if she had not had the agreement; for example, if the husband's means decrease, and he finds it difficult to pay what he has undertaken, he is still bound by the agreement, and if he is in arrears, he can be sued for them.

It is submitted that the decision in the *Tulip* and *Morton* cases is valid in Alberta under section 27(1) of the *Domestic Relations Act*, R.S.A. 1970, c. 113,[188] though undesirable.

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[186] *Williams* v. *Williams* (1958) 13 D.L.R. (2d) 139; *McIntyre* v. *McIntyre* (1954) O.W.N. 371; 108 C.C.C. 299 (Ont.); *cf. Zink* v. *Zink* (1959) 19 D.L.R. (2d) 240 (Man. C.A.)(wife's adultery after separation not proved, though child born--court refuses to discharge the order). *Earnshaw* v. *Earnshaw* (*supra*, fn. 88).

[187] *National Assistance Board* v. *Wilkinson* (1952) 2 All E.R. 255; *National Assistance Board* v. *Parkes* (1955) 3 All E.R. 1 per Denning J. at p. 3.

[188] In *Nychuk* v. *Nychuk* [1952] 6 W.W.R. (N.S.) 33, a country court judge of Manitoba held that under the Manitoba *Wives and Children's Maintenance Act*, R.S.M. 1940, c. 235, the words "suitable according to his circumstances" referring to failure by husband to provide for his wife's maintenance, related to the time of making the agreement.

In another leading case, *Northrop* v. *Northrop* (1966) 3 All E.R. 797 the English Divorce Court held that where a separation agreement makes no provision for wife's maintenance and she has released her claim, or has disentitled herself for such maintenance, but the husband has neglected or refused to maintain a dependent child, the court may make a finding of wilful neglect to maintain *the wife*. This rule, says the court, is clearly established and arises out of the close identification of the interest between the mother and the child, so that a failure to maintain the child throws the obligation on to the child's mother and amounts to a wilful neglect to maintain her in the separation agreement. This close identity is to be implied even under the *Domestic Relations Act* of Alberta which provided by section 27(2) that a deserted wife, as defined by subsection (1) of that section, may make an application for the maintenance of herself or herself and the children of their marriage, and by further provisions in the following subsections that where she is ineligible under the Part for summary maintenance, she may apply for maintenance restricted to the children (R.S.A. 1970, c. 113, s. 24(4), (5), (6), (7). (See Recommendations #7 and #8.)

# V

## TERMINATION AND DISCHARGE OF SEPARATION AGREEMENT

A separation agreement may be terminated by the parties in the same way as an ordinary contract. They may mutually agree to put an end to it, or their conduct may be such that the court will imply that they have decided to abandon their rights under it.[189] If the spouses reconcile and resume cohabitation the courts generally conclude that the foundation of the agreement is gone and that it is at an end as from the time of reconciliation. The agreement may also provide that in certain situations it will come to an end, e.g., if the parties seek divorce or other matrimonial relief. The wife may also take advantage of statutory rights in her favour and conclusively elect to proceed under the statute. Death of the wife will relieve the husband of his agreement,[190] but his death may or may not relieve his estate of the obligations incurred by him; it is a question of construction.

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[189] *Thurber* v. *Tucker* [1951] 2 W.W.R. (N.S.) 575 (B.C.) (wife by her conduct held to have abandoned her right to payments under the separation agreement provision for her child; both had remarried and she failed to enforce for four years after remarriage). *Yellowega* v. *Yellowega* [1968] 66 W.W.R. 241 distinguishes *Thurber* v. *Tucker*--"in addition to not pressing her claim for maintenance the wife in that case had also denied her husband access to the child she had agreed to."

[190] except where he had promised a lumpsum payment which is in unperformed, or there are arrears of periodic payments.

*RECOMMENDATION #8*

*(1) BANKRUPTCY SHALL NOT TERMINATE THE AGREEMENT; IT CALLS FOR VARIATION OF THE AGREEMENT IF JUSTIFIED.*

*(2) THE AGREEMENT SHALL ALSO BE DEEMED TO BE TERMINATED IF BOTH PARTIES HAVE ABANDONED IT.*

## 1. Breach of the Agreement

A very frequent ground of recourse to the courts is breach of the covenants either by the husband or by the wife. The wife commits a breach if, for example, in contravention of the provisions she asks for alimony or maintenance in a divorce action, or commits adultery, or if she makes it impossible for the husband to see their children, or if she molests or threatens him or interferes with the children's education. Similarly, the husband may violate the provisions by defaulting in his payments, or by molesting the wife or interfering in her affairs, or even by committing adultery. Breach may also occur if the husband transfers property in fraud of the wife where it has not been charged with payments, or impairing his security by mortgage or executions (the homestead excepted).

If the agreement is not fair, equitable, or reasonable, the chances are that it will sooner or later break down; conversely, if it is reasonable and equitable, it will work smoothly, without threats, quarrels and recrimination.

One of the most disturbing problems in the enforcement of an agreement arises where the economic position of

the husband, who had agreed to pay substantial periodic sums by way of alimony, has so far changed that it is impossible for him to keep up the payments and the wife refuses to give up any part of her pension. Prior to this financial setback he may have incurred additional obligations by marrying a second time and producing another set of children. If the wife insists on her strict legal entitlement, the only course available to him is to repudiate the agreement, or perhaps declare bankruptcy; the courts however do not assist him and it has been held that the doctrine of frustration because of supervening impossibility has no application to separation agreements: *Hyman* v. *Hyman* [1929] A.C. 601 per Lord Atkin at pp. 626-8.[191] Forced with such

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[191]The doubts expressed by the Court of Appeal in *Hyman* v. *Hyman*, *Hughes* v. *Hughes* [1929] P. 1 (per Hanworth M.R. at 21-22, Scrutton L.J. at 34-35 and Sankey L.J. at 76 on the correctness of the decision of *Charlesworth* v. *Holt* (1873) L.R. 9 Ex. 38, seem to have been discredited by Lord Atkin in the House of Lords. It was held in *H.* v. *H.* [1938] 3 All E.R. 415 (P.D.A.) that the doctrine of frustration did not apply even when there is a change in the law. In that case, the parties entered into a separation agreement after the wife withdrew her suit for judicial separation on the ground of husband's cruelty; by the agreement she withdrew all charges of cruelty alleged in the suit. Nine years later she filed a petition for divorce charging the same cruelty as that alleged in the former suit. The court held that the divorce suit was barred by the deed of separation, as the charges of cruelty were irrevocably withdrawn. The wife's contention that the agreement should not survive in light of an important change in the law effected by *Matrimonial Causes Act*, 1937 (which for the first time allowed divorce on ground of cruelty) did not succeed. See also *Bevan* v. *Bevan* [1955] 2 All E.R. 206 Q.B. (Separation agreement held not frustrated, nor was claim for arrears by outbreak of war and the wife voluntarily living in enemy territory. In that case the parties were married in 1931 and were separated the following year, and the Austrian wife was allowed by Sellers J. to enforce the agreement which the husband had ignored when the war broke out. According to Sellers J. "public policy did not require that this agreement should

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a situation, what is the husband to do? If his income is attached by the former wife, the second wife and children will suffer; if not she and her children will, unless she abandons her "retired" life and goes out to work or where that is not possible, go on welfare. Conceivably, the second wife who is presently living with him may then decide to separate and claim maintenance for herself and the children through the Family Court; and it will perhaps then be a contest between the two, the ex-wife and herself. In such an eventuality, then, the ex-wife would be forced to abandon her rights under the agreement for the time being and claim statutory maintenance. This type of situation results in hardship and misery all round and is not easily solved.

This then is one of the crying problems of our marriage law; the common law doctrine of non interference with the sacred obligations undertaken by the husband must be abrogated by permitting judicial variation of maintenance payments in appropriate cases. This topic will be dealt with in more detail in a later section.

As a general rule, courts regard trivial breaches of the agreement as not entitling the other party to treat the contract as repudiated;[192] similarly, unless a breach goes

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[Contined from page 116.]
terminate on the outbreak of war and the agreement was not abrogated by the outbreak of war." (p.212).

192 There cannot be an insistence on precise performance of the agreement as it deals with human conduct, but both parties must carry it out in good faith according to its spirit.

to the root of the contract, being substantial, serious and deliberate, so as to amount to a fundamental breach, as that doctrine has been developed by the House of Lords, in the leading English case of *Suisse Atlantique Société* v. *The Rotterdamshe Kolen Centrale* [1967] 1 A.C. 361, the innocent party must treat the breach of the term as a breach of warranty and sue for damages or other relief short of repudiation of the contract.[193] Even for a fundamental breach the parties may exclude the right of termination; and where the several covenants of the separation agreement are not declared to be interdependent, the only right is to claim damages, injunction, specific performance or other relief for the breach, and the other spouse cannot refuse to perform his part of the bargain.[194] If the breach is serious, then notwithstanding the particular covenants agreed upon by the parties the innocent party may resort to the remedy available at law. Thus in *Balcombe* v. *Balcombe* [1908] P. 176, where the wife had covenanted not to sue for a previous matrimonial offence of the husband, which she condoned, but the husband committed serious breaches of his obligation under the deed and had in fact repudiated it, the court held that the wife could proceed to have the marriage dissolved on grounds partly founded on the matrimonial offence committed before the

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[193] This decision has been applied by a number of Canadian courts: e.g., *Traders Finance Corp.* v. *Halverson* 2 D.L.R. (3d) 666 (B.C.C.A.); *Western Tractor Ltd.* v. *Dyck* [1969] 70 W.W.R. 215 (Sask. C.A.); *Freedhoff* v. *Pomalift Industries Ltd.* [1970] 3 O.R. 571.

[194] *Marshall* v. *Marshall* [1923] 2 W.W.R. 820; 4 D.L.R. 175; *McLellan* v. *McLellan* [1925] S.C.R. 279.

date of the deed. Even a *Rose* v. *Rose* (1883) 8 P.D. 98[195] clause is not a defence when the spouse whose offences was "finally condoned" has committed a fundamental breach of the agreement. And where in breach of a provision giving the wife custody of the children in return for her promise to give reasonable access to the father, she took the children to Florida because "she found it more pleasurable to reside there", it was held by the Ontario Court of Appeal in *Shoot* v. *Shoot* [1957] O.W.N. 22; 6 D.L.R. (2d) 366, that the agreement was terminated and the husband was within his rights to refuse to make payments of maintenance. As Roach J. A. states at p. 372 (D.L.R.), "Her obligations under the agreement must come first; her pleasures later." On the other hand, where the wife covenanted "not to molest" but in breach thereof molested or annoyed or interfered with the husband, thereby causing him inconvenience, mental worry and suffering, the Saskatchewan Court of Appeal held that the breach did not go to the whole consideration but only to a part and may be compensated by way of damages and an injunction may be granted. Courts are reluctant to allow the husband the remedy of rescission because if the husband is thus relieved of his duty to support, the burden may fall on the taxpayer; this is true especially where the wife has no other statutory remedy left, as where she has divorced her husband.

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[195] *H.* v. *H.* (1938) 3 All E.R. 415--"once the charges of cruelty, etc. have been irrevocably withdrawn they could never again be the foundation of any matrimonial proceedings." --but this is subject to the statement in the text.

*RECOMMENDATION #9*

*IF ONE PARTY IS IN SUBSTANTIAL BREACH OF THE AGREEMENT, THE OTHER SHALL BE ENTITLED TO TREAT IT AS REPUDIATED AND TO SUE FOR DAMAGES OR INJUNCTION, OR FOR STATUTORY REMEDIES. HOWEVER, IF THE INNOCENT PARTY SUES FOR REMEDIES UNDER THE LAW, HE OR SHE SHALL BE CONCLUSIVELY DEEMED TO HAVE ELECTED TO TERMINATE THE AGREEMENT.*

(a) Action for damages

By virtue of the agreement, the wife becomes a creditor. She can sue for arrears of maintenance by an ordinary action and unlike the rule with respect to orders for alimony and maintenance,[196] the claim for arrears, being contractual, is subject only to the law of limitation, *viz.*, 6 years.[197] And unless the conduct of the parties indicates that both have "walked away" from the agreement, it cannot be deemed to have been abandoned by failure to enforce for a long time (*Wilson* v. *Wilson* (1963) 46 W.W.R. 217 (Man.)). This is true even after the wife who has promised maintenance obtained a divorce (*Murdoch* v. *Ransom* (1963) 2 O.R. 484; 40 D.L.R. (2d) 146) and remarried (*Rust*

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[196]The court does not generally enforce such arrears beyond one year. See *supra* p. 10. *Hill* v. *Hill* (1964) 46 W.W.R. 158 (B.C.C.A.). The practice of divorce registry in England not to enforce arrears beyond one year except in certain circumstances, based on *Campbell* v. *Campbell* [1922] P. 187 and *James* v. *James* [1964] P. 303 has been given statutory force by s. 10 *Matrimonial Proceedings and Property Act*, 1970, c. 45 (Eng.).

[197]*Eveleigh* v. *Eveleigh* (1969) 2 O.R. 664; 6 D.L.R. (3d) 380. *Limitation Act*, R.S.A. 1970, c. 209.

v. *Rust* (1927) 1 W.W.R. 491 (Alta.)). In general the innocent party can enforce the agreement in spite of substantial breaches by the other spouse, and get liquidated damages for arrears[198] and general damages for breaches of other covenants; and where damages do not adequately compensate, he or she may get an injunction for misfeasance, or specific performance for nonperformance. Bankruptcy of the husband is no answer to a judgment for arrears nor does it discharge the contract.[199]

(b) Injunction

An injunction may be granted by the court to restrain the breaches complained of, e.g., where proceedings are commenced in violation of convenant not to sue, or threats to remove children from jurisdiction, or annoyance, disturbance, etc.[200]

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[198] Mother can forego the arrears of support for child because she is the contracting party not the child. (See *supra*, pp. 70-74).

[199] *Bankruptcy Act*, R.S.C. 1970, c. B-1, s. 148(1)(c) and he cannot claim any exemption from execution under provincial laws; nor can he prevent his entire earnings from being taken away by way of assignment. See *supra* p. 9-11,39 for a criticism of this state of the law.

[200] *Besant* v. *Wood* (*supra*, fn. 148 ); *Kichin* v. *Kichin* (1869) 19 L.T. 674 (injunction granted against suit for alimony); *Wilson* v. *Wilson* (1854) H.L. Cas. 40; 10 E.R. 811 (covenant not to molest enforceable by injunction); *Hunt* v. *Hunt* (1862) 4 De G.F. & J. 221; 45 E.R. 168 (Lord Westbury (Chancellor) granted injunction against a suit for restitution when there was a covenant to live separate and apart); *Williams* v. *Williams* (1866) L.R. 1 P & D. 178 (Plea that action for judicial separation was improperly brought sustained because wife relied on the cruelty before separation and the separation deed had condoned it); *Flower* v. *Flower* (1871) 25 L.T. 902 (husband granted perpetual injunction when wife commenced suit for judicial separation and alimony); *Aldridge* v. *Aldridge* (1888) 13 P.D. 210 (suit for nullity restrained by injunction because of covenant).

(c) Specific Performance

The court will generally enforce a separation agreement specifically unless the provisions contravene public policy.[201]

(d) Proceedings for Contempt

Contempt proceedings cannot be brought for breach of agreement, but where the agreement is incorporated in a decree by the court, assuming it has the jurisdiction over the provisions of the agreement and it has statutory jurisdiction to make any kind of provision, it is merged in the order of the court and can be so enforced (see *supra*, pp. 99-100).

(e) Election of Remedies

It has been authoritatively laid down that instead of enforcing her rights under the agreement, the wife may take advantage of statutory rights conferred on her without conclusively electing to rely on the latter, and that seeking such relief does not necessarily terminate the agreement: *Findlay* v. *Findlay* [1952] S.C.R. 96. As Rand J. points out in this case at p. 106:

> . . . the rights under the agreement and that under the statute (*Deserted Wives and Children's Maintenance Act*) are based on different matters and factors; the former could

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[201] *Elworthy* v. *Bird* (*supra*, fn. 25 ); *Besant* v. *Wood* (*supra*, fn. 148); *Girth* v. *Girth* (1792) 3 Bro. C.C. 614; 29 E.R. 729. (Spec. Perf. granted to wife though husband offered to take her back.) *Gibbs* v. *Harding* (*supra*, fn. 25).

> be resisted only by considerations arising out of the agreement but that under the statute involves desertion and the conditions laid down in s. 1. They are thus separate and distinct in substance, character and remedy. . . . The jural conclusion from the situation is this: the rights remain co-existent but, related to a period of time, the performance of only one of them can be exacted; and the operation of one and the suspension of the other will depend on the circumstances. Election could not be taken to be between the statutory right and the agreement as a whole: the latter will in general provide for essential matters which are quite beyond the purview of the statute; and if resort to the statute were to abrogate the provision in the agreement for maintenance, it would effect a basic alteration in the considerations on which the mutual promises were made. . . .

In dissenting from the majority, Cartwright J. regarded the wife's position, as expressed by her in her letter to the husband, as a definite statement that she was no longer going to regard herself as bound by the contract and was going to seek her rights at law outside its provisions, and having chosen her remedy at law the contract would no longer be in existence; having sought payments under the statute and not by virtue of the contract, she had her election.[202]

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[202] See also *Besant* v. *Wood* (*supra*, fn. 148 ). In *Brown* v. *Ingham* [1941] 2 W.W.R. 410, where a wife covenanted by her agreement to give up all claims to a homestead and all other property, but the husband was in arrears, the Alberta Supreme Court held that the wife was not in breach of the agreement by filing a caveat claiming an interest under the *Dower Act*. See also *Kunski* v. *Kunski* (1898) 68 L.J. P. 18; *Smellie* v. *Smellie* [1946] O.W.N. 458; 3 D.L.R. 672; *Divinsky* v. *Divinsky* [1970] 73 W.W.R. 79 (B.C.); 13 D.L.R. (3d) 717. cf. *Finch* v. *Finch* [1945] 1 All E.R. 580 where Macnaghten J. held that as the wife had treated the order made by the magistrates for a £2 weekly maintenance as operating to extinguish the obligations of her husband under separation deed, her claim *pro tanto* for arrears cannot be maintained.

The general rule thus appears to be that in order for the doctrine of election of remedies to operate, three essential elements must exist. The existence of two or more remedies; the inconsistency of this remedy and the choice, with knowledge of the facts, of one of the remedies. If these three elements exist, then the acceptance of the breach and treating the agreement as rescinded, and suing for an inconsistent remedy, will amount to election.

*RECOMMENDATION #10*

> *DURING THE TERM OF THE AGREEMENT, THE PAYEE SPOUSE SHOULD HAVE A LEGAL RIGHT TO SET ASIDE TRANSFERS OR CONVEYANCES OF PROPERTY IN THE NATURE OF GIFTS, INTENDED AND HAVING THE EFFECT OF DEFEATING HER CLAIMS. BONA FIDE PURCHASERS FOR VALUE SHOULD BE PROTECTED: THE PAYEE'S RIGHTS SHOULD ATTACH ONLY TO THE PROCEEDS. LEGISLATION ON THE LINES OF SECTION 16 OF THE ENGLISH MATRIMONIAL PROCEEDINGS AND PROPERTY ACT SHOULD BE ENACTED.*

## 2. Reconciliation as Terminating the Agreement

### (a) General[203]

After a separation agreement is entered into and the parties have lived apart, they may whenever they think fit come together again and then generally the agreement would no

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[203]This section has borrowed extensively from 40 A.L.R. 1227.

longer be binding.[204] The agreement itself may set the tone for future cohabitation or it may preclude that possibility by covenant against molestation, annoyance or interference or covenant not to sue for restitution, or expressions of similar import clearly indicating that the parting is permanent. In spite of such provisions, there is nothing to prevent their reunion if their desire is mutual, and having had a chance to lead their own separate lives for a time they may feel that there would be greater happiness in living together. There is however no obligation on either spouse to take back the other even in the face of a genuine offer if they had parted for good; if the parting is only temporary, it is otherwise, and the spouse refusing to accept an offer made in good faith may be in desertion.[205]

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[204] *Angier* v. *Angier* (1718) Gilb. Ch. 152; 25 E.R. 107. *Bateman* v. *Ross* (1813) 1 Dow. 235; 3 E.R. 684 (H.L.). *Christofferson* v. *Christofferson* (1924) 3 W.W.R. 545. In *Bosley* v. *Bosley* [1958] 2 All E.R. 167 Pearce L.J.at p. 173 states that the court should be slow to decide that a term is imported into a separation agreement that the separation shall be for ever and that there should be no right ever to ask the other party to return to cohabitation. *Negus* v. *Forster* (1882) 46 L.T. 675 (C.A.); *Nichol* v. *Nichol* 30 Ch.D. 143.

[205] *Gallagher* v. *Gallagher* [1965] 2 All E.R. 967 (C.A.) if the wife refuses a genuine offer she is in desertion and the question is no different whether it is consensual separation or desertion; conversely the wife is entitled to reject the offer if the offer is not genuine in both situations; *Fraser* v. *Fraser* [1969] 3 All E.R. 654. In *Pardy* v. *Pardy* [1939] P. 288, the Court of Appeal held that when spouses are living apart under a deed of separation, the relationship, begun by consent, could not be changed into desertion by a mere refusal of one party to resume cohabitation or by a breach of the covenant in the deed. Such a metamorphosis can only be effected by a complete repudiation by one party, which had been accepted as such by the other, in such circumstances that the proper inference to be drawn from all the facts of the case was that the spouse who

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(b) What constitutes reconciliation

Reconciliation may be defined as a voluntary resumption of cohabitation in the fullest sense. This ordinarily requires a living together as husband and wife and having normal marital relations. Both spouses should intend to resume married life fully, and not merely for the purpose of enjoying each other's company temporarily for limited purposes or as a trial of whether they want to be reconciled; a state of mind somewhat resembling that usually held necessary for condonation.[206] If they live under the same roof but do not act as husband and wife, it is probable that there is no real reconciliation or resumption of cohabitation. Thus in *Thomas* v. *Thomas* [1948] 2 All E.R. 98 because of a severe housing shortage the parties agreed after a separation order that the wife and child might occupy rooms in the husband's house and live entirely apart from him, and some alteration was made in the water supply so that the parties could get the necessary water without interfering with each other. In return the wife agreed that the husband might

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[Continued from page 125.]
accepted the repudiation was willing to return to cohabitation and was in a position to insist on his or her conjugal rights and was in fact reasserting them. For an excellent analysis of this case, see Joske, 22 Australian L.J. 38-45 and his enquiry whether any relief can be given by way of divorce to parties who had separated with consent has now been answered by the *Divorce Act*, R.S.C. 1970, c. D-8.

[206] *Eaves* v. *Eaves* [1939] 4 All E.R. 260 (C.A.); *Mummery* v. *Mummery* [1942] 1 All E.R. 553; *Abercrombie* v. *Abercrombie* [1943] 2 All E.R. 465 (C.A.); *Cook* v. *Cook* [1949] 1 All E.R. 384; *Whitney* v. *Whitney* [1951] 1 All E.R. 301; *Perry* v. *Perry* [1952] 1 All E.R. 1076 (C.A.).

deduct as rent a part of the money he was required to pay under the separation order. They did not have intercourse. It was held that there was no resumption of cohabitation. Mere proof that the spouses have cohabited voluntarily is not sufficient to establish reconciliation. And it is obvious that isolated acts of intercourse do not by themselves amount to a reconciliation, and do not affect a separation agreement.[207] To establish satisfactorily such a reconciliation and resumption of cohabitation it must ordinarily appear that the spouses have established a matrimonial home and that they live in it in the normal relationship of husband and wife.[208] Nevertheless, there are circumstances in which it is not possible for spouses to establish a permanent home even though they desire to be fully reconciled; as for instance where the husband travels constantly or is in the armed forces, and it would seem that in such cases there may be a reconciliation and resumption of cohabitation sufficient to affect a separation agreement or a separation decree, if they have the requisite mutual desire for a present reconciliation and they cohabit as husband and wife as fully as the circumstances will permit. In *Abercrombie* v. *Abercrombie* [1943] 2 All E.R. 465 the wife had obtained a separation *order* on the ground of the husband's cruelty.

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[207] *Rowell* v. *Rowell* (1900) 1 Q.B. 9 (C.A.); *Eaves* v. *Eaves* (*supra*, fn. 206); *Mummery* v. *Mummery* (*supra*, fn. 206); *Abercrombie* v. *Abercrombie* (*supra*, fn. 206); *Patterson* v. *Patterson* (1928) 4 D.L.R. 793; *Smith* v. *Smith* [1961] 37 W.W.R. 433 (B.C.).

[208] *Mummery* v. *Mummery* (*supra*, fn. 206); *Cook* v. *Cook* (*supra*, fn. 206); *Eaves* v. *Eaves* (*supra*, fn. 206); *Thomas* v. *Thomas* (1948) 2 All E.R. 98.

The husband was a physician engaged in various appointments as a "*locum tenens*" which evidently made it difficult for him to maintain a home in one place for any length of time. The parties exchanged several letters with a view to reconciliation and they met at one city on one occasion and at another city eight days later; they had intercourse but they did not spend the night together. They then spent two nights at a home and finally they went to a hotel in London on a "second honeymoon" and went out on a Sunday to see about a possible appointment for the husband as a *locum tenens*. The wife had agreed before taking the trip to London to resume cohabitation "provided that she was satisfied that the husband would conduct himself towards her in a normal manner and that there would be no further acts of cruelty by him." The court held that there was resumption of cohabitation,

> and that the condition imposed by the wife was a condition subsequent which did not affect the fact that there was a resumption of cohabitation. And in *Eaves* v. *Eaves* [1939] 4 All E.R. 260 the parties had separated in 1932 and executed a *deed*; they expected the separation to be temporary. The husband desired to move to another city to be trained to be a professional singer and executed the deed in order to "secure the wife's position". The parties remained friendly and had intercourse from time to time for nearly three years. During the first year, the husband's mother made the payments specified in the deed, and thereafter no payments were made. In 1934 the wife obtained a job hoping that it would encourage her husband in his studies. In February, 1935, a child died and soon thereafter the husband ceased to show affection for his wife and their informal relationship ceased. The Court of Appeal held that there was a resumption of cohabitation sufficient to put an end to the deed of separation.

The fact that the reconciliation and cohabitation did not last for more than a few days or weeks, does not establish that there has not been a true reconciliation and resumption of cohabitation. While proof that the parties soon separated may raise a question whether the spouses intended to establish permanent relationship, that is merely a matter of evidence. Cohabitation does not necessarily depend upon whether there is sexual intercourse. There may be a resumption of cohabitation without intercourse. Cohabitation means living together as man and wife (*Thomas* v. *Thomas* (*supra*, fn. 208)).

In many cases one of the spouses with a view to inducing reconciliation may consent to have sexual relations or briefly cohabit with the other.[209] In such cases, the desire is one sided only and not shared by the other. Thus in *Mummery* v. *Mummery* [1942] 1 All E.R. 553, where the wife had intercourse with her husband on a single night in the hope that her husband would return to her, but he had no such intention, the court held that there was no resumption of cohabitation. And in *Whitney* v. *Whitney* [1951] 1 All E.R. 301, the husband occasionally went to another city to see his children and on those occasions had intercourse with his wife and hoped for reconciliation, but she persistently maintained her intention to live separate and apart from him; the court held that there was no reconciliation or resumption because there was no intention on the part of the wife to set up a matrimonial home. Some times, indulgence in sexual relations may be on a "trial" basis to determine whether the temporary parting has served as an eye opener to the offending spouse. If the trial or

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[209] *Rowell* v. *Rowell* [1900] 1 Q.B. 9 (C.A.); *Smith* v. *Smith* (1961) 37 W.W.R. 433 (B.C.).

experiment is unsuccessful, the spouses resume their separate status without affecting the agreement.

In *Abercrombie* v. *Abercrombie* [1943] 2 All E.R. 465, the wife had agreed to resume cohabitation if she was satisfied that the husband would conduct himself toward her in a normal manner and there would be no repetition of acts of cruelty by him. Collins J. at pp. 470-71 said:

> Every reconciliation is subject to the condition that it will in fact break down if one or other of the spouses commits a matrimonial offence. The justices seem to me . . . to have accepted the view to which the wife deposed when she used the words "I was giving him a trial," and I think they thought that in law that concluded the question, and that, from her point of view, the resumption being probationary and tentative, there could be no resumption of cohabitation. However, for the reasons Lord Merriman P. has given . . . it is quite wrong in law to say there cannot be a resumption of cohabitation if the resumption is contingent upon the continued good behaviour of one or other or both of the spouses. It is none the less a reconciliation and carries all the consequences, among others, that the separation order comes to an end.

It thus appears, that in cases involving "trial" resumption of cohabitation the person or persons who insist that the cohabitation shall be a trial do not have a present intention to resume cohabitation on a permanent basis but

merely intend to make up their minds at a future date; the "trial" is in effect a negotiation for a future reconciliation.[210]

There does not appear to be any decision on the question whether a forgiveness of prior matrimonial offence is essential to a reconciliation and resumption of cohabitation. Forgiveness is essential to the related doctrine of condonation. Condonation may easily be proved by the parties' subsequent reconciliation, but there may be condonation even when the parties have not separated; if the husband commits adultery and then promises to reform, the wife condones the offence by forgiving him and continuing to cohabit. Common sense would indicate that forgiveness is implicit in reconciliation.[211] However where it can be

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[210] Section 2(d) *Divorce Act*, R.S.C. 1970, c. D-8 contemplates reconciliation on a trial basis where both intend it to be such or at least the guilty party knew that the innocent spouse regarded the resumption of cohabitation as an attempt to effect a reconciliation. See *Quinn* v. *Quinn* [1969] 1 W.W.R. 1394; 3 All E.R. 1212 (C.A.) decided under the English Act on wording identical to the Canadian Act. Section 2(d) has however no application where the parties have resumed cohabitation for a period more than 90 days, nor where they have resumed cohabitation *after* reconciliation as cohabitation is then not entered upon with a view *towards* reconciliation.

[211] Sir James Wilde stated at p. 346 in *Rowley* v. *Rowley* (1864) 3 Sw. & Tr. 338, ". . . condonation is that species of forgiveness or reconciliation which in furtherance of the marriage bond, the court has erected into a bar to legal proceedings." *Mackrell* v. *Mackrell* [1948] 2 All E.R. 858 at 860-1 per Denning L.J. "Reconciliation therefore is the test of condonation and until there is reconciliation there cannot be condonation."

affirmatively proved that the injured spouse has not forgiven the offender there is no condonation and *a fortiori* one may assume there is no reconciliation.[212]

(c) Effect of reconciliation

As a general rule it may be stated that where the husband and wife have made a separation agreement and afterwards become reconciled, the agreement would be annulled,[213] as from the date of reconciliation.[214]

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[212] *Leaderhouse* v. *Leaderhouse* (1971) 2 W.W.R. 180 at 184; 17 D.L.R. (3d) 316 at 320, Disbery J. "In condonation there must be both forgiveness of the offence and reinstatement of the erring spouse. There must be a mutual desire. At 323-24--"There may of course be sexual intercourse between the innocent or guilty spouse entered into without the slightest thought of forgiveness of past offences or reinstatement of the guilty spouse. *Nielsen* v. *Nielsen* [1971] 1 O.R. 393 at 397-399; 15 D.L.R. (3d) 423 at 427-29 per Galligan J. "Intercourse between husband and wife in a *bona fide* attempt to reconcile with full knowledge of a previous matrimonial offence is merely evidence from which a court can infer condonation. It is not conclusive."

[213] *Westmeath* v. *Westmeath* (1831) 1 Dow & Cl. 519; 6 E.R. 619 (H.L.); *Nicol* v. *Nicol* (1886) L.R. 31 Ch. D. 524 (C.A.); *Fletcher* v. *Fletcher* (1788) 30 E.R. 46; *O'Mally* v. *Blease* (1869) 20 L.T.N.S. 897; *Angier* v. *Angier* (1718) Gilb Ch. 152; 25 E.R. 107; *Bateman* v. *Ross* (1813) 1 Dow. 235; 3 E.R. 689 (H.L.); *St. John* v. *St. John* (1803) 11 Ves. Jun. 526 (Ch.); 32 E.R. 1192; *Hindley* v. *Westmeath* (1827) 6 B. & C. 200; 108 E.R. 427 (H.L.); *Crouch* v. *Waller* (1859) 4 DeG. & J. 302; 45 E.R. 117 (Ch.); *Pavan* v. *Pavan* (1951) 3 W.W.R. 404 (B.C.); *Brewster* v. *Brewster* (20 C.L.T. 182); *Christofferson* v. *Christofferson* [1924] 3 W.W.R. 545; *Fraser* v. *Fraser* (1938) 2 D.L.R. 732.

[214] *Macan* v. *Macan* (1900) 70 L.R. Q.B.90; 17 T.L.R. 131 (Action for arrears prior to reconciliation not affected).

Hence the agreement as a whole is abrogated including the husband's contractual duty to make periodic payments for the support of his wife and children. If the reconciliation proves abortive, the agreement cannot be revived unless there is an express clause to that effect, and the spouses may go their separate ways and claim whatever relief is obtainable at law, subject however to the rule that neither party may rely upon offences that have been fully condoned or forgiven by the reconciliation.

The general rule as set out above is however subject to several limitations. The agreement itself may be kept alive by express provision.[215] A covenant to pay annuity for life does not cease upon resumption of cohabitation, nor does an unqualified covenant for payment.[216] And the

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[215] *Wilson* v. *Mushett* (1832) 3 B & Ad 743; 110 E.R. 271; *Bowers* v. *Bowers* (1915) 34 O.L.R. 463; 25 D.L.R. 838; *Fraser* v. *Capital Trust Corp.* [1938] O.W.N. 210; 2 D.L.R. 732 (even though an agreement provides that it should remain effective "unless revoked in writing, signed and acknowledged by both parties, it may be abandoned or cancelled without writing. Subsequent reconciliation does not abrogate the agreement but is an evidence of it.)

[216] *Randle* v. *Gould* (1857) 8 E & B 457; 120 E.R. 170 (covenant in a separation deed to pay a certain sum weekly *during the natural life* held to be a post nuptial settlement, and is not avoided by subsequent reconciliation and resumption of cohabitation). *Re Abdy: Rabbeth* v. *Donaldson* (1895) 1 Ch. 435 (C.A.). *Walker* v. *Walker* (1872) 19 Gr. 37; (an unqualified covenant for payment in separation deed not avoided by subsequent reconciliation or later leaving without cause). *Webster* v. *Webster* (1853) 4 DeG. M. & G. 437; 43 E.R. 577. *Rowell* v. *Rowell* (1900) 1 Q.B. 9 (C.A.) (a provision in a separation deed to pay a weekly sum to the wife *during their joint lives "If they should so long live separate from each other"* and for the payment to her of a further sum during the minority of their son if he should so long remain under the care of the wife, held a deed simpliciter and will end if the parties become reconciled).

parties after reconciliation may so conduct themselves as to create new obligations on the footing of the old obligations contained in the deed of separation. Conversely the parties may by restoring their *status quo* and continuing to disregard the obligations under the agreement indicate that they intended to rescind it by mutual consent. As Bowen L.J. points out in *Nicol* v. *Nicol* [1886] L.R. 31 Ch.D. 524 (C.A.),

> Separation deeds are often very complicated and some provisions may be intended to apply even in the case of a reconciliation, while others may be quite inapplicable to such a state of things, and I should prefer to construe each deed by the light of its surrounding facts rather than to lay down a crystallized rule. I think we can decide most cases by the terms of the deed itself . . . . We have to find out what the parties really meant.
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> (p. 529 )

In the same case Fry L.J. goes on to distinguish between separation agreements *simpliciter* and settlements of property:

> The question here is whether the terms of the agreement . . . amount simply to an agreement under which provision was made to the wife during the continuance of the separation, or one by which it was intended to confer on her some property or irrevocable licence or other benefit, to endure whether the separation came to an end or not.
>
> (p. 530 )

and further

> I conceive it to be plain that the parties to a separation deed may agree that it shall continue to operate whether there be a return to cohabitation or not, so that the deed will amount in fact to a post nuptial settlement. The question for enquiry in each case is whether that is the true effect of the document.
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> (p. 530 )

Therefore it is now well settled that if an agreement goes beyond the terms of an ordinary separation deed, and is in effect a property settlement, the subsequent reconciliation of the parties will not affect the agreement so far as it constitutes a settlement.[217] Executory provisions of the agreement, on the other hand, are terminated by reconciliation and resumption of cohabitation, since there is failure of consideration and the conduct of the parties is inconsistent with the idea that they intended the agreement to continue in force.

Although a court may hold that a covenant to make maintenance payments is not terminated by reconciliation, it is probably unlikely that arrears could accrue, or if accrued be enforceable, during the period of cohabitation

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[217] *Negus* v. *Forster* (1882) 46 L.T.(N.S.) 675 (C.A.) *Ruffles* v. *Alston* (1875) L.R. 19 Eq. 539. *Re Spark* (1904) 1 Ch. 45 (separation agreement assigning certain property to a trustee upon trust to pay the income therefrom to the wife for her life and after her decease to divide among the children, held to constitute a voluntary settlement which cannot be revoked and is not affected by a reconciliation. *McArthur* v. *Webb* (1871) 21 U.C.C.P. 358 (explaining *McArthur* v. *Webb* (1867) 13 Grant Ch. (U.C.) 303); *Walker* v. *Walker* (1872) 19 Grant Ch. (U.C.) 37; *Re Abdy* (*supra*, fn. 216 )

if the husband has been supporting her while they lived together.

The function of a simple separation agreement is to provide for three principal matters:

(a) To stipulate that it shall be lawful for the parties to live separate and apart until by mutual agreement the separation is ended[218] (this includes additional covenants such as not to molest, annoy or interfere, not to sue for restitution of conjugal rights, etc.).

(b) To provide for the support of the wife (with a corresponding covenant that the wife will indemnify the husband against all debts and will not pledge his credit). and

(c) To provide for the custody and maintenance of the children.

A true property settlement, on the other hand, is designed to make permanent arrangements for the support

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[218] In his article on *Therapeutic Separation Agreements* (51 A.B.A. Journal 756-760) Mr. Kohut proposes a new section for separation agreements that can serve as a guide for the future relationship of the parties in the hope of an eventual reconciliation; he suggests that too often separation agreements tend to promote divorce. Instead, the clause would attempt to make separation temporary. Society has a real interest in effecting reconciliation and divorce is a remedy for a hopeless situation.

and maintenance of the wife and the children, as well as to settle all existing rights in and with respect to joint and separate property. For example, if the parties are co-owners of property under a community regime, or hold assets as joint tenants or as tenants by the entirety, or hold property to which both have equitable claim, the settlement would cover the disposition of their rights.

Reconciliation will operate differently on the two types of separation agreements and will have different tax incidents.[219] If the agreed payments are true alimony, they are not discharged by bankruptcy (*Bankruptcy Act*, R.S.C. 1970, c. B-3, s. 148(1)(c)) but if they are made under a property settlement they may be discharged. Periodic payments in the nature of alimony may be modified upon divorce of the parties but not true property settlements. A decree for true alimony may terminate on the wife's divorce and remarriage (see *supra*, pp. 32 ff) but instalment payments of a lump sum agreed to by the husband are not affected by remarriage. It is customary to provide for a fair division of property in a settlement and for mutual releases of all claims, statutory, legal or equitable, to each other's property. It is also common to state the division of property in terms of present conveyance or transfer and to acknowledge the instrument as a deed so that it may be recorded if necessary;

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[219] If the agreed payments are true alimony, husband is entitled to deduct them for income tax purposes (*Income Tax Act*, S.C. 1971, c. 63, s. 60(b)(c)) while the wife must report them as income (*Ibid*, s. 56(1)(b)(c)) but if they are consideration for property settlement not being an annuity, the husband cannot deduct and the wife need not declare it as income.

it is usually followed by deeds and bills of sale so as to give immediate independent evidence of title (see "Separation Agreements" in 28 Rocky Mountain Law Review pp. 178-183, especially p. 180).

A settlement may of course be abrogated by the parties expressly or by inconsistent conduct,[220] and a serious question then arises whether the parties can thus affect the rights conferred on third persons, usually children in whom after the wife's life interest the remainder is vested. The general rule that a settlor cannot revoke a completely constituted settlement without the consent of the beneficiaries where he did not reserve the power of revocation, may operate to prevent revocation upon the parties being reconciled.[221] But in the absence of such express or implied conduct, the correct rule would appear to be that a settlement survives reconciliation to the extent that the property disposition isintended to be permanent (See *Bowers* v. *Bowers* (*supra*,fn. 215)). In *Fraser* v. *Capital Trust Corporation* [1938] 2 D.L.R. 732 (Ont.) the agreement provided for a separation and sale by the husband of his one-half interest in a hotel business

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[220] e.g., where a house is allotted to the wife in a property settlement and after reconciliation but before the deeds are recorded they both join in borrowing upon a mortgage and execute mortgage deeds, such conduct would be evidence of rescission. On the other hand, where the parties continue to observe the terms of the settlement and to treat the property allotted to each as his or her own, it tends to show that reconciliation was not intended to put an end to the settlement.

[221] *Paul* v. *Paul* (1882) 20 Ch. D. 742 (C.A.)--whether the settlement is made for valuable consideration or is voluntary. See *supra*, fn. 116 re life insurance benefit.

and property to his wife, the contract operating as a present quit claim of the husband's rights in the real estate, business, and liquor licence. The wife agreed to pay $3,000 in instalments and to bar her dower. She also released all claims for alimony. The court said that the parties intended that the settlement should survive future reconciliation, noting that the husband was guilty of adultery and that the wife insisted on a separation which was not to be permanent and which would end when she decided to reconcile. Their reconciliation soon after the agreement was held not to abrogate the property settlement. Godfrey J. said at p. 737:

> It is obvious from all this that Mrs. Fraser intended to keep control of the purse strings. She was prepared to give her husband another chance, but if he misbehaved himself again separation would be a simple matter and she would be left in a position to support herself.

The husband's claim for return of his one-half interest failed as his wife who died shortly after reconciliation had disposed of the property by will. If a property settlement has not been fully executed by the deed of separation, for instance where there are no words of present conveyance and transfer and no other deeds have been drawn up, the evidence of intention to abrogate the settlement may easily be obtained from the conduct of the parties,[222] but where the agreement has been fully executed, it is necessary for an agreement of revocation to terminate the settlement.

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[222] *Wakaruk* v. *Wakaruk* (1926) 1 D.L.R. 493 (Alta.) by the separation agreement the husband agreed to give his wife certain property and she agreed to bar her dower. The court said at p.494 however, "she came back and of course the agreement became void." See also *Re Wiggins* [1952] O.W.N. 66; *Moher* v. *Moher* [1943] 1 D.L.R. 488.

In almost every case a contract is partially executed prior to the reconciliation insofar as the husband has made periodic payments or has transferred the property. The question then arises as to whether a subsequent reconciliation has the effect of rescinding or annulling the contract from the beginning, and requires the restoration of the *status quo* ante, or whether the termination is limited to the executory provisions of the contract. There is no clear answer. Similarly, does a wife who has barred her widow's rights in the estate of her husband on his death forfeit those rights despite the reconciliation? It was argued in *National Trust Co. Ltd.* v. *Bell* (1925) 3 W.W.R. 712,; 4 D.L.R. 1029 that renunciation of the rights was not affected by resumption of cohabitation but the Alberta Supreme Court held that the entire agreement was terminated including the barring of widow's rights; the court however pointed out (page 714) that the agreement it was dealing with did not disclose any dual purpose such as the one referred to above.

*RECOMMENDATION #11*

*THE AGREEMENT SHALL BE DEEMED TO HAVE BEEN TERMINATED IN ITS ENTIRETY BY THE RECONCILIATION AND RECOHABITATION OF THE SPOUSES, IN DETERMINING WHETHER OR NOT THERE WAS A RECONCILIATION, THE SAME TESTS AS IN THE DIVORCE ACT, s. 2 (R.S.C. 1970, c. D-8) SHOULD BE APPLIED. WHERE AN AGREEMENT IS FULLY EXECUTED BY ONE SPOUSE, RECONCILIATION SHALL HAVE NO EFFECT ON PROPERTY AND OTHER RIGHTS ACCRUED UNDER IT.*

# VI
# VARIATION OF SEPARATION AGREEMENTS

The area in the realm of domestic relations that perhaps causes the greatest amount of concern is the power of courts to vary separation agreements entered into by spouses *bona fide* in an attempt to resolve their marital conflicts or to make what they consider reasonable provisions following upon marriage breakdown. In situations where parties have been bargaining from unequal positions without the aid of legal counsel, or in all the circumstances including any bars to statutory entitlement due to matrimonial misconduct, the agreement is unfair, unreasonable or inequitable, the power to strike down a contract or vary it may be readily conceded,[223] but courts have gone beyond the strict sphere of contract law into areas of public policy in an attempt to mete out, what they consider, justice to the weaker spouse. From the numerous cases coming before them in this fertile field of litigation, one is driven to the conclusion that courts use their power of variation more

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[223]See Picher "Separation Agreements, etc." in (1972) 7 R.F.L. 257 at 279 where he suggests that the agreement itself in such cases must be set aside and not varied, as the court will in effect be writing an agreement for the spouses. This is the general rule in contract law in respect of unconscionable agreements; but where particular provisions in the context of the entire agreement are unfair (and this generally applies to maintenance) there should be no difficulty in principle in allowing the court to vary them. In the case of provisions relating to children, the court has rightly adopted the policy that their inherent jurisdiction cannot be ousted by any agreement of the parties, whatever may have been the position the spouses may have taken had they known; the particular provision itself will be set aside and the court will decide what is best for the children.

readily when a former wife comes before them than when a husband is groaning under the yoke of payments promised, even where he has undertaken additional responsibilities by remarrying after divorce. Their attitude appears to be that a man owes a higher obligation to the spouse and children of his first marriage and that he should not have undertaken new obligations by contracting a further marriage; this attitude is sometimes apparent when courts deny a divorce to the man, a power reserved to them by section 9(1)(e) and (f) of the *Divorce Act*, R.S.C. 1970, c. D-8, where it is obvious that granting a choice would permit him to remarry and that would reduce his ability (or willingness) to meet his obligations flowing from the first marriage. Taken to its logical limits, it effectively bars divorce to the husband at least economically and encourages common law unions; there is no such problem or necessity for the wife.

The inequity of the law can be readily seen when courts adopt a policy of freely modifying their own orders for alimony or maintenance on a change of circumstances than where a husband comes before them to vary agreements voluntarily made by him with his wife;[224] in the latter case,

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[224] *Kinghorn* v. *Kinghorn* [1960] 34 W.W.R. 123 (Sask.). Disbery J. at p.125 states:

> A divorced husband cannot be permitted to shun the marital obligations arising out of his first marriage by entering into a second. The mere fact that he has remarried is no ground in itself

[Carried forward on next page.]

unless the change of circumstances is fundamental, amounting almost to a "frustration" of the contract, they deny him any remedy and will let the wife even throw him into bankruptcy for arrears without, even then, lessening his future obligation. The sanctity of contract is then upheld. But if the wife makes out a strong case to the effect that the contract was unfair or has become unfair by the widening gap of fortunes between herself and the man who faithfully kept up payments over the years, they are prepared to bend over backwards to assist her. This was what Singleton L.J.

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[Continued from page 123.]

> for seeking a reduction of the amount of maintenance he has been ordered to pay to his first wife or the children of his first marriage. However, the second marriage is a circumstance to be considered on an application for modification of the said order and may, under certain circumstances, warrant a reduction in the maintenance to be paid to enable him to fulfil his obligations to support his second wife. In this connection the income or other resources of the second wife become relevant. (summarized)

See also *Barnes* v. *Barnes* [1972] 3 All E.R. 872 (C.A.) per Russell L.J. at p. 876:

> *Prima facie* a husband, or former husband, ought to support his wife and children--subject of course to any independent income or earnings of the wife. But in the lower income groups, this is frequently not possible out of the earnings of the husband, consistently with the husband being able to maintain himself to a proper standard and having regard also to any new obligation he undertakes, as by law he is entitled to undertake, in the shape of a second wife and perhaps a second family.

tried to convey in *Morton* v. *Morton* [1954]2All E.R. 248 discussed at page 94, *supra*. In *Pinnick* v. *Pinnick* [1954] 1 All E.R. 873, Lord Merriman P. after a full review of cases stated that where the parting was consensual, "it was impossible to imply an agreement to maintain her as a separated wife unless the liability to do so is implicit in a consensual separation" (at p. 876). His Lordship relying on *Baker* v. *Baker* [1949] 66 T.L.R. 81 and *Chapman* v. *Chapman* (unreported, decided on April 4, 1951) held that even though the wife, who was in her late twenties, was a sick woman and had not worked for two years, she had not demonstrated a fresh need and hence was not entitled to maintenance, stating

> It does not seem to us that there was any subsequent change of circumstances in the present case, since all the factors which were put forward in that behalf . . . were already known at the time of parting. (at p. 877)

*Tulip* v. *Tulip* was confined to a situation where there was a change of circumstances not contemplated by the parties at the time of separation by consent. He indicated an apparent conflict between *Baker* v. *Baker* which had been approved by the same Court of Appeal that decided *Tulip* v. *Tulip* on the previous day and *Tulip* v. *Tulip* had suggested that the Maintenance Agreements Bill (since enacted) would resolve it.

The leading case on the power of the court to vary a separation agreement, which probably represents the watershed from which all later developments flow, is *Hyman* v. *Hyman*

[1929] A.C. 601; [1929] All E.R. Rep. 245 decided by the House of Lords on the basis of a statutory power given to courts by an *Act* of 1925.[225] That *Act* empowered the court (1) if it thinks fit to order the husband on a dissolution of marriage by a decree of divorce or nullity to

> . . . secure to the wife such gross sums of money or annual sum of money for any term not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable . . . .

and (2)

> . . . if it thinks fit, to . . . direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sums for her maintenance and support as the court may think reasonable . . . .

and (3)

> . . . where any decree for restitution of conjugal rights or judicial separation is made on the application of the wife, the court may make such order for alimony as the court thinks just.

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[225] *Supreme Court of Judicature (Consolidation) Act* 1925, s. 190(1) and (4), which provision was a re-enactment of provisions first appearing in the *Matrimonial Causes Act* of 1857, as modified by later *Acts* in 1866 and 1907. The corresponding power is conferred on Alberta courts by s. 23 of the *Domestic Relations Act* (R.S.A. 1970, c. 113) (which is almost identical to *Matrimonial Causes Act 1857*) and by the *Divorce Act*, R.S.C. 1970, c. D-8, s. 11 (where the parties seek divorce). *Tuxford* v. *Tuxford* (1913) 4 W.W.R. 894 (Sask.). *Kawin* v. *Kawin* (1927) 1 W.W.R. 690 (Sask.) (allowance increased in action for judicial separation and alimony but there was no covenant not to sue for alimony). *Spillett* v. *Spillett* (1943) 3 W.W.R. 110 (Man.) (though there was a covenant, *Hyman* v. *Hyman* applied, and alimony ordered there being no disentitlement by conduct such as adultery).

The only question before the noble Lords was whether or not the existence of the wife's covenant in the deed of separation precluded her from making any application for maintenance; they were not asked to consider whether the provision in the deed was adequate. The House of Lords unanimously decided that the court had power to fix maintenance on the application of the wife by reason of its statutory power notwithstanding any prior agreement between the parties, and although they restricted the decision to the facts of the case which involved dissolution of the marriage, they were prepared to extend it to judicial separation and restitution, and to overrule *Gandy* v. *Gandy* (1882) 7 P.D. 168[226] which had decided to the contrary in a case involving judicial separation. The power was founded upon the policy inherent in the statutory provision, *viz.*, to provide a substitute for the husband's duty of maintenance (which would otherwise cease upon divorce) and partly to prevent the wife from being thrown upon the public for maintenance. As Lord Atkin states (at p. 629 A.C.) "the wife's right to future maintenance is a matter of public concern which she cannot barter away . . . . *privatorum conventio juri publico non derogat.*"

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[226] In *Horoshok* v. *Horoshok* [1965] 53 W.W.R. 482, Nikitman J. extends the power of the court to vary a separation order on the application of the husband, applying the "general tenor" of the reasoning of the House of Lords in *Hyman* v. *Hyman*. "In my opinion," he says, "it was never intended that the right of review be limited to applications only on behalf of the wife." This appears to be wrong for *Hyman* v. *Hyman* is not authority for any such proposition. See also *Divinsky* v. *Divinsky* (*supra*, fn. 202) where the court refused to vary a separation agreement where the wife was earning $700 per month because the only change in the parties' circumstances was employment by the wife on a monthly salary. The court treated the agreement as a post nuptial settlement and said it had power to vary it.

Canadian legislation based on English *Matrimonial Causes Act*, 1857 (as in the case of Alberta's *Domestic Relations Act*, R.S.A. 1970, c. 113) empower courts to make an alimony or maintenance order in favour of a wife with or without seeking other relief but she should be clearly entitled to a judgment of judicial separation or restitution of conjugal rights (section 16); similarly in the case of divorce or nullity (section 23). (In the case of divorce the entire jurisdiction has now been assumed by federal Parliament.) From our previous analysis, it will have been seen that a separation agreement may be a hurdle to any matrimonial relief and, if so, the court has no jurisdiction to make an alimony or maintenance order in the first place (see *supra*. pp. 60 ff). *Gandy* v. *Gandy* (1882) 7 P.D. 168 is still the law in all matters other than divorce (and probably also in nullity cases where the marriage is voidable as distinct from void); if the court is not thus restricted by the separation agreement, it can in its discretion make an order for alimony or maintenance and vary or modify it from time to time, or temporarily suspend it wholly or in part and again revive it: section 26(1). There is no power to rescind the order on the stated change of circumstances. In the case of divorce, under the *Divorce Act*, R.S.C. 1970, c. D-8, only the Divorce Court can make such an order or vary or rescind it (*Divorce Act*, R.S.C. 1970, c. D-8, s. 11(2); *McKee* v. *McKee* (1971) 2 R.F.L. 350 (Ont.)).

Where the parties are not seeking a matrimonial decree, or are precluded from doing so,[227] the court's

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[227] They are probably no longer bound by any agreement not to seek divorce; see *supra*, pp. 96-97.

power to vary a separation agreement which was fair and freely entered into and has been faithfully performed by the parties must be founded upon express statutory authority unless the doctrine of frustration can be invoked. As Lord Atkin in *Hyman* v. *Hyman* [1929] All E.R. Rep. 253 at 257 points out it is difficult to accept the view "that the agreement is dissolved by what is known as frustration. And as Sir Boyd Berriman P. stated in *H.* v. *H.* [1938] 3 All E.R. 415 "the change in the law did not make the performance of the contract either impossible or more difficult." (p. 426). The doctrine of frustration due to substantial change in the law of divorce does not apply to separation agreements (*Hyman* v. *Hyman* [1929] All E.R. Rep. 253 at 258). Therefore, the husband will not be relieved of his obligation to make stipulated payments under a valid and subsisting agreement because of financial reverses, or because the wife is gainfully employed or because the children have grown up and are earning money, or because the husband has remarried and assumed additional obligations, or even if the wife has remarried. Conversely, an agreement that was fair at the time of execution and has been duly performed by the husband will not be rescinded in equity at the wife's instance on the sole ground that the financial resources of the husband have since substantially increased in inheritance or otherwise. But where the agreement itself is attacked, obligations concerning the increase in the husband's income subsequent to the breach of the agreement are relevant.

*RECOMMENDATION #12*

*THE DOCTRINE OF FRUSTRATION DUE TO SUPERVENING EVENTS SHALL NOT APPLY TO A SEPARATION AGREEMENT, BUT THE SPOUSE FINDING IT EXTREMELY DIFFICULT TO PERFORM HIS OR HER PART OF THE BARGAIN SHOULD BE ENTITLED TO SUE FOR VARIATION OF THE AGREEMENT.*

The Ontario court in *Burns* v. *Burns* [1963] 2 O.R. 142; 38 D.L.R. (2d) 572, held that there is no power in the courts to reduce the amounts payable under a voluntary separation agreement if there is an unexpected change of circumstances. The same conclusion was reached by Hunt J. in *Yellowega* v. *Yellowega* (1968) 66 W.W.R. 241. These cases apply to the power of court to vary where the marriage still subsists; it is otherwise on the grant of a divorce decree, where there is express authority under the *Divorce Act*, R.S.C. 1970, c. D-8, s. 11 if an application is made at the time of decree nisi; but if the decree is silent the court is *functus officio* and the matter cannot be litigated again. Furthermore, the variation is confined to maintenance and custody provisions of the agreement and cannot be extended, as the *Divorce Act* cannot be extended to cover property settlements except for the purpose of and restricted to the power to award maintenance; that is not within the constitutional jurisdiction of the federal Parliament. On the other hand courts are not reluctant to vary the provisions relating to children on the grounds previously outlined (see *supra*, pp. 84-85), in the interests of the welfare of the children. Here again, provisions thus varied must be in the nature of custody, care and upbringing (i.e., very broadly, certain guardianship

rights) and maintenance but not any property matters, and the powers are conferred in various child welfare legislation.

In England, however, the power to vary agreements at the instance of the wife was exercised by courts on the ground of neglect or failure to provide reasonable maintenance even though there was no default on the agreement.[228] This common law inequality was criticized by the (Morton) Royal Commission on Marriage and Divorce 1951-55 (Cmd. 9678), observing that

> . . . it seems to us that if the wife is to be allowed to apply to the court for an increase in the amount of maintenance provided under an agreement, on the ground of her husband's wilful neglect to provide reasonable maintenance, then it is only fair that the husband should be able to apply to the court for a reduction in the amount which he has undertaken to pay, on the ground that owing to changed circumstances it is reasonable that the amount should be reduced (Report Para. 726, p. 194)

After a careful examination, the Commission concluded that as a general rule maintenance agreements should be binding on and enforceable by the parties to them, but not as regards any undertaking by the wife not to apply to the court for maintenance for the children. If, however, owing to fresh circumstances the terms regulating the financial position of the parties have become inequitable, either party should be able to apply to the court for an

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228 *Tulip* v. *Tulip* [1951] 2 All E.R. 91; *Morton* v. *Morton*, see *supra*, p. 110 . This was done under the *English Law Reform (Miscellaneous Provisions) Act*, 1949, s. 5(1) repealed and replaced by s. 23 of the English *Matrimonial Causes Act*, 1950, but there was prior to that no common law or statutory right in England or in Canada (*Burns* v. *Burns*, *supra* p. 149 ).

order varying the agreement. It was accordingly recommended that

> (i) the wife should be bound by an undertaking not to apply to the court for maintenance for herself[229] so long as the circumstances remain as they were at the time of making the agreement, but should fresh circumstances intervene whereby it would be inequitable to hold her to the undertaking, she would be able to apply to the court for variation;
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> (ii) the husband should be bound to make payments in the agreed amount, but would have the right to apply to the court for a reduction in that amount if warranted by a change in his or his wife's circumstances.[230]

These recommendations were accepted by the government and the *Maintenance Agreement Act*, 1957, gave effect to them. The *Act* confines the power of variation to any agreement making or failing to make financial arrangements provided it was entered into during the course of marriage (i.e., as a post nuptial agreement) or within six months from the date of dissolution of the marriage. Variation should be permitted only upon proof of a change in the circumstances such that they were not contemplated nor foreseeable by the parties when they entered into the agreement.[231] The

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[229] An undertaking by the wife not to apply to the court for maintenance of the *children* would still be void as being contrary to public policy.

[230] *Ibid.*, §727, p. 194. See Olive M. Stone, in 19 Modern L. Rev. 601 at 619-20 for a criticism of the Recommendations of the Royal Commission on this topic.

[231] For an outline of the legislation, see Payne *Separation Agreements* in 33 Sask. L. Rev. 1 at pp. 10-11.

subsequent case law based on this *Act* displays a liberal attitude of the courts. In *Gorman* v. *Gorman* [1964] 3 All E.R. 739 the Court of Appeal held that the husband may invoke the court's jurisdiction even though it was he who brought about by his voluntary act a change of circumstances, and in *Ratcliffe* v. *Ratcliffe* [1962] 3 All E.R. 993, where a husband gave up his employment to study, the Court of Appeal held it was a change of circumstances, and it felt that the change was not brought about just to alter the agreement. But in *K.* v. *K.* [1961] 2 All E.R. 266, a husband successfully contended that the court had no jurisdiction under the new *Act*, where the circumstances had been in contemplation at the date of the agreement. In that case the wife was suffering from arthritis and she chose a fixed sum in preference to one third of the husband's fluctuating income; arthritis became worse but the husband's income had also increased. It was held by the Court of Appeal that there was no change in circumstances. Delivering the judgment of the Court of Appeal, Holroyd Pearce, L.J. at pp. 269-70 stated:

> We think that "a change in the circumstances in the light of which any financial arrangements . . . were made" means something quite outside the realization of expectations. The parties make their bargain on certain basic facts and expectations. When those facts unexpectedly change or these expectations are not realized there is then a change of circumstances which may produce unfairness. . . .

The *Maintenance Agreements Act* places no time limit for variation of the agreement but after death of the husband an action for variation cannot be made except within six months from the date when representation in regard to the

estate of the deceased is first taken out or, by leave of the court, at any time before the administration of the estate is completed. (s. 25).

Variation of the financial provisions under the above *Act* does not affect any of the powers of the court under any other legislation.[232] In other words, the court would continue to exercise its existing powers under the *Matrimonial Causes Act*; but the *Act* seems to have equated the court's power with respect to variation of maintenance or alimony orders with the power to vary provisions freely agreed to. And a variation once permitted can further be amended, under the *Act*, though frivolous or too frequent applications will probably be denied.

Legislation on the English pattern is desirable in Alberta, but the powers should be conferred on the Superior Courts and exercisable even after the parties have been divorced. The post divorce jurisdiction should be exercised only where the divorce court has not exercised expressly or by implication its powers under the *Divorce Act*, R.S.C. 1970, c. D-8, s. 11 presumably having been satisfied with the agreement made by the parties without making it an order of the court or "approving" of it (see *supra*, p. 99-100 on the significance of this). This would, it is submitted, avoid the difficulties created by the constitutional division of powers. Professor Payne (Payne *supra*, fn. 231, at pp. 17-18) points out the disadvantages

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[232] *Orst* v. *Orst* unreported, noted (1959) 109 L.J. 50 (See Payne, *supra*, fn. 231 at p. 13). Settlements can be varied under the *Domestic Relations Act*, R.S.A. 1970, c. 113, and where the courts construe separation agreements as post nuptial settlements they can be varied. See Riley J. in *Redgrave* v. *Unruh* [1961] 35 W.W.R. 682.

of the English legislation, in that (a) there is no general power of variation, and (b) that the power of variation cannot be exercised where there are *anticipated* change of circumstances, and recommends that these be eliminated in any Canadian legislation. These criticisms are sound subject only to one caveat, that where the provisions agreed to are adequate to provide a reasonable standard of living to the wife (or the husband, if he is the beneficiary), a variation because of the husband's unanticipated fortunes should not be permitted, as it runs counter to the entire philosophy of a wife's entitlement at common law. Such a power would let in an element of partnership long after the agreement has terminated their conjugal union or even divorce, which even the most liberal community property regimes do not anticipate. This is not a groundless fear for in *Jones* v. *Jones* [1971] 3 All E.R. 1201 the English Court of Appeal increased the maintenance of £900 a year awarded in 1947 to the wife on divorce to £1450 in 1960, to £2200 in 1967 and to £3500 in 1970, i.e., 23 years after divorce, notwithstanding the fact that the husband had remarried and had three children. Although this was a case of a maintenance order, the same attitude could be readily apprehended in the context of the new proposals for change in law covering maintenance agreements. Before varying the financial provision the court should also ensure that the wife (or ex-wife) is not in a position to supplement the payments by her own industry.

The court should not have power to vary an "integrated" property settlement in which the property division provisions and the support provisions constitute reciprocal considerations, so that it is impossible to separate the two.[233]

Furthermore as Picher suggests in his recent article in 7 R.F.L. 257, the powers of variation by way of legislation should discard the antequated concepts of guilt and innocence so that need, not morality, is the paramount consideration for changing the maintenance provisions; however, as in the *Divorce Act* situation, the conduct (rather misconduct) of the wife should be a relevant consideration; a wife or former wife's openly adulterous or common law existence should not be encouraged by the courts. It may in fact be a fit case where husband should be entitled to ask the court to reduce maintenance, so that a divorced wife would then be forced to marry the man she is living with; the glitter of alimony from an ex-husband is too great a temptation in the way of remarriage (and often of remunerative employment).

The court's power to vary provisions respecting children's maintenance or custody should however be unaffected; this would ensure that children are not penalized for the sins of their mother. But where the mother has remarried (and her new husband has accepted them) or her fortunes have increased in comparison with her husband (or ex-husband),

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[233] The parties should be encouraged to submit their differences as far as possible to binding arbitration, especially in regard to matters of support and access or visitation rights, but with regard to custody, the court should continue to exercise its supervisory function.

the latter's burden should be lightened; children should not be the sole responsibility of their father, especially where he does not have their custody.

*RECOMMENDATION #13*

> *EITHER PARTY SHOULD BE ENTITLED TO SEEK A VARIATION OF THE AGREEMENT, EITHER BY ARBITRATION IF AGREED TO OR BY LEGAL PROCEEDINGS, IF BECAUSE OF A SUBSTANTIAL CHANGE OF CIRCUMSTANCES, RENDERING IT UNFAIR FOR THE APPLICANT TO CONTINUE TO PERFORM HIS OBLIGATIONS UNMITIGATED, WHETHER AT THE CIRCUMSTANCES WERE ANTICIPATED OR NOT. THESE CIRCUMSTANCES SHOULD INCLUDE A SUBSTANTIAL LOSS OF EARNINGS OF THE PAYOR WHETHER DUE TO CONTINUOUS UNEMPLOYMENT, REMARRIAGE, OR BANKRUPTCY, OR OTHER REASONABLE CAUSE OR AN INCREASE IN THE ASSETS OR EARNINGS OR POTENTIAL OF THE PAYEE. THE COURT SHOULD BE JUSTIFIED IN DECREASING PAYMENTS AGREED TO BY THE PAYOR IF AFTER TAKING INTO CONSIDERATION SOCIAL SECURITY BENEFITS, AND REASONS FOR NOT BEING ABLE TO WORK, IT IS NOT AN UNDUE HARDSHIP ON THE PAYEE. THIS SHOULD BE THE UNDERLYING PRINCIPLE. AN INCREASE IN PAYMENTS BY THE PAYOR SHOULD BE AWARDED ONLY ON THE BASIS OF NEED OF THE APPLICANT, AFTER TAKING INTO CONSIDERATION THE REASONS IF ANY WHY THE PAYEE HAS NOT BEEN ABLE TO UNDERTAKE REMUNERATIVE EMPLOYMENT, AND THE AMOUNT OF SOCIAL SECURITY BENEFITS.*

Variation by Mutual Agreement

The spouses may agree to modify the provisions of their contract themselves or to submit their differences to binding arbitration. Many differences arising out of the agreement are unfit for litigation, and arbitration should be encouraged. There are however difficulties in the existing case law. In a very early case it was held that

the spouses could arbitrate their differences arising out of the terms of a separation agreement: *Soilleux* v. *Herbst* (1801) 2 Bos. & Pul. 444; 126 E.R. 1376. In *Scott* v. *Avery* (1855-6) 5 H.L.C. 811; 10 E.R. 1121, the House of Lords in a commercial contract held that although an agreement that ousts the jurisdiction of the court is void being against public policy, there is nothing illegal in stipulating that no action shall be brought in any court until the arbitrators have made a determination; as Lord Campbell says at p. 854 (pp. 1138-39 E.R.), "that is not ousting the courts of their jurisdiction, because they have no jurisdiction whatsoever, and no cause of action accrues until the arbitrators have determined." In *Bennett* v. *Bennett* [1952] 1 All E.R. 413, the parties stipulated that no proceedings whatever shall be brought for maintenance and the court held that the clause was void as it ousted the jurisdiction of the court. It would no doubt have been within the rights of the parties to stipulate that no proceedings shall be brought until the differences over the terms have been submitted to arbitration. But where the wife is dissatisfied with the agreement itself and the clause relating to arbitration does not cover such an eventuality it would be clearly within her rights to claim relief before the courts. It is submitted that the validity of arbitration clause should be recognized by legislation and that an award should be final and binding except in the case of custody and maintenance of children; but that appeals should be allowed from an award as in the case of ordinary contracts.

*RECOMMENDATION #14*

*AN ARBITRATION CLAUSE IN THE AGREEMENT SHOULD BE HELD VALID; THE PARTIES SHOULD EXHAUST ARBITRATION PROCEDURES BEFORE RESORTING TO A COURT OF LAW. EITHER PARTY, OR THE CHILDREN AFFECTED BY THE DECISION OF ARBITRATORS, SHOULD BE ENTITLED TO APPEAL TO THE COURTS ON MATTERS OF LAW AS WELL AS FACTS.*

# VII

## CONCLUSIONS AND RECOMMENDATIONS

It is apparent from this survey that one cannot meaningfully discuss separation agreements in isolation for they touch upon some of the most sensitive areas of family law, having ramifications far beyond the interest of the immediate parties affected. Throughout their history, courts have endeavoured to uphold the rights of the state not only in the interests of the taxpayer but of the society generally; by interfering with the absolute rights of the husband and father they have given a rough sort of justice to the wife and children. The piecemeal legislation of the last one hundred years has brought about the desired legal equality of married women but has not lessened the burdens imposed on the husband. The modern welfare laws have largely taken care of the public policy arguments given effect to by courts; social security is now available to everyone from cradle to the grave, and the future holds out hopes for guaranteed income security. In light of this and the general economic and social emancipation of married women, as borne out by employment and income statistics, it is time for a dispassionate evaluation of the alimony obligations that have survived as relics of a different society. In a recent article, A Tide in the Affairs of Women (123 New L.J. 742). Ruth Deech points out that "a wife cannot be equal to the husband and expect maintenance for herself as a right; a marriage which is dead can entail no continuing financial commitments after its dissolution except in relation to the children; there may be a case for mutual support during marriage but not after ." Separation agreements in the future

should be of no concern to the state except in regard to the custody, care and control of the children, and the spouses should be free to make any reasonable provisions for the settlement of rights and equities flowing from their marriage relationship. Admittedly, the present social security laws do not wholly dispense with the need for alimony in all circumstances, but this is not a reason for clinging on to the past; modern society must find its own alternatives. An effective substitute would be a system of sharing the gains and losses of the marital partnership, taking into account the equities and the legitimate expectations of the spouses, including the situation where a wife devotes her best years of life to the welfare of the family.

The recommendations that follow, to some extent bear out the above considerations. There may be many cases where an equitable sharing of property would not adequately compensate the wife, even after social security benefit has been accounted for; e.g., where the wife is unable to work because of her responsibilities to young children entrusted to her custody, or unskilled or unemployable and hence not qualified for welfare payments, or she and her husband are not yet of retirement age to qualify for pension. Alimony then would be a temporary expedient; and even a lumpsum payment over and above her share of property may be justifiable where special needs are shown, such as training for job, etc. But the parties themselves, should make their own agreement on these matters and where they are unable or unwilling to do so, the court should be called upon to arbitrate. But the court in arbitrating upon rights should eschew all ideas of public policy based

upon rights flowing from the status of marriage and do what is just and fair between the parties that come befire it.

(1) Validity of the agreement

An agreement that is fair and fairly obtained should never be set aside. The fairness of the provisions should be judged as at the date of its execution.

(2) Duration of payments

Unless expressly stated in the agreement the alimony payments should cease upon the death of the spouse or upon remarriage of the payee, whichever event occurs first. However if the wife has contracted out of her statutory rights of succession or family relief, and the court finds that her own resources, including earning potential, are inadequate, the agreed payments should be continued unless the contrary is indicated in the agreement. In the latter case, the court should decide on the amount of her need.

(3) Amount of alimony

Where the parties have agreed to an amount that was fair at the time of the execution of the agreement, no proceedings should be allowed to increase the same under the Deserted Wives statutes or any other statutes; if there is real need, the court should proceed to vary the agreed payments in accordance with recommendation 11. Lumpsum payments should be specifically recognized.

(4) Contracting Out

There should be no distinction between succession and fmaily relief laws, and the spouses should be at

liberty to contract out of all statutory rights. If however alimony payments are expressed to continue for the duration of their joint lives, the payee spouse should be entitled to have payments continued if there is no other lawful way she can maintain a decent standard of life. This may be done by variation of the period fixed by the Agreement.

(5) Enforcement

During the term of the agreement, the payee spouse should have a legal right to set aside transfers or conveyances of property in the nature of gifts, intended and having the effect of defeating her claims. Bona fide purchasers for value should be protected; the payee's rights should attach only to the proceeds. Legislation on the lines of section 16 of the English *Matrimonial Proceedings and Property Act*, 1970, c. 45 should be enacted. A disposition by a testamentary instrument should not be subject to restraint by courts.

(6) Substantive rights

While a separation agreement is in force, and there is no default under it, all substantive rights of the spouses should be suspended. Thus, no action for restitution of conjugal rights, judicial separation, alimony or summary maintenance should be permitted. But the parties should not be at liberty to agree not to sue for dissolution of the marriage. [This is also provided for in the 1968 *Domestic Proceedings Act* of New Zealand, No. 62, s. 58.]

The agency of necessity whereby a deserted wife could pledge her husband's credit should be abolished, even if the husband is in default of payments. This right has little utility at the present time and it only gives an unwarranted right to a tradesman to sue the husband.

(7) Other substantive rights

The incidents of a separation agreement in all respects, including acquisition of domicile, should be the same as those of a judicial separation. In the absence of a provision to the contrary, neither spouse should be entitled to succeed to the other's property. The spouses should in all respects except for contracting another marriage be deemed to be independent persons, as if unmarried. This could be achieved by a system of registration of the agreement as provided for in New Zealand by its 1968 *Domestic Proceedings Act*, No. 62, ss. 55 and 57.

(8) Provisions for children

(a) Maintenance: The law should recognize that the father and the mother are jointly and severally liable for the maintenance of the child. The responsibility in the first place should be that of the parent having physical custody of the child, with a right of action against the other parent. The obligations of the parents to maintain the child should be no higher when they are separated than when they were living together. In the absence of a specific age limit, the obligation should terminate when the child reaches the age of majority as prescribed by various provincial legislation.

(b) Custody: Courts should not interfere with an agreement granting custody to one parent unless in all the circumstances of the case, the parent having custody is unfit to take care of the child. The relevant criteria to determine unfitness should be the same as in child welfare legislation.

(c) Guardianship rights: In all matters of guardianship, not covered by the agreement granting custody, both parents should have equal rights and these rights when they disagree, should be determined by the court whose decision should be based on expert testimony; the child should have the right to be represented by independent counsel. The official guardian may be entrusted with such responsibility where the child is not thus represented.

(9) Arrears of payment

Arrears under separation agreement should be equated to those under court ordered alimony, so that except with leave of court, arrears in excess of one year should not be enforceable. Arrears under one year should be enforceable by garnishment as under the *Attachment of Debts Act*, R.S.S. 1965, c. 101.

(10) Termination of the agreement

(a) The agreement shall be deemed to have been terminated in its entirety by the reconciliation and cohabitation of the spouses; in determining whether or not there was a reconciliation, the same tests in the *Divorce Act*, s. 2 (R.S.C. 1970, c. D-8) should be applied. Where an agreement is fully executed by one spouse, reconciliation shall have no effect on property and other rights accrued under it.

(b) Bankruptcy shall not terminate the agreement; it calls for variation of the agreement if justified.

(c) The agreement shall also be deemed to be terminated if both parties have abandoned it.

(d) If one party is in substantial breach of the agreement, the other shall be entitled to treat it as repudiated and to sue for damages or injunction, or for statutory remedies. However, if the innocent party sues for remedies under the law, he or she shall be conclusively deemed to have elected to terminate the agreement.

(e) The doctrine of frustration due to supervening events shall not apply to a separation agreement, but the spouse finding it extremely difficult to perform his or her part of the bargain should be entitled to sue for variation of the agreement.

(11) Variation of the agreement

Either party should be entitled to seek a variation of the agreement, either by arbitration if agreed to or by legal proceedings, if because of a substantial change of circumstances, rendering it unfair for the applicant to continue to perform his obligations unmitigated, whether the circumstances were anticipated or not of the agreement. These circumstances should include a substantial loss of earnings of the payor whether due to continuous unemployment, remarriage, or bankruptcy, or other reasonable cause or an increase in the assets or earnings or potential

of the payee. The court should be justified in decreasing payments agreed to by the payor if after taking into consideration social security benefits, and reasons for not being able to work, it is not an undue hardship on the payee. The underlying principle.

An increase in payments by the payor should be awarded only on the basis of need of the applicant, after taking into consideration the reasons if any why the payee has not been able to undertake remunerative employment, and the amount of social security benefits.

(12) Arbitration

An arbitration clause in the agreement should be held valid; the parties should exhaust arbitration procedures before resorting to a court of law. Either party, or the children affected by the decision of arbitrators, should be entitled to appeal to the courts on matters of law as well as facts.

# INDEX OF CASES